CRC MEMORANDUM

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STATEWIDE BALLOT ISSUES: PROPOSAL 2012-02
COLLECTIVE BARGAINING RIGHTS

CRC's Analysis of State Ballot Issues

This paper is one in a series of papers that analyze the six questions Michigan electors will be voting on at the November 6, 2012, general election. The papers, information about webinars, links to the actual proposed amendments, and ballot language can be accessed at http://election.crcmich.org. The Citizens Research Council of Michigan does not endorse candidates for office or take positions on ballot issues. In analyzing these ballot issues, CRC hopes to provide more information so that voters can make better informed decisions in formulating their vote.

On November 6, 2012, voters will be asked to amend the 1963 Michigan Constitution to add a Section 28 to Article I (Declaration of Rights) and to amend Article XI (Public Officers and Employment), Section 5. Proposal 2012-02, which is on the statewide ballot as a result of petitions circulated by the Protect Our Jobs Coalition, seeks to enshrine in the fundamental law of the state the right of public and private sector employees to organize for the purpose of collective bargaining. It would allow collectively bargained labor contracts to undo all previously enacted restrictions on the right to organize and engage in collective bargaining and for employees to financially support their collective bargaining representatives, and forbid the enactment of future legislation that would affect those rights. It would effectively restrict the ability of the Michigan legislature to enact right to work legislation. It would codify in the Constitution the right of state employees to formally organize for the purpose of collective bargaining. The proposal allows the state to continue to exercise the ability to prohibit strikes by public sector employees.

An affirmative vote would add Section 28 to Article I and amend Section 5, Article XI, the implications of which are analyzed below. A vote against this amendment would allow those laws currently in place to set parameters within which collective bargaining exists for local governments, school districts, institutions of higher education, and other political subdivisions of the state. The state's civil service commission would continue to create the work rules and conditions of employment for state employees and employee organizations would continue to negotiate with the state employer on matters not covered by civil service rules.

Background

Unions and collective bargaining enhance the strength of workers who join together to negotiate with employers on matters of wages, benefits, and conditions of employment. Michigan is considered a cradle of the union movement and has long been a focus of private sector organized labor. The concentration of manufacturing in the state has meant that historically large percentages of the state's workforce belong to labor unions.

Data from the Current Population Survey (CPS) conducted by the Bureau of Labor Statistics (BLS) show that Michigan has the 5th highest concentration of union membership in the nation: 18.3 percent of the total Michigan workforce are union members. The concentration of union membership in private sector employment is relatively large: 12.4 percent of private sector Michigan workers belong to unions. This is the

Proposal 2012-02

The proposal would add a new section (Section 28) to Article I of the Michigan Constitution to provide:

(1) The people shall have the rights to organize together to form, join or assist labor organizations, and to bargain collectively with a public or private employer through an exclusive representative of the employees' choosing, to the fullest extent not preempted by the laws of the United States.

(2) As used in subsection (1), to bargain collectively is to perform the mutual obligation of the employer and the exclusive representative of the employees to negotiate in good faith regarding wages, hours, and other terms and conditions of employment and to execute and comply with any agreement reached; but this obligation does not compel either party to agree to a proposal or make a concession.

(3) No existing or future law of the State or its political subdivisions shall abridge, impair or limit the foregoing rights; provided that the State may prohibit or restrict strikes by employees of the State and its political subdivisions. The legislature's exercise of its power to enact laws relative to the hours and conditions of employment shall not abridge, impair or limit the right to collectively bargain for wages, hours and other terms and conditions of employment that exceed minimum levels established by the legislature.

(4) No existing or future law of the State or its political subdivisions shall impair, restrict or limit the negotiation and enforcement of any collectively bargained agreement with a public or private employer respecting financial support by employees of their collective bargaining representative according to the terms of that agreement.

(5) For purposes of this Section, "employee" means a person who works for any employer for compensation, and "employer" means a person or entity employing one or more employees.

(6) This section and each part thereof shall be self executing. If any part of this section is found to be in conflict with or preempted by the United States Constitution or federal law, such part shall be severable from the remainder of this section, and such part and the remainder of this section shall be effective to the fullest extent that the United States Constitution and federal law permit.

