VA Code §§ 40.1-57.2 – 57.3 – Where are the lines?

VA Code § 40.1-57.2 (Prohibition Against Collective Bargaining) provides:

> No state, county, municipal, or like governmental officer, agent or governing body is vested with or possesses any authority to recognize any labor union or other employee association as a bargaining agent of any public officers or employees, or to collectively bargain or enter into any collective bargaining contract with any such union or association or its agents with respect to any matter relating to them or their employment or service.

VA Code § 40.1-57.3 (Certain Activities Permitted) provides:

> Nothing in this article shall be construed to prevent employees of the Commonwealth, its political subdivisions, or of any governmental agency of any of them from forming associations for the purpose of promoting their interests before the employing agency.

Q: So, what is collective bargaining?

A: The process by which an employer bargains with his employees collectively regarding wages, hours, and working conditions, instead of individually at the time each employee is hired. This is done through the selection by the employees of an employee representative. . . . Such an employee representative, having been selected by a majority of the employees in an appropriate unit, then speaks with the employer regarding wages, hours, and working conditions in that unit and the two sides bargain with a view to reaching an agreement on those matters for that unit.

Commonwealth of Va. v. Arlington County Board, 217 Va. 558, 572 (1977).

Q: Was collective bargaining between local governments and employee representatives ever "legal" in Virginia?

A: Yes. Prior to the Virginia Supreme Court decision in Arlington County Board in 1977, collective bargaining was occurring between local governments and their employees throughout Virginia.

Q: Why did collective bargaining between local governments and their employees stop?

A: In the Arlington County Board case, our Supreme Court held that the power of local governments to bargain collectively was "a subject of controversial public and political debate" and constituted a "singularly political question" falling within the responsibility of the General Assembly. In 1993, the General Assembly codified the Arlington County Board decision in 40.1-57.2.

Q: So what does 40.1-57.3 mean?

A: Great question – and one there is not a lot of legal authority on. After the Arlington County Board decision, certain county local governmental governing bodies prohibited representatives of an association of the local government employees from presenting to it the collective views of its members solely because the speaker was a representative of an association of employees. The employee association challenged this prohibition on the collective expression of member employees' views as a violation of its and its members' First Amendment rights of speech, association and petition. In Henrico Prof. Firefighters Assoc. v. Bd. of Supervisors of Henrico County, 649 F.2d 237 (4th Cir. 1981), the United States Court of Appeals for the Fourth Circuit held that this prohibition was an unconstitutional restriction on the First Amendment rights of the association and its member employees. 40.1-57.3 is the codification of this federal right of an association to present the collective views of its members to local government.

Q: Does 40.1-57.3 permit an elected official of a local government board or council to engage in "discussions" with an association regarding the collective views of its members?

A: Here's what is **clear**: Attendance at a meeting with an employee association in which the elected official merely observes/listens – but does not participate or negotiate terms of employment – does not constitute unauthorized collective bargaining and is permissible. See 1980 Va. AG LEXIS 240 (January 7, 1980). Similarly, listening to a presentation from an employee association representative at a council meeting about the collective views of its employee members is permissible. Henrico Prof. Firefighters Assoc., 649 F.2d 237.

Q: We get it – listening is OK, but what about "discussions" with employee representatives?

A: In 2008, a bill was introduced into the General Assembly (HB No. 152) to amend 40.1-57.3. This bill would have amended 40.1-57.3 as follows:

> Nothing in this article shall be construed to prevent employees of the Commonwealth, its political subdivisions, or any governmental agency of any of them from forming associations for the purpose of ~~promoting~~ discussing their interests ~~before~~ with the employing agency whenever the employing agency agrees to do so.

This bill died in committee. It is informative, however, because it attempted to explicitly permit employee associations to "discuss" their interests "with" local governments rather than "promote" their interests "before" local governments. While a "discuss[ion]" contemplates a two-way form of communication, the current language only allows the employee associations to "promote" their interests "before" the employing agency – which is a one-sided, one-way form of communication. In light of the failure of HB No. 152, the best read of the language of 40.1-57.3 is that while it permits listening and consideration of the interests of an employee association, it does not permit local

governments (and their elected officials) to have a "discussion" with an employee association about the interests of the association's members.