VETERAN"S PREFERENCE VIOLATION?

In the matter of **DAVID W. KASTNING**, Complainant, v. **FLORIDA STATE UNIVERSITY BOARD OF TRUSTEES**, Respondent. (Case No. VP-2009-006)

On February 9, 2009, David W. Kastning filed a veteran's complaint against the Florida State University Board of Trustees (FSUBOT) alleging that he was denied a veteran's preference in employment when he was not hired by the FSUBOT as a help desk support technician. On March 12, a hearing was conducted in Tallahassee.

ISSUE

The issue for resolution in this case is whether the FSUBOT violated Kastning's veteran's preference rights.

STIPULATIONS

At the hearing, the parties entered into the following stipulations:

1. The Commission has jurisdiction in this case under Chapters 447 and 295, Florida Statutes (2008).
2. Kastning is entitled to a veteran's preference in employment pursuant to Chapter 295, Florida Statutes, and Florida Administrative Code Rule Chapter 55A.
3. Kastning properly and timely notified the FSUBOT that he was entitled to a veteran's preference pursuant to Chapter 295, Florida Statutes, and Florida Administrative Code Rule Chapter 55A.
4. The classification of help desk support technician is a "covered position" within the meaning Chapter 295, Florida Statutes, and Florida Administrative Code Rule 55A.
5. Kastning was minimally qualified for the position of help desk support technician.
6. The person selected for the vacant classification of help desk support technician was not entitled to a veteran's preference.
7. The FSUBOT is a covered employer as defined by Chapter 295, Florida Statutes and Florida Administrative Code Rule 55A.

FINDINGS OF FACT

Based on the testimony, exhibits, and the evidence adduced at the hearing as a whole, I make the following findings of fact:

1. In late Spring or early Summer 2008, the FSUBOT advertised a vacancy for the classification of help desk support technician (technician). The vacancy was at the FSUBOT Center for Reading Research (FCRR). The FCRR is a grant-funded initiative housed within the learning systems institute at the FSUBOT. The FCRR provides technical assistance to schools statewide in the area of reading proficiency for kindergarten through the twelfth grade. In connection with its mission, the FCRR maintains large electronic databases of student assessment and research tools, supporting Florida's Reading First initiative.
2. The FCRR receives a large volume of telephone and electronic mail inquiries from teachers and administrators at school districts statewide regarding the use of the electronic databases and accessing information. Sixteen support specialists are employed at the FCRR to assist in answering these questions. In turn, technicians are employed at the FCRR to supervise the support specialists. Specifically, each technician supervises eight support specialists. Each technician is expected to take the lead in training new support specialists, as well as other computer-related duties. Further, each technician is expected to be able to interact with the same public and respond to the same or more complicated questions as the support specialists.

3. The technician job opening and description stated that the position was within the FCRR. The mandatory qualifications included a high school diploma or GED and two years of appropriate experience. Appropriate college course work or vocational/technical training could substitute for an equivalent amount of the required experience. Specifically, the job requirements were stated as:
   - Knowledge of general office procedures and good telephone and e-mail skills.
   - Ability to handle detailed work with accuracy and

PRESIDENT'S MESSAGE

It's the end of another month this year and the time sure seems to be flying by!

Many of us are struggling to juggle day-to-day tasks - I'm currently preparing for impasse proceedings - while also assisting our chief executive and our boards by providing accurate human resources information on wages and benefits for their use in budget deliberations. It is a time when many of us are focused solely on keeping our noses to the grindstone and doing everything we can to get through these trying times.

Your work-life may be changing drastically - insert the *doing-more-with-less cliché* here - but it is not ending!

That's why we can not be so focused on our work that we forget about ourselves, our families and our professional colleagues. We need to continue to pursue our stress-relieving recreational outlets for our own well being.

We also need to connect deeper with our families, who are stressed out with their own issues but can still sense the heightened stress in us.