The proposal would add the following to Article XI, Section 5 of the State Constitution: Classified state civil service employees shall, through their exclusive representative, have the right to bargain collectively with their employer concerning conditions of their employment, compensation, hours, working conditions, retirement, pensions, and other aspects of employment except promotions, which will be determined by competitive examination and performance on the basis of merit, efficiency and fitness.

third highest percentage in the nation.[1]

[1] See Unionstats.com, Union Membership, Coverage, Density and Employment by State, 2011, http://unionstats.gsu.edu/State_U_2011.xlsx.

Public Sector Employees and Prevalence of Unionization

The CPS data show that 55.0 percent of the public sector workers in Michigan are union members: Michigan ranks 13th among the 50 states and the

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District of Columbia on this metric.[2] The pattern of unionization varies by type of public sector employer.

The prevalence of public sector unions in general-purpose local governments in Michigan is closely tied to the size of the populations served by those jurisdictions; the larger the jurisdiction, the more likely the employees are to be unionized. The 2010 Census counted only 6 percent of Michigan's 1,857 counties, cities, villages, and townships with populations in excess of 20,000 residents. A recent University of Michigan survey of local governments found that only 27 percent of the local governments have employee unions. Public sector unions exist in 98 percent of the state's largest jurisdictions, but are rare in the state's smaller jurisdictions. Among the types of local governments that responded to the University of Michigan survey; 100 percent of the counties and 87 percent of the cities reported having at least one union representing their employees. Unionized workers in villages (20 percent) and townships (9 percent) are relatively rare. The jurisdictions with employee unions tend to be located in southeast Michigan.[3]

Public sector unions in K-12 school districts, community colleges, and universities are much more common regardless of the populations served or the number of students attending the schools. In contrast to traditional school districts, many charter schools are not unionized.

Unlike the private sector that has a long history of unionized workers, the introduction of formal collective bargaining rights for state workers is a relatively recent development. State police troopers and sergeants were granted rights of collective bargaining and binding interest arbitration by constitutional amendment in 1978. The state Civil Service Commission granted collective bargaining rights to the majority of other classified employees in 1980. The delay in extending collective bargaining rights to state employees was because of a perception that to do so would involve an unauthorized delegation of the Civil Service Commission's authority.

The state Office of State Employer reports that state employees are organized into 11 employee units for the purposes of collective bargaining. Of these, 10 units comprising approximately 71 percent of the total state classified work force are represented by exclusive representatives. Employees in supervisory, managerial and confidential positions are non-exclusively represented employees and are ineligible for collective bargaining.[4]

Jurisdiction of Federal and State Laws

Collective Bargaining for Private Sector Employees

The right of workers in private industry to organize and the duty of employers to bargain with their employees' representatives is established in the National Labor Relations Act (NLRA). The act gives unions the privilege of seeking provisions in their negotiated contracts that compel employees to join the union, and to have the employer collect dues, fees, and assessments on behalf of the union (compulsory union security) and the ability to collect dues by labor contract. States may pass legislation creating exceptions to this privilege in the form of right to work laws.

A number of classes of employees, including state and local government employees, are outside of the jurisdiction of the NLRA. The reason for this lies with the Tenth Amendment to the U.S. Constitution which states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." State and local governments have the right to make laws regulating the relationship between employees and the government agencies for which they work.

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[2] ibid.

[3] *Public sector unions in Michigan: their presence and impact according to local government leaders*, Michigan Public Policy Survey, The Center for Local, State, and Urban Policy, Gerald R. Ford School of Public Policy, University of Michigan, August 2011, http://closup.umich.edu/michigan-public-policy-survey/12/public-sector-unions-in-michigan-their-presence-and-impact-according-to-local-government-leaders/ (accessed Aug. 9, 2012).

[4] Office of State Employer, State of Michigan, http://michigan.gov/ose/0,4656,7-143-48505—,00.html (Accessed Aug. 9, 2012).

Within the context of; (a) the limited jurisdiction of federal laws over the ability of state and local government employees to organize for the purpose of collective bargaining; and, (b) the limited jurisdiction of Michigan laws over the ability of workers in private industry to organize for the purpose of collective bargaining, it is clear that the proposed constitutional amendment would affect public sector employees to a greater extent than private sector employees.

Collective Bargaining for State Employees

State classified civil service employees currently have the right to engage in collective bargaining. The 1963 Michigan Constitution, as originally adopted, continued the role of the state Civil Service Commission as an independent entity to serve quasi-legislative, quasi-executive, and quasi-judicial roles with plenary authority over all aspects of state classified employment. Wage and benefit recommendations of the Commission must be submitted to the governor for inclusion in the Executive Budget and the legislature has constitutional authority to reject or reduce the recommended increases in rates of compensation authorized by the Commission.

