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Before the

Unites States House of Representatives
Committee on Education and Labor
Subcommittee on Health, Employment, Labor and Pensions

On

H.R. 413, the Public Safety
Employer- Employee Cooperation Act

March 10, 2010

Good Morning Chairman Andrews, members of the subcommittee, my name is Douglas Steele, and I thank you for the opportunity to speak before the committee this morning in support of H.R. 413, the Public Safety Employer-Employee Cooperation Act. I will be speaking with you today concerning the structure of H.R. 413, and how it is intended to operate under a variety of scenarios. If time permits, I will also address the constitutionality of H.R. 413.

For the past 20 years it has been my privilege to represent public safety employees, as well as other public and private sector employees and their labor organizations throughout the United States. This has included representing public safety employees in States that provide them significant bargaining rights, as well as States that provide them with none; jurisdictions where there is great cooperation and communication between public safety departments and labor organizations, and States where there is open hostility. Of course, as a litigator, I see more of the latter than the former.

That wealth of experience has helped me to assist in the drafting of H.R. 413, as well as earlier versions, over the past 10 years. H.R. 413 takes a very balanced approach to meeting its goals, and gives full respect to existing State and local laws, as well as constitutional considerations. I believe it is that balance and restraint that has allowed this bill to garner such a large number of co-sponsors from both sides of the aisle. Several key provisions in H.R. 413 were drafted by Republican staff members of this Committee, and refinements were made following the 2007 committee hearing at the request of Republican committee staff. Indeed, in the 110th Congress, H.R. 980 passed the House by a

vote of 314 – 97, with the support of the majority of both Republicans and Democrats. Those distinguished Members clearly recognized that the Public Employer-Employee Cooperation Act is not simply a nice thing to do, but the right thing to do; the smart thing to do.

The guiding principles in creating the structure of H.R. 413 were (1) to preserve existing State and local laws that provide bargaining rights that are comparable to or better than the minimum requirements set forth in the Bill; (2) to ensure at least a minimum level of collective bargaining rights and responsibilities where they presently do not exist; and (3) to fully respect the role of the States in Our Federalism.

As others have stated, these minimum rights protected by H.R. 413 are the (1) the right to form and join a labor organization; (2) requiring public safety employers to recognize and bargain with a labor organization freely chosen by a majority of the employees; (3) to commit any agreements reached in to an enforceable written agreement; and (4) to make available an interest impasse resolution mechanism, such as fact-finding or mediation. Procedurally, the Act would operate as follows:

The FLRA is tasked with reviewing existing State laws to determine whether they substantially provide for the rights and responsibilities that I have just mentioned. In doing so the FLRA is to consider and give weight to the opinions of the employers and labor organizations covered by the Act. At this point, one of two things may happen. First, if the FLRA determines that a State or local government already substantially provides the rights set forth in the Act,

then the role of the FLRA and the Federal government comes to an end, and such jurisdictions proceed just as they had previously. Second, if a State's laws do not substantially provide for the rights and responsibilities set forth in the Act, the FLRA would notify the State of such deficiency, and then the State chooses one of two paths to follow.

First, a presently non-compliant State may choose to provide such rights to the public safety employees in the State by passing appropriate legislation meeting the Act's minimum standards, utilizing the methods and procedures that the State determines is the best way to provide these rights to public safety employees in the State. The State could achieve this in a variety of ways, left to the determination of the individual State. This must be accomplished within two years of the enactment of the Act ***or*** the end of the first legislative session in such State that begins subsequent to the date of enactment, ***whichever is later***. If a State elects to come into compliance in this way, once again the role of the FLRA and of the Federal Government comes to and end, and the State proceeds to enforce its compliant legislation in the manner it selects.

The other path that a non-compliant State may choose, however, is simply to do nothing, at which point the administration and enforcement obligation falls solely on the Federal government, acting through the FLRA. As an overwhelming majority of public safety employees are already provided these basic rights and responsibilities to public safety employees, one can fairly assume that most non-compliant States will similarly enact their own legislation,

and provide these basic rights and responsibilities in an appropriate manner of the State's choosing.

It is important to understand, however, that nothing in H.R. 413 ***requires*** non-compliant States to pass new legislation or to undertake the enforcement or administration of the rights and responsibilities provided for in the Act. H.R. 413 simply provides for a basic level of collective bargaining rights and responsibilities for public safety employees, while allowing the States maximum flexibility in achieving these goals.

It is worth noting that H.R. 413 also respects and accommodates the fact that in some States it is the local governmental entities that have enacted ordinances providing for public safety employee bargaining rights, even though there is not a State-wide bargaining law. In these circumstances, if a State chooses not to enact its own compliant legislation — and thus leaves the responsibility for administering the Act to the FLRA — the FLRA is not authorized to enforce or administer the Act with respect to such compliant local jurisdictions. The FLRA's authority would be limited to those areas of the State where public safety employees have not been provided these basic bargaining rights by State or Local government.

There are several other provisions in H.R. 413 that specifically address and preserve the interests of State and local governments, among these are the following:

a) H.R. 413 explicitly *prohibits* Public Safety Employees from engaging in a strike; and prohibits their labor organizations from calling for a strike

by public safety employees. Presently, no such prohibition exists under Federal law;

b) H.R. 413 protects and preserves any duly established bargaining agreement or memorandum of understanding that is in effect at the time of enactment;

c) The Act does not in anyway interfere with or invalidate State right-to-work laws;

d) The Act does not prohibit any State law from requiring a collective bargaining agreement or memorandum of understanding to be presented to the jurisdiction's legislative body for approval;

e) In States where the FLRA administers the Act, the parties are prohibited from negotiating provisions what would prohibit public safety employees from engaging in part time employment or volunteer activities during off-duty hours. In compliant States, where the FLRA does not administer the Act, the issues of part time employment and volunteering are left to the individual States to determine; and

f) H.R. 413 allows compliant States with the *option* to exempt from coverage political subdivisions with a population of less than 5,000, or that employ fewer than 25 full time employees.

