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MEMORANDUM

May 5, 2004

TO: W. Smith and Edward Herber

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed Initiative Measure 2003-2004 #165, Concerning Use of School District Facilities by Labor Organizations

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado Constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed initiative appear to be:

1. To prohibit a labor organization from using a school district's facility, property, or resource for specified activities unless the labor organization pays the fair market value for such use;
2. To establish that, if a school district does not regularly charge members of the public for the use of its facilities, properties, or resources, the fair market value of such use is one hundred dollars;

3. To clarify that the provisions of the proposed initiative do not apply to a collective bargaining agreement entered into prior to the approval of the initiative, but they apply to a collective bargaining agreement entered into, renewed, or extended after the approval of the initiative;
4. To provide that any person or organization that violates the prohibition is subject to a fine of the greater of two thousand dollars or twice the fair market value of the use of the facility, property, or resource, and that any person who knowingly and intentionally violates the prohibition is subject to a fine of the greater of five thousand dollars or five times the fair market value of the use of the facility, property, or resource;
5. To create a private right of action pursuant to which a private party may bring an action in a court of law for fines or injunctive relief;
6. To create a two-year statute of limitations on enforcing a violation of the proposed initiative; and
4. To specify that the measure shall take effect immediately upon approval by the people.

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical questions:

1. Generally, in Colorado statutes, monetary amounts are written out such as "one hundred dollars" rather than "\$100". Would the proponents consider writing out the monetary amounts in the proposed subsection (3) and paragraphs (5) (a) and (5) (b)?
2. In a series of three or more, standard drafting practice uses a comma before the conjunction "or" or "and". Thus, in the proposed subsections (1) and (2) and paragraphs (5) (a) and (5) (b), there would be a comma after the word "property" and the phrase would read: "FACILITY, PROPERTY, OR RESOURCE". Would the proponents consider adding the four commas?
3. The last sentence in the proposed subsection (1) twice refers to a "public school district" while the remaining references are all to a "school district". Do the proponents intend there to be a distinction between a "public school district" and any other "school district"? If not, would the proponents consider removing the word "public" before "school district"?
4. In the introductory portion to the proposed subsection (2), would the proponents consider changing the period after "resource" to a colon, and in paragraphs (a) through (c) of subsection (2) changing the periods to semicolons?

5. The first proposed subsection (5) deals with enforcement of violations of the new section. Generally, standard drafting practices would not include the words "Enforcement Provisions" or would include them as a headnote to the subsection to read:

"(5) **Enforcement provisions.** (a) Any person or organization
... :".

Would the proponents consider deleting the words "Enforcement Provisions" or including them as a headnote to the first subsection (5)?

6. The proposed measure includes two subsections (5). Would the proponents consider renumbering the last subsection to be subsection (6)?

Substantive questions:

1. The proposal prohibits the use of a school district facility, property, or resource for communications involving a labor organization unless the labor organization pays the school district the fair market value of the use. Can the proponents give examples of how school district facilities, properties, or resources are used for communications involving a labor organization?
2. The term "labor organization" is not defined in the proposed measure and is not defined anywhere in title 22 of the Colorado Revised Statutes. Would the proponents consider adding a definition of "labor organization" or would the proponents anticipate that the general assembly would define the this term for purposes of the measure?
3. If a school district makes its facilities available for use by a private organization or entity, the facilities are considered a quasi-public forum. At this point, the school district must make the facilities available to all requesting entities, and cannot discriminate on the basis of content or message. Discriminating against a group in this situation could be considered an unconstitutional violation of equal protection of the laws. The proposed initiative could be interpreted as discriminating against labor organizations because it would require them to pay for the use of a school district facility, property, or resource even though the school district makes the same facility, property, or resource available to other entities at no cost. The requirement to treat labor organizations differently imposed by the measure may be found constitutional if there is a rational reason related to a legitimate governmental purpose for treating labor organizations differently. What do the proponents believe is the rational reason for treating labor organizations differently and to what governmental purpose is that reason related?
4. Paragraph (5) (a) imposes a fine for any person or organization that violates any provision of the proposed measure, and paragraph (5) (b) imposes a higher fine if a person or organization "knowingly or intentionally" violates a provision of the proposed initiative.
 - a. In the criminal context, if a crime does not specify a particular mental state, the court will generally imply "knowingly" as the mental state. What is the intended mental state in

paragraph (5) (a)? If it is not knowingly, would the proponents consider specifying the mental state?

- b. Paragraph (5) (b) requires a mental state of "knowingly and intentionally". These are two different mental states; "intentionally" is a higher standard and therefore includes "knowingly". Would the proponents consider clarifying the requisite mental state under paragraph (5) (b)?
5. Can a school district violate the provisions of the proposed initiative? If so, would a school district be subject to the same fines as a labor organization that uses the facility, property, or resource? Can an employee of a school district violate any provision of the proposed measure?
6. In the proposed paragraph (5) (c), the measure authorizes a private right of action to enforce the provisions. Do the proponents intend that the private party would be entitled to keep any fine recovered or would the fine go to the state? Do the proponents intend that this private right of action be the sole enforcement provision or can a governmental agency also enforce the proposed initiative?
7. The second proposed subsection (5) establishes that the measure will take effect immediately upon approval by the people. Pursuant to Article V, Section 1 (4), generally, measures take effect on the date that the Governor proclaims the vote, but not more than thirty days after the vote has been canvassed by the secretary of state. Usually, the governor's proclamation occurs in late December or early January following the election. Do the proponents want the measure to take effect on the proclamation of the governor or sooner? If sooner, when does approval by the people occur? The date of the election? The date that the secretary of state finishes the canvassing of the votes? Some other date? Would the proponents consider specifying the date rather than referring to the approval by the people?