Democratic Rights in Federal Employee Unions

A Ramble through the Law's Bureaucratic Maze

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Federal employees have come a long way. On January 31, 1902, President Theodore Roosevelt issued a a stern gag order which forbade U.S. government employees "either directly or indirectly, individually or through associations, to solicit an increase of pay or to influence or attempt to influence in their own interest any other legislation whatsoever, either before Congress or its Committees, or in any way save through the heads of the Department in or under which they serve, on penalty of dismissal from Government service." Those days are gone.

The Civil Service Reform Act of 1978, and earlier executive orders, authorized collective bargaining rights for federal employees. The law not only asserted their right to bargain through unions but assured them that these unions would remain clean and democratic. Section 7120 of the Civil Service Reform Act, entitled "Standards of conduct for labor organizations" requires that federal employee unions be "free of corrupt influences" and maintain "democratic procedures and practices." CSRA Section 7120 itself is quite brief; the principles and practices of democratic unionism which it espouses and the procedures for implementing them are, with certain modifications, patterned upon the Labor-Management Reporting and Disclosure Act of 1959, a federal law which established basic democratic rights for members of private employee unions.

Title I of the LMRDA, a "Bill of Rights," provides that members of private employee unions have the right of free speech, the right to assemble in caucuses, to criticize union officials and union policy, to due process in internal union trials, etc. In short, union members have roughly the same kind of rights inside their unions that people of the United States enjoy in their country under the First Amendment to the U.S. Constitution.

Another part of LMRDA (Title IV) requires unions to choose officers in fair and honest elections. Title III limits the authority of a national union to undermine the autonomy of subordinate bodies; the national cannot arbitrarily impose and maintain trusteeships over locals. Other sections of the law give members the right to obtain copies of their collective bargaining agreements, protect them from threats and physical assault, and require unions to issue periodical financial reports. The LMRDA is not perfect. (What is?) But even within the limits of its imperfections, it has not been adequately and fully enforced by federal authorities. Nevertheless, in the 30-odd years since its adoption, union reformers have learned how to utilize the law's provisions with effectiveness. A felicitous combination, the crusading efforts of rank and file reformers backed by the power of federal law, has substantially strengthened democracy inside our unions. Union members can no longer be unceremoniously expelled simply for speaking their minds.

The LMRDA, applying only to private employees, explicitly omits government employees from coverage. (One exception: the Postal Reorganization Act of 1970 puts unions in the U.S. Postal Service under the LMRDA.)

Nevertheless, even though they are not directly protected by the LMRDA, federal union activists should become familiar with its provisions, and with related court decisions, because the regulations for enforcing CSRA Section 7120 make extensive references to it.

Title VII of the Civil Service Reform Act, the title which includes Section 7120, is entitled "Federal Service Labor-Management Relations." This title does for federal employees what the National Labor Relations Act did for private employees: it legalizes the right of federal employees to join unions and bargain with government agencies. It prescribes grievance procedures and provides an orderly mechanism for granting unions exclusive bargaining rights after secret ballot representation elections. These provisions, which are already quite familiar to most union officers and many members of federal employee unions, establish the basic right of federal employees to union representation in dealing with management. Here, in this discussion, we are concerned with another aspect of the law, namely, *the right of union members to fair treatment within their unions*, the right to fair treatment in dealing with their union officials. Other sections of the CSRA refer to your right to representation *by a union.* We are concerned with those sections of the law that refer to your rights *inside a union.*

Section 7120 elaborates your legal rights in your union. It requires "the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings."

The U.S. Department of Labor, which has primary enforcement responsibility under Section 7120, has issued detailed enforcement regulations. Paragraph 458.1 of these rules makes clear that rights under Section 7120 are analogous to those in the LMRDA: "In applying the standards contained in this subpart, the Assistant Secretary [of Labor] will be guided by the interpretations policies followed by the Department of Labor in applying the provisions of the LMRDA and by applicable court decisions." To appreciate the full implications of your rights under Section 7120, then, you should study the operations of the LMRDA. In this connection we note two very useful books:

1. "Democratic Rights for Union Members," by H.W. Benson, a handbook written for union members. It explains not only how the law is written but also how it works out in practice; and it suggests what you might do for yourself without a lawyer. Published by AUD. [redacted] 245 pp.

2. "Individual Rights within the Union," by Martin H. Malin. Written for lawyers, it is comprehensive, informative, and expensive. It can be a bit heavy

for the ordinary citizen but it is a great reference work. Published by Bureau of National Affairs. 743 pp.