And, we need to stay connected to our professional colleagues as they provide a 'safe-haven' to vent our frustrations, float our ideas, and provide us some new avenues of thought.

Let us commit to taking care of ourselves, in whatever manner that takes, so that we can enjoy each day for what it is!

confidentiality, and communicate effectively both verbally and in writing.

- Demonstrated ability to work with and train others.
- Familiarity with the Microsoft Office Suite on PC and various internet browsers on multiple platforms.
- The job opening also indicated a preferred qualification of "experience with other productivity and/or development software; specifically student web-based data management systems."

4. Kastning timely applied for the technician vacancy and provided documentation supporting his veteran status. The position was subsequently re-advertised. Applicants from the first advertisement were still under consideration so it was unnecessary for Kastning and the other prior applicants to reapply.
5. Danny Brooke supervises the technicians and had direct responsibility for hiring employees in that classification. Brooke preferred contacting applicants bye-mail because of the requirement that the technician be extensively familiar with the operation of e-mail and other computer operations. Kastning had applied through the internet to the FSUBOT for the classification. Consequently, it would reasonably be expected that he would receive notification of an interview for the vacancy through his e-mail. Brooke had used this method previously, and had used it in the current instance in notifying applicants of interviews for employment vacancies without any apparent problems.
6. Brooke noted that Kastning's on-line application process had run into some difficulties on Kastning's part. Specifically, Kastning had some difficulty in filling out the application on-line as well as sending separate documentation, including copies of a letter of reference and his form DD214, documentation of a veteran's preference. Nonetheless, Brook believed that Kastning was minimally qualified for the classification and, therefore, entitled to a veteran's preference in the form of an oral interview. Consequently, Brooke sent Kastning an e-mail concerning an interview on June 25, 2008. Kastning was to contact Brooke with a time for the interview.
7. Kastning did not receive Brooke's e-mail notifying Kastning concerning setting an interview for the technician vacancy. Several reasons were indicated by Kastning in this respect, in that his failure to receive notice of the oral interview could have been caused by a problem with his internet service provider, his own deletion of the e-mail message because he considered it to be "spam," or that there was a systemic problem with the internet that somehow caused him not to receive the e-mail (i.e., Kastning's evidence that a certain number of emails are lost on the internet without any explanation is credited). In any case, it is not challenged that the notice of an interview was sent to Kastning bye-mail, he did not know of the e-mail, and the FSUBOT did not know of Kastning's non-receipt of the e-mail notifying him about an interview.
8. Because Kastning did not respond to the e-mail, Brooke

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assumed that Kastning did not desire an interview and was no longer interested in the vacancy. Brooke continued with the selection process, including interviewing other applicants.

9. Because Kastning had not heard about any progress on his employment application, he began in June to telephone the FSUBOT's human resources department (department) concerning his application. During a July 29 telephone conversation with a department representative, Jamira Napier-Lanh, Kastning learned that there were interviews taking place concerning the vacancy. Neither Kastning nor Napier-Lanh spoke about whether Kastning had received notice concerning a possible interview. Specifically, Kastning did not state that he had not been contacted concerning the interview, and Napier-Lanh did not question Kastning about whether he had received notice concerning an interview.

10. On August 20, Kastning again telephoned the department. In a series of telephone conversations with various FSUBOT employees that day, he was informed that he did not schedule an interview that had been requested and that a non-veteran had been hired on August 11. This began the veteran's preference complaint process in which Kastning has argued that he should prevail because he did not receive notice from the FSUBOT concerning the oral interview and that a non-veteran was hired.

11. A stated preference for the technician position was to have "student web-based data management system" experience. This was because a technician was required to have the ability to deal with subordinates and the general public in the form of teachers and school administrators, who were having practical difficulties with the on-line database that supported Florida's Reading First initiative. The three main qualities that Brooke sought in a successful applicant were: supervisory skills, interpersonal skills, and technical skills.

