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Strikes by Public Employees: The Consequence of Legislative Inattention

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STRIKES BY PUBLIC EMPLOYEES: THE CONSEQUENCE OF LEGISLATIVE INATTENTION

INTRODUCTION

The issue of whether or not California public employees have the right to strike has drawn widespread debate. Despite judicial indications that the legislature has not granted this right to public employees, strikes in the public sector do in fact occur and in great numbers. During the period from 1970 to 1974, there were seventy-two strikes by public employees in California. This figure more than doubled between the years 1975 to 1978.[1]

The figures cited above are indicative of increasing labor militancy among public employees and a demand for the same rights afforded workers in the private sector. They also call into question traditional arguments that the right to strike is unnecessary and inappropriate in the public sector.[2] Nonetheless, the strike weapon is still considered by some observers the most threatening possible consequence of public employee collective bargaining. Opponents of collective bargaining in the public sector argue that the civil service system offers an adequate alternative and that public welfare and safety would be jeopardized if the government were subject to the demands of labor organizations. Although increased public employee organizing and militancy have influenced state legislatures and local governments to adopt public sector labor policies granting limited bargaining rights to public employees, legislation in most jurisdictions governing public employee labor relations still denies the right to strike.

In California, the right to strike question has been tossed back and forth between the legislature and the courts. Legis-

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1. Bogue & Stern, *A 1977-78 Tabulation of Strikes in California's Public Sector*, 40 CALIFORNIA PUBLIC EMPLOYEE RELATIONS 20 (March, 1979). There were 44 strikes by California public employees in 1975; 20 in 1976; a high of 60 in 1977; and 27 strikes in 1978.

2. Haemmel, *Government Employees and the Right to Strike—The Final Necessary Steps*, 39 TENN. L. REV. 75 (1971-72).

lation governing public employee bargaining rights contains no express grant or denial of the right to strike.[3] As a result, the judiciary has assumed, albeit reluctantly, the task of formulating labor relations policy with respect to this issue. Many public employee organizations have argued emphatically before the courts that a right to strike may be implied in the absence of express prohibition by the legislature. The California courts of appeal, however, have declined to confer such a right in the absence of express legislative intent.[4] The California Supreme Court has refused to address this question at all, thus leaving the issue of strike legality essentially open.[5]

This comment first examines the historical and political background to the present controversy surrounding the strike issue. Second, it analyzes the merits and deficiencies of the legislative and judicial pronouncements regarding the question of strike legality in the public employment sector. The primary focus is on public school employee relations because the history and current status of public school teachers' collective bargaining rights illustrate the rights gained by state and local public employees in general. Of key importance in this discussion is the Rodda Act[6] that grants limited collective bargaining rights to public school employees. Like the Meyers-Milias-Brown Act[7] that governs labor relations for public employees in general, the Rodda Act contains no provision regarding the right of public school employees to strike. Yet teachers, more than any other group of public employees, have a history of strong labor militancy and a high level of strike activity. Moreover, teachers are a particularly significant segment of the public work force because they constitute

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3. See CAL. GOV'T CODE §§ 3500-3511, 3540 (West 1980).

4. *See* San Diego Teachers Association v. Superior Court, 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979); Pasadena Unified School Dist. v. Pasadena Fed'n of Teachers, 72 Cal. App. 3d 104, 140 Cal. Rptr. 41 (1977), *hearing denied;* City and County of San Francisco v. Evankovich, 69 Cal. App. 3d 41, 137 Cal. Rptr. 883 (1977), *rehearing denied*; Crowley v. City and County of San Francisco, 64 Cal. App. 3d 450, 134 Cal. Rptr. 533 (1976), *rehearing denied,* 1977; Los Angeles Unified School Dist. v. United Teachers—Los Angeles, 24 Cal. App. 3d 142, 100 Cal. Rptr. 806 (1972), *rehearing denied;* Almond v. County of Sacramento, 276 Cal. App. 2d 32, 80 Cal. Rptr. 518 (1969), *rehearing denied,* 1969, *petition denied.*

5. See note 4 *supra.*

6. CAL. GOV'T CODE §§ 3540-3549.3 (West 1980). This Act is also referred to as the "Educational Employment Relations Act." For the sake of consistency, this comment will refer to it as the "Rodda Act."

7. CAL. GOV'T CODE §§ 3500-3511 (West 1980).

a large percentage of total government employees.[8] Finally, the comment advocates legislative alternatives aimed at achieving the goal of fair and effective resolution of public sector labor disputes.

HISTORICAL PERSPECTIVE: PUBLIC EMPLOYEES AND COLLECTIVE BARGAINING

In the past decade there has been increased application of private sector collective bargaining practices to public employees. The rights to organize, bargain collectively, and process and arbitrate grievances have been acquired by government workers through legislation and judicial decision. In spite of these gains, however, collective bargaining rights for public employees still lag far behind those granted to workers in the private sector. In order to understand the current status of public employee labor relations, it is necessary to review the theories used historically to distinguish public employees from their counterparts in the private sector.