CONSTITUTIONALITY OF H.R. 413

The stated authority for H.R. 413 is Congress' authority to regulate commerce pursuant to Article 1, Section 8 of the U.S. Constitution. It is well-established that such authority extends to Federal regulation of the relationship

between public employees and their employers, where commerce may be affected. This was established by the U.S. Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), where the Supreme Court held that Congress' authority to regulate commerce includes the authority to apply the wage and hour standards of the Fair Labor Standards Act (hereinafter "FLSA") to State and local governments.

Although detractors have questioned the continuing viability of the Garcia decision, the simple truth is that Garcia remains the law of the land. The Supreme Court has had ample opportunity since Garcia to revisit that decision, but has refused to do so. The Court has not wavered from the fundamental holding in that case that Congress, acting pursuant to the Commerce Clause, may regulate the relationship between public employees — *including public safety employees* — and their public employers. Indeed, the Act is in fact ***less intrusive*** on principles of federalism than the FLSA because the Act does not dictate wage and hour requirements for public safety employees, but merely establishes the right of such employees to bargain collectively over such terms and conditions of employment.

Moreover, the constitutionality of H.R. 413 is unaffected by the Supreme Court's decisions in New York v. United States, 505 U.S. 144 (1992) and Printz v. United States, 521 U.S. 898 (1997). In the New York case, the Supreme Court invalidated a provision of the Low-Level Radioactive Waste Policy Amendments Act that required States to regulate the disposal of internally generated waste or to take possession of the waste, and assume liability, therefore. In Printz, the

Supreme Court invalidated an interim provision of the Brady Act that required local law enforcement officers to conduct background checks of proposed handgun transferees. In both of these cases, the Court applied its now well-established principle that "the Federal Government may not compel States to enact or administer a federal regulatory program."

Significantly, in reaching its conclusions, the Supreme Court contrasted the legislation in New York and Printz with that present in Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981). In Hodel, the Supreme Court ***upheld*** the constitutionality of Surface Mining Control and Reclamation Act because that Act did not "commandeer" the States into regulating surface mining. Instead, if a State chose not to enact a program that complied with the Federal requirements, "the full regulatory burden will be borne by the Federal Government." Of course, that is precisely the situation with the Public Safety Employer-Employee Cooperation Act.

H.R. 413 does not "commandeer" State government or State officials to enact or administer a federal program. Rather, the Act provides States with the ***option*** to enact a State law meeting the minimum requirements of the Federal Act. If a State declines to exercise that option, the responsibility for administering the Act rests with the ***Federal Government***, acting through the FLRA, to implement and administer the program. Thus, as was the case in Hodel, "the full regulatory burden will be borne by the Federal Government." In light of the fact that the Supreme Court reaffirmed its adherence to Hodel in the more recent decisions of New York and Printz, it is clear that the enforcement mechanism

provided in the Public Safety Employer-Employee Cooperation Act is fully consistent with controlling law.

Lastly, it should be noted that H.R. 413 does not run afoul of Eleventh Amendment sovereign immunity as interpreted by the Supreme Court's decisions in Seminole Tribe v. Florida, 517 U.S. 44 (1996), Alden v. Maine, 527 U.S. 706 (1999), and Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002). These decisions concern a State's sovereign immunity from suit. In Seminole Tribe, the Supreme Court held that individuals cannot sue States in ***Federal*** court based upon Federal or State law claims, ***unless*** the State has waived its sovereign immunity. Three years later, in Alden, the Court held that, in most circumstances, individuals — *as opposed to the* ***Federal Government*** — cannot sue a ***State*** in ***State*** court based on a Federal cause of action unless the State has waived its sovereign immunity from suit.

In 2002, in Federal Maritime Commission, the Court held that *individuals and private companies* may not adjudicate complaints *against States* in front of federal agencies, as doing so would infringe upon the States' sovereign immunity. Thus, the Court extended its holding in Seminole Tribe and Alden to cases brought by private parties against States in federal administrative agencies.

In response to these decisions, H.R. 413 explicitly provides that in the absence of a State's waiver of its Eleventh Amendment sovereign immunity, the FLRA shall have the ***exclusive*** power to enforce the Act in regard to public safety employees employed by a State. Thus, H.R. 413 explicitly avoids any

infringement on a State's Eleventh Amendment immunity, as defined by the Supreme Court in Seminole and Alden.

With respect to Seminole and Alden, it is also important to understand the distinction drawn between State and local governments. Both of these decisions are based on State sovereign immunity. In Seminole and Alden, the Supreme Court reaffirmed its previous holdings that such immunity does ***not*** extend to local governments or local governmental entities such as cities, towns and counties. More recently, these holdings were affirmed by the Court in Jinks v. Richland County, South Carolina, 538 U.S. 456 (2003) and Northern Insurance Company of New York v. Chatham County, Georgia, 547 U.S. 189 (2006). Thus, these decisions have no impact on the enforcement of the Act against local governments or local governmental entities.

I appreciate this opportunity to appear before this subcommittee in support of H.R. 413, and would be happy to answer any questions that you may have.