12. Kastning's resume indicated that he had an Associate's degree in 1984, a Bachelor's of Arts degree in 1985 with a major in psychology and a Master's degree in instructional

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systems in 1986. Kastning had been certified as a NetWare engineer in 1994, 1997, and 2000. Kastning was certified as a Microsoft professional in 2002. Despite these computer-related skills, Kastning had not worked as an employee in the computer field since July 2001 when he had worked from 1998 to July 2001 for the Public Defender in Tallahassee.

13. Kastning's experience prior to working for the Public Defender was as follows: March 1996 to December 1997, systems engineer for advanced data systems; September 1995 to December 1995, a systems engineer for Executive Technologies; systems engineer for RECOM Associates from March 1995 to September 1995; and, on the job training as a systems engineer for Mainline Information Systems from September 1994 until March 1995. There is no evidence that Kastning had any supervisory duties in any of this prior employment.

14. Since June of 2002 to the present, Kastning has worked as a paper route subcontractor delivering newspapers for the Tallahassee Democrat to homes, paper machines, and convenience stores. Kastning has not worked on computers or information systems other than for himself or other persons on an irregular basis since leaving full-time employment in the field when he left work for the Public Defender. Kastning stipulated that he had no "student web-based data management systems" experience.

15. The non-veteran selected for the vacancy was Demetrius L. Brown. Brown obtained an Associate's degree in computer science in 2002 and Bachelor of Science degrees In computer science and information technology from Florida State University (FSU) in 2007. Brown is currently a student obtaining a Master's degree from FSU in computer technology.

16. Brown worked as an information technology network administrator intern at FSU's London studies center in England from December 2006 to July 2007. During this time, he developed problem solving skills such as fixing computers, fixing network problems, and working on network upgrading. Brown worked at FSU's College of Social Work as a website developer from August 2006 to December 2006. Brown also worked at FSU's Oglesby Union in assisting faculty, guests, and students with computer problems from August 2004 to December 2007. Brown's relevant other experience included working as an IT intern at the Broward County School Board in Ft. Lauderdale assisting with student record databases in June through August 2000. I note, as argued by Kastning in his post-hearing submission, that Brown claimed that he worked for FSU's Oglesby Union in Tallahassee in part during the time he was in London. I concluded that this statement was an indication that Brown worked in this capacity when he was in Tallahassee during the time period on his application. As it was not disputed that there is a business practice of verifying claims in employment applications by the FSUBOT, I find no significant

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discrepancy in Brown's application.

17. Brown was especially considered to be well-qualified for the technician position because of his technology-related work experience that was concentrated in a student or academic environment. Further, it was considered to be a plus that, as a recent graduate in the field at FSU, Brown's technological experience was current and closely-related to the qualifications of the technician position.

DISCUSSION AND ANALYSIS

Chapter 295, Florida Statutes, provides for a veteran's preference in employment for covered positions with covered employers. There is no dispute that the FSUBOT is a covered employer, that the technician classification was a covered position, and that Kastning was entitled to a veteran's preference in employment for that position. Further, there is no dispute that he was minimally qualified for the position of technician, and that despite his qualification, and known veteran's preference status, a non-veteran was hired.

It is beyond dispute that, if a veteran intentionally ignores a hiring process, such as an interview appointment, an employer may lawfully not consider that veteran for employment. *Damato v. City of Lakeland, 22 FPER ~ 27504 (1996)*. However, a veteran must be given adequate notice of an interview. *Coleburn v. Department of Transportation, 20 FPER ~ 25502 (1994)*. In the absence of such notice, the veteran is denied a preference in not being interviewed.

Here, it is disputed as to whether Kastning's absence from the interview was excused because the FSUBOT did not give him adequate notice of the interview. Specifically, because of systemic problems with the receipt of e-mails (such as failures of both the internet system itself and of the internet provider), Kastning argues that it was incumbent upon the FSUBOT to utilize a second notification process other than e-mail to insure that he knew about the interview in order to give Kastning a veteran's preference.