In 1978, a constitutional amendment carved out collective bargaining rights for state police troopers and sergeants. This was followed in 1980 by unilateral action by the Civil Service Commission to adopt policies according collective bargaining rights to non-uniformed, classified state employees. In order to balance the quasi-legislative, quasi-executive, and quasi-judicial roles, the Commission was restructured from a wage and benefit setting body to a regulatory body, overseeing both the process of collective bargaining and the results produced by those negotiations. A separate Office of State Employer was established as the designated representative of the state government as a whole in the setting of wages, benefits, and other conditions of employment, including representing the state in all primary negotiations. Civil Service Commission policies were amended to define mandatory and prohibited subjects of collective bargaining, and the Commission retained the right to approve, modify, or reject negotiated agreements before they took effect. An Employment Relations Board also was established to handle certain functions that the Commission opted not to perform directly, including; a) acting as an appellate body with respect to certain matters; b) developing a coordinated compensation plan for nonexclusively represented classified employees; and c) serving as a panel to resolve impasses arising during the course of contract negotiations.

A proposed constitutional amendment was submitted to the voters on November 5, 2002, to grant to state classified employees the right to organize in unions and collectively bargain over wages, hours, pensions, and all other terms and conditions of employment; compel the state to bargain in good faith for the purpose of reaching a binding agreement; and make binding arbitration available as a right for the settlement of any matters bargained to an impasse. The proposal was defeated with 1,336,249 (45.6 percent) votes for and 1,591,756 (54.4 percent) votes against.

Public Employment Relations Act

All other public employees – including municipal, county, school, university, and others – currently are permitted to organize for the purposes of collective bargaining. The Public Employment Relations Act (PERA), Public Act 379 of 1965, was enacted pursuant to Article IV, Section 48 of the 1963 Michigan Constitution in part to standardize the process by which public sector collective bargaining is to occur. With enactment of PERA, public sector employees, regardless of their employer and where they are located in the state, could look to a single, comprehensive state statute as the source for their collective bargaining rights, rather than having to rely upon a patchwork of ordinances or charter provisions.

PERA was modeled after the NLRA and parts of PERA are virtually identical to sections of the NLRA, including provisions imposing upon public employers and public unions the mutual obligation to bargain in good faith on matters "with respect to wages, hours, and other terms and conditions of employment..." Similar to the federal statute, many of the terms in PERA are not defined. Therefore, many of the provisions in PERA have been subject to interpretation by the courts.

The state Supreme Court has held in a series of cases that PERA is the predominant state statute governing public employment relations in Michigan.

Recent History

The Great Recession has greatly affected state and local government budgets. Budget reductions have translated into decreased public sector employment in Michigan and throughout the nation.[5]

At the same time, policymakers in Michigan and other states have enacted a number of laws that are perceived to adversely affect public sector unions. Some of these changes are intended to directly address the fiscal challenges facing states and localities. In February of 2012, Indiana became the 23rd state in the nation and the first Great Lake state to adopt right to work legislation. In Wisconsin, Governor Scott Walker worked with the state legislature to enact a number of laws that were seen as stripping public sector employees of their collective bargaining rights. Other actions in New Jersey, Ohio, Iowa, and other states have affected the collective bargaining rights of public sector employees.

In Michigan, the actions of the 96th Legislature are cumulatively perceived by organized labor as threats to public sector employees and their collective bargaining rights. Among the perceived affronts to public sector employees were bills enacted that weaken teacher tenure rules; weaken employee protections under the Urban Cooperation Act; require greater employee contributions for health care insurance premiums; and prohibit minimum staffing levels for police and fire departments. The most threatening was enactment of Public Act 4 that granted to state-appointed emergency managers the authority to modify or terminate existing collective bargaining agreements and exempted local governments from the requirement to bargain with employee unions under specific circumstances.

The Proposed Amendment

Laws Affecting Private Sector Employment

Although states have limited power to enact laws affecting private sector employment and union membership, the 1947 Taft-Hartley Act expressly authorizes states to enact laws outlawing the union shop and agency shop for employees working in their jurisdictions. In a union shop, employers may hire union or non-union workers, but employees must join the union in order to remain employed. In an agency shop, employers may hire union or non-union workers, and membership in the union is not mandatory to remain employed, but the non-union workers must pay a portion of the union dues for costs related to finance collective bargaining, contract administration and grievance adjustment. By outlawing union and agency shops, state laws give workers the *right to work*, regardless of whether or not that person is a union member or financially contributes to the union.