Sovereignty

One of the underlying bases for the traditional omission of government employees from legislation providing collective bargaining was the concept of state sovereignty. According to the sovereignty theory, the government has authority that cannot be delegated. Proponents of the sovereignty theory argue that all decision-making power rests with the government and should not be shared with labor unions.[9] This idea is also used as a foundation for the policy against strikes by public employees; President Franklin D. Roosevelt stated:

> A strike of public employees manifests nothing less than an intent on their part to obstruct the operation of government until their demands are satisfied. Such action, looking toward the paralysis of government by those who have sworn to support it is unthinkable and intolerable . . . [M]ilitant tactics have no place in the functions of any organization of Government employees.[10]

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8. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1978 (99th ed. 1978).

9. Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQUESNE L. REV. 357, 358-361 (1971-72).

10. Letter from Franklin D. Roosevelt to L.C. Stewart, President of the Na-

Other government officials have maintained that collective bargaining rights would have an adverse impact on government by infringing on management perogatives, weakening authority, and breaking down the efficiency of government operations.[11] It is clear today, however, that the sovereignty argument is not a valid justification for denying collective bargaining rights to public employees. The growth of unions during recent decades simply has not posed a threat to efficient government operations. Moreover, the historical concept that "the King can do no wrong" offers little practical guidance in the formulation of labor policies concerning public employees.

Civil Servants

A second theory closely related to the sovereignty doctrine is the concept of public employees as "civil servants." As this term implies, the attitude toward government employees traditionally has been that they must sacrifice their own interests to the public good unlike their counterparts in private industry. Traditionally, there was concern that extension of collective bargaining rights to public employees would endanger the operation of such essential government service as police and fire protection and health care. This theory was applied by Justice Oliver Wendell Holmes in *McAuliffe v. Mayor of New Bedford.*[12] Declaring that no individual has a *right* to be a policeman, he stated that a "city may impose any reasonable conditions on holding offices within its control."[13] Holmes concluded that a city rule prohibiting policemen from joining a certain political committee was among such reasonable conditions.

The number and kinds of public services created by legislation to meet the expectations and needs of the public have obscured the distinctions between government and private employment. Further, the increasing numbers and decreasing average age of public employees have contributed to changing the image of civil servants as a professional elite.[14] The natu-

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tional Association of Federal Employees (August 16, 1937), *reprinted in* Vogel, *What About the Rights of the Public Employees?* 1 LAB. L. REV. (1950).

11. Edwards, *supra* note 9.

12. 155 Mass. 216, 29 N.E. 517 (1892).

13. *Id.* at 220, 29 N.E. at 518.

14. The total number of government employees increased from 6,402,000 in

ral result is that public employees are no longer willing to waive collective bargaining rights for the *privilege* of public service and now demand job security and benefits comparable to those enjoyed by their private sector counterparts.

Economic Pressures

Another principal argument used to deny collective bargaining rights to public employees is based upon what has been perceived to be the unique position of government as an economic and political entity.[15] Under this view, there has been particular emphasis upon one fundamental difference between government and private industry: the former is not governed by the same economic pressures as the latter. In the private sector, the law of supply and demand for goods and services acts as a constraint on the cost of labor. Union demands for higher wages result in higher costs of production and higher prices in the market which, in turn, lead to a decrease in demand for the higher priced products with resulting lower demand for labor in the affected industry. This reality offsets the power of labor to demand increased wages. It is argued, however, that this built-in limit on wage rates is not found in the public sector because the demand for publicly provided services does not vary with the cost of production. The government employer is not able to pass on increased labor costs to consumers except through revenue increases. This relative lack of free market pressures, it is feared, gives public employee unions too much bargaining power and leads to unreasonable union demands.[16]

Growth of the Public Sector

During the period that federal legislation governing labor relations in the private sector was enacted,[17] a far-reaching

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1950 to 15,012,000 in 1976. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1977 at 306 (98th ed. 1977).

15. Edwards, *supra* note 9, at 361-62.

16. *Id.* at 362.

17. Congressional passage of the Wagner Act in 1935 established the right of private sector workers to bargain collectively. 49 Stat. 449-57 (1935) (current version at 29 U.S.C. §§ 151-166 (1976)). The Taft-Hartley Act, passed by Congress in 1947, defined the duty of collective bargaining as the mutual obligation of employers and unions to reach bilateral agreements. 61 Stat. 136 (1947) (codified in scattered sections of 29 U.S.C.). Both are obligated to meet at reasonable times and to confer in

metamorphosis was occurring in the public work force. Initially, the number of public employees was small and these civil servants enjoyed a relatively high status in society. Traditional attitudes toward public employment began to erode as government expanded into a greater range of activities. The growth of the federal payroll can be traced, for example, from the 240,000 civilians employed at the turn of the century[18] to 559,000 federal employees by 1932.[19] By 1969, there were 12.7 million public employees, of which 9.7 million were employed by state and local governments.[20] In the past twenty years, local and state government employment has increased six times faster than federal employment.[21] By 1976, nearly twenty percent of the national labor force was government employed. And in 1977, there were 13 million state and local government employees and 2.6 million federal employees.[22]