It is not disputed that the interview e-mail message was sent by the FSUBOT and that it had no notice that Kastning had not received the message. However, it is also not disputed that Kastning had no knowledge of the e-mail message of the interview. This may have been Kastning's fault in mistakenly deleting the FSUBOT's message. However, it is just as likely that the message did not arrive because of some systemic problem from Kastning's internet provider or from a systemic internet problem. Complicating the notice issue is whether Kastning should have reasonably inquired as to why he was not being interviewed when he

Employee Free Choice Act is Coercive Even Without Card Check

Submitted by Carl Horowitz on 7/22/2009

The Employee Free Choice Act (EFCA), as *Union Corruption Update* has noted repeatedly, is a misnamed piece of federal legislation. Its sole ulterior purpose is an expansion of union power at the expense of dissenting employees and employers. And despite the fact that supporters appear willing to strip the measure of its highly controversial "card check" component, the bill (H.R. 1409, S. 560) remains coercive in intent. That's because its less-heralded binding arbitration provision remains. And arbitration, as supporters envision things, would authorize the federal government to write (or rewrite) employment contracts from scratch. Rep. George Miller, D-Calif., and Sen. Tom Harkin, D-Iowa, are the bill's leading advocates in Congress. They and Democratic allies are determined to deliver the goods for organized labor in this, an eleventh-hour push.

"Card check" is a practice that unions have employed for decades as a way of gauging support from nonunion workers for a representation election. Organizers go to an affected workplace and in some cases to workers' residences, asking them to sign a card indicating a desire to join. A worker's signature in no way is a formal commitment to vote for representation later on. But typically if a union gets at least 70 percent of workers to sign, it is confident they have the strength to win a secret-ballot election. Under current law, a card-check campaign must reach a 30 percent threshold of signatures in order to trigger a National Labor Relations Board (NLRB)-supervised election. And if a card check campaign can secure signatures from at least 50 percent of all workers, an employer may recognize the union as the sole collective bargaining agent, but does not have to. What EFCA would do is force an employer to accept a card check as binding if a simple majority of workers sign. What's more, the measure would require employer neutrality during a

was informed by FSU's Human Resources department of the interviews.

It has been long established that, if the FSUBOT ultimately hired a non-veteran applicant more qualified than Kastning, there is no violation of the veteran's preference law. See *Harris v. PERC, 568 So. 2d 474, 477-78 (Fla. 1st DCA 1990)* (holding that an employer must give preference to a minimally qualified veteran but does not have to hire him or her over a more qualified non-veteran). Consequently, even if it is assumed that Kastning did not receive proper notice of the interview through no fault of his own, the ultimate issue is whether the non-veteran selected was better qualified. See *Rafferty v. Martin County Board of County Commissioners, 21 FPER,-] 26052 (1995)* (holding that, although an interview demonstrates per se a veteran's preference, an employer may still establish no violation of the law where there is no interview by showing that the nonveteran is better qualified).

Although Kastning testified that he had assisted neighbors and friends in computer-related problems since 2001, when he was initially employed full-time as a paper route delivery person, Brown's experience was recent and more tailored to the technician position (e.g., including web-based student data experience that Kastning stipulated on the record that he did not have). Accordingly, I conclude that the FSUBOT did not violate the veteran's preference law when it hired Brown, who was more qualified than Kastning. See *Seymour v. Lee County Board of County Commissioners, 21 FPER ,-] 26500 (1994)* (concluding that a non-veteran was more qualified for a data processing systems support representative as more closely matching the qualifications sought by the employer).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of this case pursuant to Chapters 295 and 447, Florida Statutes.
2. The FSUBOT's decision to not hire Kastning for the technician position was not unlawful because the non-veteran hired was more qualified.

RECOMMENDATION

Based on the foregoing, I recommend that the complaint be dismissed.

Note: Mr. Kastning represented himself in the proceeding against the Florida State University Board of Trustees (FSUBOT) heard by Mr. Jack Ruby.

