

APTA LEGAL AFFAIRS CONFERENCE

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Section 13(c) Hot Topics



Capital Metro Outsourcing

- Capital Metro sought arbitration of the contracting and labor protection dispute over the outsourcing of its StarTran operations.
- ATU alleged carryover rights in the transition to the new contractors – asserting the workforce and collectively bargained rights must be assumed by the contractors. Pension benefits in particular were at issue.

Capital Metro Outsourcing



- 13(c) agreements and the statute provide that rights, privileges and benefits (including pension benefits) under existing collective bargaining agreements must be “preserved and continued.” This language does not prohibit changes to rights under labor contracts. Rather, these rights can be modified through bargaining to substitute new rights.

Capital Metro Outsourcing



- Also, this language does not in effect bind a third party contractor to a labor agreement to which the contractor did not negotiate or agree to, as a contractual matter.

Capital Metro Outsourcing



- In the Capital Metro case, there were no carryover rights in the current 13(c) agreement or in the collective bargaining agreement between StarTan and the ATU.
- 13(c) by statute only provides for carryover rights in acquisition situations. The ATU tried to establish that there was an acquisition of a private carrier with federal funds back in the 1970's by the City.

Capital Metro Outsourcing



- Successor clauses in 13(c) agreements really only speak to the obligations of successors as to the 13(c) protections themselves – that is, is the contractor bound by the 13(c) agreement? Even if bound, what does the 13(c) agreement require?
- If the 13(c) agreement does not have carryover provisions in it, there is no carryover obligation on the part of either the public agency or the contractor.

Capital Metro Outsourcing



- The effective approach Capital Metro took was to compare the terms of their 13(c) agreement with one that had express carryover terms in it – simplifying it to a case of contract interpretation.
- Carryover provisions typically say that in a transition of contractors the incoming contractor must afford employment to the existing employees, jobs cannot be offered to other individuals if there are existing employees qualified, seniority is maintained, the labor contract must be assumed, and terms of employment cannot be “worsened.”

Capital Metro Outsourcing



- These types of provisions, in effect, give a contractor a set workforce and labor agreement, and reduces flexibility to find cost savings in the contracting action.
- Capital Metro did extensive research to disprove an acquisition occurred – culling through City meeting notes, UMTA grants and corporate documents to establish the carrier at issue was folded into the parent and its assets transferred, not acquired.
- In addition, Capital Metro found a key witness – the former director of transportation for the City – who testified at the arbitration hearing.

Capital Metro Outsourcing



- In addition, Capital Metro included in its procurement documents certain core terms of employment that it would require the successful contractor to honor until a new labor contract was negotiated, and a requirement to hire existing employees who were qualified and passed physical exams, background checks, etc. These obligations did not, however, require the contractor to assume the existing labor contract.

Capital Metro Outsourcing



- This approach helped to strike a middle ground of avoiding disruption in the workforce and enabling the contractor to effect a smooth transition of the O&M services.

Capital Metro Outsourcing



- The ATU opposed going to arbitration, contested arbitrability of the dispute, and delayed the process – even refusing to participate in selecting the arbitrator through the striking process.
- After witnesses testimony and extensive briefing, the arbitration award was rendered on several issues, including the 13(c) issue – finding no carryover right existed.

California Pension Reform



- 13(c) issues associated with public pension reform legislation enacted in California that went into effect January 1st.
- Several unions have objected to grants for California properties at DOL arguing that collective bargaining rights over pensions have been eliminated. DOL has almost uniformly found the objections sufficient under their Guidelines. Under DOL's process, a sufficiency finding triggers negotiations with the union for a 30-day period.

California Pension Reform



- As in a prior dispute involving the MBTA over health care legislation, DOL has indicated in its letters finding the objections sufficient that it is “not anticipated” that an interim certification will be issued - which allows the grant funds to be released while the dispute is resolved at DOL.
- DOL explains it is “due to the substantial possibility that the parties’ failure to negotiate a statutorily sufficient resolution to the issues in this matter may render [the grantee] ineligible for the receipt of Federal funds.”

California Pension Reform



- In so stating, DOL has in effect prejudged the parties ability to negotiate a resolution that meets the requirements of 13(c) and has done so without providing any legal analysis supporting that position.
- The 13(c) issue currently before DOL is not whether pension rights and benefits under current collective bargaining agreements have been adversely affected or lost – the 13(c)(1) issue.

California Pension Reform



- Rather, it is the 13(c)(2) issue of whether collective bargaining rights – the ability to bargain over pension benefits – has been eliminated by the legislation.
- The unions are arguing that bargaining has been “diminished” precluding certification of grants. The standard used by the Donovan court, which examined a Georgia law that removed certain issues from the bargaining table, is whether bargaining has been eliminated over an issue – not whether it has been diminished.

California Pension Reform



- In the MBTA case, bargaining over core health care benefits and coverages was eliminated by State law, and MBTA employees transitioned over to a state insurance commission.
- Despite that, an agreement was negotiated with the unions that recognized the MBTA's ability to bargain over supplementary health benefits – e.g., wellness and dental insurance.
- That reduced scope of bargaining was deemed adequate by DOL and allowed the certification of grants.

California Pension Reform



- Also at issue is the fact that the bulk of the California law applies to new hires – individuals with no prior bargaining or, for that matter, 13(c) rights.
- At this point in the process, the unions have proposed that the law be amended and transit employees exempted.
- They have also proposed that new hires be afforded the same rights and benefits as existing employees – which would conflict with state law.

California Pension Reform



- The California Labor and Workforce Development Agency has just recently weighed in with DOL and took the position that bargaining is not eliminated by the legislation. As stated in the letter:
 - PEPPRA promotes retirement security for public employees by placing common sense limits on the defined benefit pensions that can be offered to future employees. These prospective changes do not impede the ability of current or future workers to engage in bargaining and accordingly do not conflict with the requirements of 13(c).

California Pension Reform



- The letter made a further point of interest in stating that :
 - Nothing in PEPRRA prevents a local transit authority from negotiating other retirement or compensation benefits designed to offset the changes in defined benefit pensions in which future workers may be enrolled.
- As the letter points out , bargaining over the *effects* of PEPRRA can still occur and the parties can negotiate adjustments to compensation and other terms of employment to *offset* those effects.

California Pension Reform



- At this point in the process, DOL has missed deadlines for 13(c) processing of grants.
- Under its Guidelines, after an objection is found sufficient and the parties negotiate for 30 days, there is a submittal made by the transit agency and the unions involved explaining the status of the dispute and the position and proposal of each party.
- Within 5 days thereafter, DOL usually issues an interim certification releasing the grant while the DOL dispute resolution process proceeds.

California Pension Reform



- However, in many of these cases, DOL has not yet issued interim certifications and may not.
- Further, DOL 's Guidelines provide that within 10 days of the interim certification it will define the issues in dispute and set a schedule for resolution (usually through a briefing process).
- That deadline, too, has passed in some cases without any action by DOL.

Conclusion



**Waiting game and transit funds
hang in the balance....**

Thank you!



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