To summarize: Section 7120 of the CSRA, "Standards of conduct for labor organizations," parallels the LMRDA. It establishes the same kind of responsibilities for federal employee unions: basic rights for members under a Bill of Rights, control over trusteeships, guarantees for fair and democratic elections, etc. But there are significant differences in enforcement. While the standards for judging union democracy are similar in both the LMRDA and the CSRA, the procedures for applying these standards diverge. These differences make for some good news, but also for some bad news, for federal employees.

The essential difference is this: The LMRDA, to some extent, permits prompt and easy access to federal court by complaining unionists. But CSRA Section 7120 assigns total enforcement authority to the U.S. Labor Department and makes it extremely difficult to get recourse in the courts against the DOL administrative bureaucracy.

[The agency assigned to CSRA enforcement by the Labor Department is currently called the Office of Labor Management Standards (OLMS), but political leaders, as they come and go, like to show imagination by shuffling around labels and administrative charts. Don't be confused if there has been a name change by the time you read this.]

Just one example of how good news and bad news are mixed together: Under the LMRDA Bill of Rights, the Labor Department has no enforcement authority. If you are expelled from your private employee union on patently illegal charges — you may have criticized the business agent — the Labor Department will not help. You've got to hire your own lawyer and file a private suit, and that can run up into Big Money for you. And so you will hesitate to exercise your perfectly legal right to speak up at a meeting for fear of being forced to defend yourself in court at your own expense. The good news for federal employees is that under the CSRA the Labor Department is responsible for protecting all your rights, including free speech. Instead of hiring a lawyer, you need only file a complaint at the DOL.

But it's a mixed blessing. The bad news is that the record of the Labor Department in enforcing those sections of the LMRDA under its aegis is spotty. As an LMRDA enforcer, the DOL is a weak reed, undependable, erratic, sometimes irrational. That's mainly because final Department decisions are made, not by DOL field personnel in your locality, but in Washington and are often based not on justice but on politics, on a tendency to appease certain influential labor leaders. Under the LMRDA, if you can afford it, you can bypass the Labor Department in Bill of Rights cases and get before an impartial federal judge. Under the CSRA, however, federal unionists have virtually no practical alternative but the Labor Department except under extraordinary conditions.

With the good and the bad, Section 7120 is there, and federal unionists can surely use it to strengthen democracy in their unions. Get a copy of the DOL regulations on "Standards of Conduct for Labor Organizations in the Federal Sector." It is a lengthy document, complicated and difficult to follow. But that's a minor burden in the life of any union reformer. Study it.

At this point, we pause and step back a bit. Yes, you must study the LMRDA and the CSRA and the regulations. But even before that, there is important work to do. First of all, you must study your union constitution and bylaws and become intimately familiar with their provisions. Without that, everything else you do could be useless. (The terms "constitution" and "bylaws" are normally interchangeable; from now on we use "constitution" to refer to both.)

Ordinarily, before the Department of Labor will consider complaints under Section 7120, it will insist that the complaining unionist first make an effort to resolve the dispute within the union itself. As the regulations put it, the unionist must spend some time to "exhaust his internal remedies," that is, you must appeal inside the union before appealing outside to the DOL. The theory is that the union deserves a chance to remedy any infraction before the government intervenes. You may be convinced that any internal union appeal would be a farce because the officials who process appeals are prejudiced against you and simply want to shut you up. Doesn't matter. In most instances, it is best to file your internal appeal and go through the useless motions just so that the record will show that you actually tried to "exhaust your internal remedies."

Let us say you distribute handbills to union members criticizing the local president for acting dictatorially, for not handling grievances properly, or whatever. That's your right under the law, but the officials, not interested in your rights but only in their own power, bring you to trial for "disruption" and fine you or suspend or expel you.

They violated the law, and you don't intend to take it lying down, you want to teach the officials and the members a lesson in union democracy, you decide to fight the illegal discipline.

Your first step is to process an appeal within the union. How? When? The answer should be in your union constitution. Whatever it requires, follow those rules. You may have to appeal to a higher union official, or to an executive board, or to a membership meeting. Whatever the constitution says, do it. (If the constitution is silent, file a written appeal with the union secretary.)