On April 20, 2009 PERC accepted the hearing officer's findings of fact. Furthermore, [they] agreed with the hearing officer's analysis of the dispositive legal issues, his conclusions of law, and his recommendations in dismissing Kastning's complaint.

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card check. That is, management may not offer counter-arguments of its own, even if the union appears to be applying strong-arm tactics.

Unions like card checks because they work. National Labor Relations Board data shows that during this decade unions have won roughly 60 percent of secret-ballot elections over first-time representation, a figure that exceeded 65 percent in 2008. That's a pretty good track record. But it's not quite as good as the card check process, in which unions have won about 80 percent of the time. One possible reason for the higher success rate is that unions have more opportunity to apply undue pressure, if not harassment, in persuading undeclared workers to sign. Common sense dictates that under EFCA, the closer union organizers get to that magic 50 percent threshold, the more they will be emboldened to bully workers who say (or might say) "no." Opponents of the Employee Free Choice Act are fully aware of this dynamic. And the more they convey their concern to the public, and especially to moderate Democrats, the greater their chances of stopping this legislation - as they had done through Senate filibuster a little over two years ago.

It takes a three-fifths vote to invoke cloture of a Senate bill; i.e., override a filibuster. In 2007, lawmakers, along party lines, voted 51-48 to invoke cloture. This time around, the Democrats hold a 58-40 majority over the Republicans, and enjoy the support of two pro-union Independents in Bernie Sanders (Vt.) and Joe Lieberman (Conn.). Yet even that might not be enough. Democratic Senators Ted Kennedy (Mass.) and Robert Byrd (W.V.) are ailing, and are unlikely to show up to cast a vote. And Republican resistance has hardened in recent months. Union leaders such as the Service

D.C. Circuit: Consistently Apply E-mail Solicitation Policies as Written

By John J. Coleman III ***7/24/2009***

The U.S. Circuit Court of Appeals for the District of Columbia enforced in part and denied enforcement in part of the National Labor Relations Board's (NLRB) first definitive word on the application of company e-mail policies to union communications.

The first incident arose out of a union official's response to a company announcement urging people to avoid a union rally for fear of anarchists. The union official subsequently sent a responsive e-mail to "set the record straight" and notify employees that it was the company that had told police of concerns about anarchists and not the other way around. The court agreed with the NLRB's decision, affirming the **administrative law judge** (ALJ) in finding that discipline for sending this e-mail was an unfair labor practice. The e-mail did not violate a policy forbidding use of company communication systems for non-business-related solicitation because the e-mail itself was not a solicitation.

The second incident arose a few months later when the same union official used the company e-mail system to encourage employees to wear green at an upcoming event to support the union's position in then-pending collective bargaining. Reversing the ALJ, the NLRB found that the company properly disciplined the official for this e-mail because it, unlike the earlier communication, solicited employees to take some affirmative action in response.

The court of appeals reversed the NLRB, however, because the court found that the employer had not consistently applied the rule to all solicitation, but had allowed some personal solicitation to take place. Without deciding whether an employer could ever properly make a generic distinction between group solicitation and personal solicitation, the court held that nothing in the rules or in the disciplinary actions in the present case suggested that this employer made such a distinction when applying the rule in this case or in the past.

Guard Pub. Co. v. NLRB, D.C. Cir., No. 07-1528 (July 7, 2009).

Professional Pointer: This case is important for three reasons. First, it makes clear that employers may apply nondiscriminatory no-solicitation rules to e-mail communications. Second, the court expects employers to adhere to the rules' terms as written and not create categories of excluded behavior after the fact. Third, the decision leaves open the possibility that employers' rules can exempt certain categories of solicitation without affecting the ban as long as the exceptions do not make the rules appear only aimed at union activity. Carefully draft e-mail solicitation policies to ensure realistic and consistent application.

