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Chief Steven P. Westermann
President
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Re: S. 2123 and Limited Protection of Two-Hatters

Dear Chief Westermann:

This letter provides an analysis of S. 2123, the Public Safety Employer-Employee Cooperation Act of 2007 and, specifically, whether section 8 of this bill would preserve the use of “two-hatters” in collective bargaining agreements negotiated between labor organizations and state and local public safety agencies.

S. 2123 was introduced by Senators Judd Gregg (R-NH) and Edward M. Kennedy (D-MA), and was referred to the Senate Health, Education, Labor and Pensions (HELP) Committee on October 1, 2007. The bill provides collective bargaining rights for public safety officers employed by states and their political subdivisions. Among other things, the legislation requires – in section 4 – a determination of whether states meet strict minimum standards for collective bargaining rights under existing state law and – in section 5 – delineates responsibilities for states that are determined to not “substantially provide” labor rights comparable to or greater than the standards enumerated in section 4.

Significantly, one provision discusses “two-hatters” – public safety employees who volunteer to perform services for the same public agency or for a separate public agency.¹ Namely, section 8 states that nothing in the bill, if it becomes law, shall be construed:

¹ The Fair Labor Standards Act (FLSA) allows volunteers to perform a different type of service for the same public agency, or perform the same type of service for a separate and independent public agency. Specifically, an individual who performs services for a public agency qualifies as a volunteer, if:

- o the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
- o such services are not the same type of services which the individual is employed to perform for the same public agency.

29 U.S.C. § 203(e)(4)(A) (2006).

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(5) to permit **parties in States subject to the regulations and procedures described in section 5** to negotiate provisions that would prohibit an employee from engaging in part-time employment or volunteer activities during off-duty hours (emphasis added).

The clause means that public safety agencies covered by section 5 cannot collectively bargain with their firefighters, law enforcement officers and emergency medical service (EMS) personnel for a contract provision banning volunteer activities during off-duty hours. The provision applies to prohibit contractual restrictions on volunteer activities only during off-duty hours.

The key language is the meaning of the phrase “parties in States subject to the regulations and procedures described in section 5.” As explained above, a state or local public safety agency will be subject to the requirements of section 5 if it is determined that existing state laws do not already “substantially provide” for certain enumerated labor rights – including the right of firefighters to form and join a union, to bargain over wages and other conditions of employment, to sign an enforceable collective bargaining agreement, and to make available an “interest impasse” resolution mechanism. Section 8, however, does not appear to apply in states that provide comparable or greater collective bargaining rights. That means that states that already provide for such labor “rights” could, in theory, ban or restrict two-hatters.

Although its companion bill, H.R. 980, is substantially similar to S. 2123, there is a significant difference in the restriction on prohibiting volunteer activities in collective bargaining agreements. In contrast to S. 2123 (which applies to parties subject to section 5 of the bill), the House bill states that it shall not be construed “to permit **parties subject to the National Labor Relations Act** (29 U.S.C. 151 et seq.) and the regulations under such Act to negotiate provisions that would prohibit an employee from engaging in part-time employment or volunteer activities during off-duty hours.” (emphasis added). Because state and local governments are expressly excluded from coverage under the National Labor Relations Act – but rather the Federal Labor Relations law – this provision would not even apply to them.

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Conclusion

S. 2123 would permit volunteer service during off-duty hours in circumstances where there is a collective bargaining agreement with a public safety agency mandated by section 5 of the bill. That is in stark contrast to H.R. 980, which would threaten volunteer fire and EMS departments by requiring state and local public safety agencies to collectively bargain with employees without protecting two-hatters from negotiated bans on serving in volunteer fire departments.

As noted, this protection of two-hatters in S. 2123 only applies to collective bargaining agreements in states subject to the mandatory requirements in section 5. The legislation would not affect contracts in states that provide for greater or comparable rights and responsibilities than the rights delineated in section 4. Thus, two-hatters would remain vulnerable in those states.

If you have any questions, please do not hesitate to contact me.

With best regards, I am

Cordially,



Garen E. Dodge