Your internal appeal must be "timely." That is, it must usually be filed within a specified number of days. If the constitution says 15 days, don't wait 16. You'll be "untimely," the union can reject your appeal, and the OLMS is

likely to dismiss your complaint on technical grounds no matter how justified it is in substance.

If on appeal, the union reverses the verdict and finds you not guilty, you can rejoice at your success. But if the union rejects your appeal, or simply ignores it, you may want to appeal to the Office of Labor-Management Standards (OLMS) of the U.S. Labor Department under the terms of Section 7120 which protects your free speech.

At this point, you must get into the proper frame of mind. Yes, the discipline against you was an arrant outrage. But if you imagine that because the law is obviously on your side you need only turn to a kindly OLMS intake clerk and justice will be done, think again. Life is hardly ever that simple. The road to hell is paved with such illusions.

True, you need not hire a lawyer. And yes, the OLMS is supposed to process your complaint and dispense justice. And so you may expect to meet a conscientious, dedicated soul at the Labor Department office who will cluck sympathetically at your sad story, lift the burden off your weary shoulders, and fight hard for little old you. (One small investor lost her shirt when she thought she had discovered so noble an agent in her stockbroker's office.) Maybe you will indeed find such a person; maybe you will win the state lottery. If so, thank your lucky stars. But then you might not. It takes all kinds of people to make a Labor Department world. You might run into a time-server who detests complexities and prefers serene routine.

In any event, never relax your own effort. No one knows your case better than you; no one is more eager for vindication; and the Lord helps those who help themselves. Your best shot comes from knowing your legal rights and following the correct procedures, and pressing the Labor Department to follow its own rules. Here, then, in outline are some of those rules embodied in the law and in the regulations. (Remember: this is not a full course but only an elementary introduction to help you get started.)

There's a long, long winding road to enforcement. If an agent of the Labor Department finds your complaint worthy of consideration, it will ultimately be tried before an administrative law judge, and from there it will go up to the Assistant Secretary of Labor. However, the exact routing to the law judge varies, depending upon the precise nature of your complaint. There are Bill of Rights complaints, election complaints, trusteeship complaints, and others.

The "Bill of Rights of members of labor organizations," spelled out in DOL regulation 458.2 is similar to Title I of LMRDA. These basic civil liberties include the right to free speech and assembly; equal right to vote and participate in meetings, due process in trials. *(This section does not regulate union elections and trusteeships; procedures in such complaints are slightly different.)*

If you are disciplined for criticizing your union officials, you have a Bill of Rights complaint. Remember: before your appeal will be considered by a Labor Department representative, you will probably be required to "exhaust reasonable hearing procedures" within the union. *But in Bill of Rights complaints, you need not spend more than four months on that effort.* If the union has not satisfied you within that time, you may appeal to the Labor Department's OLMS under Section 7120.

Where to file: Your Bill of Rights complaint can be filed with any area office or any other office of the OLMS. The complaint must include: a concise statement of facts demonstrating that the union violated the law and a record, including dates, of your effort to resolve the issue within the union to prove that you have spent up to four months in internal union procedures. You serve a copy of the complaint upon the union and notify the OLMS area administrator in writing.

If the area administrator dismisses your complaint, he or she must explain, in writing, to you and the union, the reasons for that decision. In that event you, the rejected complainant, can appeal to the Assistant Secretary of Labor for Labor Management Relations, but you must file that appeal within 15 days of receiving the notice.

If, on the other hand, the OLMS administrator decides that your complaint has a "reasonable basis," a hearing will be scheduled before an administrative law judge of the Labor Department.

We now interrupt this review in order to consider how to initiate complaints that do not derive from the Bill of Rights. Election complaints, for example. These also can reach the administrative law judge. But they follow somewhat different rules.

Paragraph 458.29 of the regulations make explicit that the requirements for fair union elections under the CSRA Section 7120 are precisely those established by Title IV of the LMRDA: "Adequate safeguards to insure a fair election," which include a secret ballot and the right of candidates to post observers at the polls and counting of ballots. Sounds great. But it is not so simple. There is less here than meets the eye because it is necessary to prove, not only that the law was violated, but that these violations may have affected the election outcome.

Let us suppose that you discovered that 175 improper ballots were cast in your local union election. The law violated, you challenge the validity of the election and demand a rerun. What is your first step? *You must first appeal within the union.* In this election case, you are not required to spend more than three months to "exhaust your internal remedies." If your appeal has not been resolved in the union within the three months, you may appeal to the OLMS under Section 7120 CSRA. But your appeal from the union decision must be

presented to the OLMS *within the next month.* And if the union acts on your appeal before the lapse of three months, you must file under Section 7120 within the following month after receiving a final decision from the union.