*John J. Coleman III is an attorney with the Birmingham, Ala., office of **Burr & Forman**.. Article first appeared on www.shrm.org.*

Employees' Andrew Stern are grim over the bill's chances for success in present form. Certain Democratic Senators, if out of fear of a filibuster more than out of principle, have defected. Last week, six of them agreed to drop EFCA's card check provisions while retaining the section on binding arbitration. Joining Harkin were Sherrod Brown (Ohio), Blanche Lincoln (Ark.), Mark Pryor (Ark.), Charles Schumer (N.Y.) and Arlen Specter (Pa.). Specter, who this past spring switched parties from GOP to Democrat and who has been lobbied heavily by both sides, remarked, "I cannot remember an issue this emotional in all my years in the Senate."

But this compromise in no way ought to lull opponents into thinking the measure is consistent with workplace liberty. As one AFL-CIO official, insisting on anonymity, explained to the New York Times: "This bill will bring about dramatic changes, even if card check has fallen away." Unfortunately, he's right. The Employee Free Choice Act would authorize an arbitrator from the Federal Mediation and Conciliation Service to force a settlement if management and the newly-certified union at a given work site aren't able to come to terms after 90 days of bargaining and 30 days of mediation. The arbitration panel would face no time deadlines or duty to issue an accompanying opinion after the 120 days are up. It would dictate all terms of a contract, from wages to work schedules to vacation time to health benefits. And decisions would be final, not subject to appeal. The FMCS thus would have powers unimagined by its creators in 1947 as part of the Taft-Hartley Act.

Read the rest at:

http://www.nlpc.org/stories/2009/07/22/employee-free-choice-act-coercive-even-without-card-check

Vallejo Must Die

Editor's Note: On June 17, 2008, the City of Vallejo, California filed a motion for Approval of Rejection of Collective Bargaining Agreements (CBA) to seek court guidance on whether chapter 9 of the [U.S.] Bankruptcy Code permits a municipality to reject CBA's. The U.S. Bankruptcy Court, Eastern District of California, subsequently cleared the way for Vallejo to file and void the contracts. The two following articles present this issue - the Chapter 9 filing and ability to reject CBA's by Vallejo, California—from both a union and a management perspective.

BY MARC GARMAN
VALLEJO INDEPENDENT BULLETIN
7/13/09

The City of Vallejo is a problem. Not just a local problem either. It is a national problem. The legal precedent that Vallejo's bankruptcy has and may create will put many hundreds of millions of union dollars at risk. It will severely erode the leverage enjoyed by labor unions in California and elsewhere.

The courts have ruled that Vallejo has the right to void employee contracts deemed "burdensome". Time will tell if the contracts Vallejo has with its employees will meet that fate. Fire and IBEW (International Brotherhood of Electrical Workers) employees are inhabiting a judicial purgatory that requires patience and large amounts of money. Of course, large amounts of money are needed on both sides of this legal battle.

Cities all across America are feeling the squeeze of these tight economic times. Threatening to "Do a Vallejo" has become a common tactic cash strapped cities use to leverage their employees into making concessions.

Such threats are **beyond** unacceptable to organized labor. With the prospect of a union win in court seeming to dim there are only so many tactical options left. The battle of perception and public opinion are now the ones that matter most.

The movement to crush the Vallejo *precedent* will continue on the legislative front as well as the judicial one. The recent withdrawal of AB 155 from the California State legislature is sure to be temporary as it is certainly tactical. At some point over the next two years, this bill, which seeks to create a state panel to serve as a gatekeeper for cities seeking bankruptcy protection will re-emerge. When conditions in Sacramento are more favorable, it may pass, robbing cities of another piece of self determination.

Win, lose, draw or make a deal, the national labor unions have decided to make Vallejo an example. To "Do a Vallejo" is a term that must be re-defined at all costs.

Discussions have likely gone late into the night. Wrangling over "setting an example" versus "collateral damage" has been sweated over for some time. Local union leaders have undoubtedly pushed for their members here in Vallejo. A final decision has been reached though. Perhaps not a total consensus...but one with enough people at the top who matter.