Michigan is one of 27 states and the District of Columbia that has not enacted right to work legislation. Indiana recently became the 23rd state to enact a right to work law. Adoption of Proposal 2012-02 would effectively preclude Michigan from enacting right to work legislation.

Laws Affecting Public Sector Employment

Proposal 2012-02 would allow parties engaged in public sector collective bargaining (employees and governmental employers) to argue that the right to collective bargaining supersedes all laws that can be judged to abridge, impair, restrict, or limit the rights of public employees to organize for the purpose of collective bargaining, except the provisions in the PERA containing prohibitions on strikes by employees of the state or its subdivisions. In essence, public sector employees and employers could bring any issue up for negotiation.

[5] See Michigan Private and Public Sector Employment Levels over the Business Cycle, CRC Note 2009-01, October 2009, www.crcmich.org/PUBLICAT/2000s/2009/note200901.html.

Issues

The first, and primary, issue for voters to consider is that the proposed amendment has the potential to dramatically alter the established powers and authorities constitutionally granted to different branches of government (executive, legislative, and judicial) and different types of government in the state (counties, cities, villages, townships, school districts, community college districts, universities, special authorities).

Several constitutional provisions authorize political subdivisions of the state to supervise and control activities of those governmental entities, and direct expenditures from those entities' or institutions' funds. Those funds are used to employ workers, some of whom are represented by public unions. The constitutional provisions that may be abrogated, neutralized, or strengthened by the proposed amendment include:

- The legislature's authority to enact budgets and appropriate funds accordingly (Article IV, Section 31);
- The legislature's authority to enact laws to resolve disputes concerning public employees (Article IV, Section 48);
- The legislature's authority to enact laws relative to the hours and conditions of employment (Article IV, Section 49);
- The legislature's authority to enact laws for the protection and promotion of the public health and welfare (Article IV, Section 51);
- The governor's authority to organize the executive branch and assign functions to various departments (Article V, Section 2);
- The State Transportation Commission's ability to prioritize transportation projects (Article V, Section 28);
- The Supreme Court's authority to provide general superintending control over the various courts (Article VI, Section 4);
- The provisions for a county sheriff, clerk, treasurer, register of deeds, and prosecuting attorney in each county with statutorily assigned duties and responsibilities over their respective functions (Article VII, Section 4);
- The legislature's responsibility to enact general laws for the incorporation of cities and villages, including laws to limit the rate of ad valorem property taxation, to borrow money, and to contract debts (Article VII, Section 21);
- Cities' and villages' power to adopt resolutions and ordinances relating to municipal concerns, property, and government (Article VII, Section 21);
- The provisions for a township supervisor, clerk, and treasurer with statutorily assigned duties and responsibilities over their respective functions (Article VII, Section 18);
- The provisions granting to the University of Michigan regents, the Michigan State University trustees, the Wayne State University governors, and the governing bodies of the other Michigan universities the ability to control and direct all expenditures from the institutions' funds (Article VIII, Sections 5 and 6);
- Local governments' authority to determine terms and conditions of employment for their employees (Article XI, Section 6); and
- The authority of local governments to establish, modify or discontinue merit systems for their employees (Article XI, Section 6).

In the absence of direction by Proposal 2012-02 for how this proposed amendment should interact with, supersede, or be superseded by these other constitutional provisions, adoption of the proposal promises to bring uncertainty to the management of governments throughout the state and litigation for many years to come.

Laws for Resolution of Disputes Concerning Public Employees

Most significant in this regard is the certain contrary interaction between this proposed amendment and Sections 48 and 49 of Article IV of the 1963 Michigan Constitution. As was noted above, the federal National Labor Relations Act established the boundaries for private sector employment and collective bargaining. Section 49 empowered the Michigan legislature to enact laws within those boundaries.

The NLRA does not provide a duty for state or local governments to bargain in good faith or impose upon public employers and public unions the mutual obligation to bargain in good faith on matters "with respect to wages, hours, and other terms and conditions of employment..." Section 48 empowered the Michigan legislature to fill this void, and subsequently PERA was enacted to do so.

But Proposal 2012-02 does not propose to amend Article IV. Instead it adds a new section to Article I, leaving Article IV intact. Laws enacted pursuant to Sections 48 and 49 will surely become the subjects of litigation as efforts are made to negotiate contract provisions under collective bargaining pursuant to the new provisions of Article I that would supersede the previous laws.