Let's repeat that because it is so important. You need not wait more than three months after filing your internal union appeal before complaining to the OLMS. But you must go to the OLMS within the next month. *And you may have to act sooner.* If there is an earlier final internal appeal from your international executive board or president, you must go to the OLMS before another month has elapsed.

(Note: Section 7120 covers only the regular periodic election of officers. A special election to fill out the term of an officer who has resigned is not regulated by the law. This subject is usually covered in union constitutions.)

As in Bill of Rights complaints, you file your appeal with the area administrator and you note that you have properly exhausted your internal remedies. If the area administrator finds that your complaint is technically proper, he or she will conduct an investigation to determine the following: 1. Was there really a violation of the law during the election? and 2. If so, could the violation (or violations) have affected the election outcome?

If the answer to either of these questions is "no," your complaint will be dismissed.

Let us underline the point. You should try to demonstrate not only that violations were committed during the election but that, because of these violations, a candidate might have been improperly declared elected. In our example, you charged that 175 votes were fraudulent. But if the person declared elected had won by a margin of, say, only 150 votes — or any number less than 175 — then obviously those 175 votes could have made a difference. In that case, the violation could have affected the outcome.

But suppose the winner enjoyed a margin of 200 votes. In that case, those 175 fraudulent votes could not have made any difference. There may have been an election violation but it could not have affected the outcome.

Obviously this hypothetical example is quite simple. If, however, you had complained that the secrecy of the ballot was widely violated and marred the whole election process, it would be a different story, for such violations could have affected the outcome. In any event, the area director's findings are reported to the OLMS Director of Elections in Washington.

If your election complaint is dismissed, the OLMS Director of Elections (not the area administrator) must issue a written statement explaining the reasons for the dismissal. In that case, you have the right to appeal to the Assistant Secretary of Labor, an appeal that must be presented within 15 days after the dismissal of your complaint by the director. There is a catch here. The Assistant Secretary will not review the validity of the director's decision

by any normal standard. The director is permitted to make an ordinary error in judgment, and the Assistant Secretary will not reverse the decision. The Assistant Secretary will consider only whether the decision was arbitrary or capricious. That's an appeal standard you will find hard to meet.

If, oh lucky day!, the director upholds your election complaint and agrees that there were violations that could have affected the election outcome, he or she will try to induce the union "voluntarily" to take some kind of "remedial" action, like running a new election, or agreeing not to commit the same offenses again. If the union hangs tough and refuses, the director will institute proceedings before an administrative law judge, most likely with the aim of voiding the challenged election and ordering a new election under Department of Labor supervision. In proceedings before the law judge, the director, not you, the original union complainant, becomes the complaining party.

Proceedings on other types of complaints, like trusteeships, for example, are pretty much the same as in election cases, except that in trusteeship cases the director is not required to disclose the names of anyone who called the violations to his attention, presumably to protect whistle-blowers from retaliation.

The regulations describe the procedural requirements in hearings before the administrative law judge in extensive detail. In the end, however, the judge's decisions are only advisory. The administrative law judge proposes, but the Assistant Secretary of Labor disposes.

According to regulation 458.91, the Assistant Secretary can adopt the ALJ regulation, throw the whole thing out, or come up with some other decision: "... the Assistant Secretary shall issue his decision affirming or reversing the administrative law judge, in whole or in part, or making such other disposition of the matter as he deems appropriate." If the Assistant Secretary finds that the law has been violated, he might order a new election, direct the union to reinstate a suspended member, lift a trusteeship, or any other appropriate (even inappropriate!) action.

It is a tedious process, but even this may not be the end. If the union resists and refuses to obey his order, the Assistant Secretary of Labor refers the matter to the Federal Labor Relations Authority for "appropriate action." But the FLRA cannot enforce an order upon the union; for enforcement, it must file suit in a U.S. Court of Appeals.

The Federal Labor Relations Authority is the top administrative agency responsible for implementing the relevant sections of the Civil Service Reform Act. It is a three-person, fulltime board appointed by the President for a five-year term. Like the National Labor Relations Board, it must sue in a federal Appeals Court to enforce its orders.