To "Do a Vallejo" must become a euphemism for a devastation so complete it is unthinkable. The unions have only one clear option left in this battle:

VALLEJO MUST DIE!

What follows are some readers comments at the original website article: http://ibvallejo.com/index.php?option=com_content&task=view&id=527&Itemid=1

By TRUTH TELLER on July 13, 2009
Powerful piece there Marc. This [sic] scotched earth policy the PSU's have been running I hope will turn on them.

Know this, the current awareness that taxpayers in Vallejo have of the games, excesses, abuses and greed of the PSU's will lead in the backlash that the PSU's have wrought upon themselves. They have only themselves and their greed to blame.

We, Vallejo, will continue to stand though every community based organization and program may not. We, with our long memories and the power to vote, will not tolerate candidate's who carry water for the PSU's. We WILL be victorious in the end when new contracts are to be negotiated.

Until then, it's war. Plain and simple.

By STREETSWEEPER on July 14, 2009
Wow, this is a little dark even for Marc but there is some truth to it. With little to no revenue in sight the only things this city will be able to pay for is the most important and basic services.

That means public safety in whatever form and amount will be provided, leaving little for anything else. Even with labor peace at some point it will not matter because the damage is done and we will have reaped what we sowed, disaster.

We can now sit back [and] ride into Vallejo's dark ages and hope somebody [sic] events the wheel of revenue.

Editor's Note: ***The article below is presented as a companion to Mr. Garman's article above in order to illustrate the chilling effect the "Vallejo" verdict presents to unions across the country and to better illustrate Mr. Garman's premise that "To do a Vallejo" must die.***

CALIFORNIA BANKRUPTCY RULING A PRECENDENT FOR DPS [Detroit Public Schools]

By Marisa Schultz / The Detroit News
July 31, 2009

Detroit -- Detroit Public Schools, facing a $259 million deficit and diminishing cost-cutting options, has a recent California court ruling on its side as officials weigh Chapter 9, experts say.

Chapter 9, a rarely used form of municipal bankruptcy, could allow the district to discard its labor agreements, said retired U.S. Bankruptcy Judge Ray Reynolds Graves, who has been advising the district's emergency financial manager, Robert Bobb.

"The bond obligations and the labor contracts are the big financial burdens on DPS," Graves said. "Failure of the constituents to make sacrifices will make Chapter 9 inevitable. If people don't want to make deals, then (the district will) have to file." Union leaders, however, are concerned about whether parents would want to send children to a bankrupt school district.

"Filing bankruptcy sends the wrong message to the community," said Keith Johnson, president of the Detroit Federation of Teachers, one of the 10 unions and 16 bargaining units negotiating with the district. "It says, 'We are broke and we can't afford to educate your children.' That will be the perception, whether real or imagined. That would accelerate the exodus of Detroit Public Schools."

Established during the Great Depression, Chapter 9 is so rarely used that of the 1 million bankruptcy cases filed in U.S. courts last fiscal year, only four were Chapter 9. It has never been used in Michigan.

Chapter 9, like Chapter 11, allows for the restructuring of debt, but one of the key differences between the two is the treatment of collective bargaining agreements. The protections for unions, allowed under Chapter 11, do not extend to public workers in a Chapter 9 filing, a federal judge ruled in March. That judge ruled that Vallejo, Calif., a San Francisco Bay area city of 117,000, could toss out its labor contracts when it filed for Chapter 9 bankruptcy. The Vallejo decision was a turning point for municipalities grappling with declining revenues and rising labor costs around the country, experts say.

'BEST USED AS A THREAT'

The ease of throwing out union contracts may make Chapter 9 an attractive option, but it should only be used as a last resort, said James E. Spiotto, a Chapter 9 specialist and partner with Chapman and Cutler LLP in Chicago.