The most significant target of such efforts will be PERA. Without a doubt, PERA can be viewed as an existing law that abridges, impairs or limits the rights of public unions to engage in collective bargaining. In fact, Section 15 of the PERA details subjects of bargaining that are mandatory and others that are illegal.

It is not clear what would happen if Michigan adopted provisions in its Constitution that are at cross purposes. PERA was enacted to do for state and local government public employee relations what the NLRA does for private sector employee relations. It defines the playing field upon which labor negotiations are to occur with regard to employees organized into public sector unions for the purpose of collective bargaining. It sets limits and restrictions "with respect to wages, hours, and other terms and conditions of employment..." and requires employers (state and local governments) to bargain in good faith with union representatives.

Adoption of the proposed amendment would create a playing field for public sector employee relations with uncertain boundaries. The legislature's previous and future ability to enact laws that may be seen as abridging, impairing, or limiting labor's right to organize and to engage in collective bargaining would be nullified.

Previous court decisions have held Section 48, Article IV and PERA above all other constitutional provisions and enacted laws. Even though this section was adopted at the same time as all other provisions of the 1963 Michigan Constitution, it has been given a predominant status over other provisions. When a conflict has arisen between another state statute, charter provision, or local ordinance, and a provision of a contract negotiated under PERA, in virtually every instance the contract provision has been held to prevail. The courts could decide to continue giving PERA precedence over others when asked to rule on conflicts between PERA and the proposed amendment (if it is adopted).

That the proposed amendment has the potential to neuter or repeal PERA and other state enacted laws that affect employment is not necessarily a negative. Previous court decisions in which Article IV, Section 48 and PERA were held to prevail over other constitutional provisions can be considered as infringing on the home rule authority constitutionally granted to cities, villages, and counties and on the autonomy constitutionally granted to the institutions of higher education, especially the University of Michigan, Michigan State University, and Wayne State University.[6] Likewise, residency requirements, minimum employee contributions to health care costs, and other laws have impeded the ability of local governments to determine their own structure and operations. A constitutional amendment that abrogates Section 48 and neutralizes or repeals PERA would restore the authority and autonomy that the drafters of the 1963 Constitution seemingly intended to provide to those entities.

Local Government Civil Service Commissions

The authority of local governments to oversee their work forces – set wages and work classifications – through civil service systems was included in Section 6, Article XI of the 1963 Michigan Constitution, which states in pertinent part, "each county, town-

[6] While state law created the governing bodies for the other 12 state universities, Article VIII, Section 5 of the 1963 Michigan Constitution specifically creates the governing bodies for the University of Michigan, Michigan State University, and Wayne State University provides to those institutions a constitutional level of autonomy.

ship, city, village, school district and other governmental unit or authority may establish, modify or discontinue a merit system for its employees other than teachers under contract or tenure...." Over the years, the state Supreme Court determined that the provisions of PERA were predominant and that local civil service commissions were limited in the extent to which they could affect matters that were otherwise negotiated by the governments' elected leaders and the unions.

If PERA is abrogated in whole or in part, the extent to which the remaining local government civil service systems may regain any powers that were otherwise ceded to PERA will be a matter of contention.

Conclusion

Past and present laws in Michigan have extended to organized labor the ability to represent public workers and engage in collective bargaining.

If approved by the voters, Proposal 2012-02 will affect the cost of government because large percentages of government costs relate to personnel. The ability of the leaders of government at all levels to manage personnel costs directly translates into a cost to taxpayers and the quantity and quality of public services.

Governments exist, in part, to manage the interaction among parties. A number of constituents take great interest in the policies and operations of governments, including government employees, businesses, families of school children, and taxpayers. In a period of declining revenues, the increased costs that could result from this proposal could well have the perverse effect of increasing pressure on state and local governments officials to cease provision of some services or move work to lower cost private sector providers.

With respect to public sector workers, the fundamental question of this proposal is whether the state legislature should have some say over the ability of public sector workers to organize and the scope of issues that can be bargained, or whether the right of public sector workers to organize and bargain on all issues is fundamental and should be enshrined in the constitution.

The scope of this proposal for private sector workers is significantly more limited but still significant. Federal law allows states to outlaw the union shop or agency shop for employees, commonly referred to as right-to-work laws. This proposal would prohibit the Michigan legislature from enacting right to work laws similar to those that have been enacted in 23 other states.