Union officials and the union are guaranteed a right to judicial review. If

they are dissatisfied with any decision of the Assistant Secretary or of the FLRA, they can force the case into federal court, get before the judges and argue their position. But what about the complaining rank and file unionists? Suppose *they* don't like decisions that come out of the administration bureaucracy? What is their right of appeal under Section 7120? On this subject we find a black hole in the law and in the regulations.

Can they appeal from the Assistant Secretary to the Federal Labor Relations Authority? No. In reply to that question, the FLRA informs us: "There are no Authority procedures which establish an appeal route for a union member who files a complaint under Section 7120 and who is not satisfied with a decision of the Assistant Secretary of Labor."

If not to the FLRA, can the dissatisfied unionist appeal to the federal courts? The answer to this question is so complicated that we might say, "Yes, but under very limited conditions." Not very satisfactory but that's how it is. The Labor Department writes us: "There is no provision for judicial review in the standards of conduct provisions of the CSRA ... or in implementing regulations." But that's not the full story.

The Labor Department has consistently argued that its decisions under the LMRDA and CSRA are immune from judicial review. But the courts have just as consistently rejected this position. In 1982, the District of Columbia Court of Appeals, in *Local 1219 American Federation of Government Employees v. Donovan* ruled that Secretary of Labor decisions under Section 7120 CSRA are indeed reviewable in federal court. That case arose out of Carl Sandler's 1980 race for AFGE national president against incumbent Kenneth Blaylock. When Sandler was declared defeated by a narrow margin, his complaint under Section 7120 was sustained by the Assistant Secretary of Labor. But instead of voiding the election and ordering a prompt rerun, the DOL agreed with the union that the next regular presidential election would be supervised by the Department. Not satisfied with this agreement, four locals of the AFGE and 86 individual members sued in federal court.

In court the DOL argued, as usual, that its decision was not reviewable by the courts. But the district judge and the Appeals Court decided otherwise. According to the Appeals Court:

"... the government's argument amounts to an attack on the judiciary's ability to review *any* of the Assistant Secretary's actions taken pursuant to Section 7120. Should we accept the government's argument we would therefore be recognizing an unchallengeable authority in the Assistant Secretary to monitor violations, investigate charges, and impose sanctions. No desire to impart such a far reaching immunity is evident in the legislative history the government relies on."

But the standard for review asserted by the court is quite narrow. "We

cannot substitute our judgment for that of the Director in whom the Department entrusted the decision to enter into settlement agreements. Rather, we must restrict our inquiry to determining whether his actions violated applicable statutory or regulatory provisions, or demonstrate that he acted arbitrarily, capriciously, or otherwise in the abuse of his discretion."

Applying that standard, the court rejected the DOL claim to immunity from judicial review but upheld its right to reach an agreement with the AFGE for supervision of its next regular election.

The basic flaw in CSRA Section 7120 enforcement is that it depends so precariously upon the top U.S. Labor Department bureaucracy in Washington. For some 30 years the Department has had major LMRDA enforcement responsibilities. Under Republican and Democratic administrations alike, its record has been weak, disappointing, unpredictable. Under the LMRDA, however, there were at least some avenues around the Labor Department and into federal court for judicial review. Under Section 7120, with judicial review only a limited and distant hope, the federal unionist is trapped within the confines of the DOL's own administrative apparatus.

The complainant must run the gauntlet before different arms of the same bureaucracy: the area administrator, the OLMS director, the administrative law judge, and, finally, the Assistant Secretary of Labor. The federal complainant can't break out of this incestuous family in which prosecutor, investigator, judge, and appeals body are all part of a single administrative mechanism, none really independent of the other.

At the top, is the Assistant Secretary armed with exceptional powers to verify, nullify, or modify almost anything that was decided below. The Assistant Secretary is no Solomon dispensing impartial justice but a political appointee of a Washington administration with its own partisan interests. As a last irony, the administrative apparatus which decides the fate of a complainant's appeal is an arm of the executive branch of government, the complainant's own employer. Under these conditions, a broad right of judicial review is urgent; instead, it is now only a remote possibility.

When the LMRDA was first adopted in 1959, it creaked and wobbled. But 30 years of union democracy battles, court tests, and election complaints transformed the law into a strong pillar for democratic rights in unions of private employees. The main thing about Section 7120 is that it is there. Use it! It is up to federal unionists to take advantage of the law to strengthen their rights in their unions. By mastering the law's intricacies, and applying it in informed and intelligent fashion, and insisting upon all your rights, you can transform it into an effective instrument.