"Chapter 9 is probably best used as a threat -- which it normally is -- to get people to return to their adult state and find a solution," Spiotto said. "It seems like an attractive option because there are things you may be able to do. But like any narcotic, once the moment of euphoria passes there is real pain."

It's always best to try to negotiate the specific problem outside the court, he said, rather than be forced to air out every debt issue in court, which may produce an undesirable outcome. Spiotto added that there's a stigma that bankruptcy would prevent municipalities from having access to the municipal bond market, which is needed to finance projects.

On top of that are the legal fees.

Vallejo was rocked by the downturn of the housing market and loss of tax revenue. Meanwhile, it was locked into multiyear labor agreements with built-in pay increases.

"It was a double whammy," said JoAnn West, a public information officer for the city. Vallejo tried to renegotiate with the unions, but couldn't reach deals.

"We were going to reach July 1, 2008, and not make payroll," she said. "We had no choice." The city chose to file for bankruptcy in May 2008.

After the March ruling, the city and its firefighters and electrical workers were ordered to reach new agreements through a court-appointed mediator. As of yet, no deals have been reached. The spat with labor unions has cost the city more than $5 million, West said. More legal bills are on the way with the appeals process.

"It isn't anything you want to enter into lightly," Spiotto said. "Nobody who is going through with it would ever want to go through it again. You may not be the same after."

'BLEAKER BY THE YEAR'

Under Michigan's Public Act 72 of 1990, an emergency financial manager is authorized to pursue Chapter 9 bankruptcy. Bobb, whom Gov. Jennifer Granholm appointed in January, has uncovered millions in unbudgeted expenses and poorly managed finances that have caused the deficit to skyrocket in his four months on the job. He has met with at least two bankruptcy experts, including Graves.

Since taking over, Bobb has spearheaded the layoffs of more than 2,400 employees and closure of 29 schools.

The district's woes have been fueled by seven years of overspending and a reduced number of students -- and the revenue that comes with them -- to charter schools, other districts and private schools. Enrollment has continued to plummet, with DPS dropping below 100,000 students and losing its distinction as a "first class district," which has cleared the way for additional charters to operate in the city.

The outlook is even bleaker for 2010, in which district officials predict enrollment will drop to about 84,000, a level that's less than half its peak enrollment.

"Bankruptcy, like the other remedies, will not by itself solve a $259 million legacy deficit nor all of the factors that contributed to it," said DPS spokesman Steve Wasko. "However, it would allow the school district to renegotiate contracts with vendors, look at restructuring debt, and (it) provides an opportunity to reopen collective bargaining agreements."

DPS' bonded long-term debt is nearly $1.47 billion as of June 30.

'Worst option,' union says

Since 1980, six school districts nationwide have filed bankruptcy and 40 cities, villages or counties, according to data Spiotto compiled. Causes of municipal bankruptcy include large lawsuit judgments that local governments can't pay, burdensome labor contracts and poor financial planning.

In bankruptcy court, DPS would list all of its "executory contracts" -- or contracts it has with another party under which if either side stopped performing their duty it would be a breach of contact. In DPS' case, this list would range from teacher contracts to lease and bond agreements.

DPS would have to prove it has made a good faith effort to resolve these issues outside of court.

In bankruptcy court, decisions are made as to what executory contracts are kept and which ones aren't affordable.

"A collective bargaining agreement is no different than any other executory contract and it can be canceled," Graves said.

Since Bobb publicly announced he's considering bankruptcy, the tone of teacher union negotiations has not changed, Johnson said. The terms of the teachers' contract, which expired June 30, remain in effect. Johnson said the negotiations have yet to address district finances.

"It's not the teachers' salaries and benefits that created this fiscal deficit, it's the perpetual ... mismanagement of the district," said Johnson, whose union represents more than 5,000 teachers.

"Everybody acknowledges that (bankruptcy) is an option that has to be explored. We believe this is the worst option."

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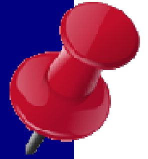

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