A corresponding increase in union organizations has occurred in the public sector at all levels. Since 1972, union membership among public employees has increased by ten percent.[23] In 1977, thirty-six percent of these employees were union members.[24] This rapid growth of public employee unionism in the United States has prompted many state and local governments to alter their labor policies. Forty-two states now have statutes or policies governing labor relations in the public sector.[25] In thirty-three states and the District of Columbia, the right of state and local government employees to bargain collectively is granted by statute, judicial decision, attorney general opinion, or executive order.[26]

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good faith with respect to wages, hours and other terms and conditions of employment. Due to policy considerations previously discussed, however, federal, state, and local governments were exempted from the definition of "employer." Public employees were thus denied the labor rights guaranteed to workers in the private sector.

18. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES 710-11 (1960).

19. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 1967, at 56 (Bull. No. 1555, 1967).

20. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, PUBLIC EMPLOYMENT IN 1969, at 1-2 (Series GE 69 No. 1, 1969).

21. McCart, *Public Worker: Handy Scapegoat*, 83 AFL-CIO AMERICAN FEDERATIONIST 11 (1976).

22. *Id.*

23. *Id.*

24. *Id.*

25. [1978] GOV'T EMPL. REL. REP. REFERENCE FILE (BNA) 41:245.

26. *Id.*

Although the adoption of collective bargaining laws for public employees would appear to represent an attempt to extend rights afforded private employees, a notable departure from this trend is seen in the treatment of the right to strike. At present, few states permit strikes by public employees or even allow some limited form of strike.[27]

STRIKE ACTIVITY IN THE PUBLIC SECTOR

Although strikes in the public sector are prohibited in most states,[28] few public employee organizations refrain from threatening to strike or actually striking.[29] The number and duration of strikes by public employees have increased and legislatures and courts have been unsuccessful in fashioning satisfactory alternatives to the strike.[30]

The number of worker-days of idleness per year due to strike activity in the public sector has also increased. The average number of lost worker-days per year rose to 50,000 between 1958 and 1965 and to 1,525,556 per year between 1966 and 1976.[31] The peak year for strike activity was 1970, in which 2,023,200 days were lost.[32]

Most public employee strike activity occurs at the local level. In 1976, for example, approximately ninety-four percent of public employee strikes were conducted by local government employees,[33] with over fifty percent occurring in public education.[34] During the same year, strikes in schools accounted for fifty-seven percent of all workers involved in strikes by government employees and sixty-four percent of worker-days lost due to strike activity.[35]

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27. These states include Alaska, Hawaii, Minnesota, Montana, Oregon, Pennsylvania, Rhode Island, and Vermont. *See* AFL-CIO Public Employee Department, *State Public Labor Relations Laws* (January 1, 1978).

28. *Id.*

29. [1980] GOV'T EMPL. REL. REP. REFERENCE FILE (BNA) 71:1014.

30. The number of strikes by public employees increased sharply in the 1960's. From 1958 to 1965, the number of strikes averaged only approximately 29 per year; the average number of strikes increased, however, to 332 per year between 1966 and 1976. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 71:1017.

35. *Id.*

Teacher Strikes

Currently, there are almost three million people employed in public and private elementary and secondary schools.[36] Between 1960 and 1963, there was an average of four teacher strikes per year nationwide;[37] this number increased to twenty-one between 1964 and 1967. The average number of strikes reached 144 per year from 1968 to 1976.[38]

Recent statistics show, however, that the number of teacher strikes has begun to decline. An unofficial National Educational Association (NEA) strike survey, released during an NEA convention in July 1978, revealed that there were 152 strikes by teachers nationwide in 1977-1978.[39] Of these, 121 walkouts were by NEA affiliates, twenty-eight by the American Federation of Teachers, and three by the American Association of University Professors.[40] This number was well below the peak number of teacher strikes (229) recorded in 1975.[41] NEA attributed this dropoff in strike activity primarily to the increasing bargaining sophistication of teachers, coupled with increasing acceptance on the part of school boards of the reality that collective bargaining cannot be avoided.[42] As a further indication that bargaining was working in most cases, NEA noted that ninety-nine percent of all local teacher groups did not strike during the period studied.[43]

At the same time the NEA report was released, the Association proposed alternatives to prohibitions against strikes. In a resolution on strike activities passed at the convention, the NEA declared that "the chances of reaching voluntary agreement in good faith are reduced when one party to negotiations has the power to use the court system unilaterally against the other party" by obtaining injunctions against strikes and imposing fines on striking teachers.[44] In order to resolve an impasse in bargaining, the NEA recommended mediation, factfinding, binding arbitration, political action, and

36. [1977] GOV'T EMPL. REL. REP. REFERENCE FILE (BNA) 41:103.
37. [1975] GOV'T EMPL. REL. REP. REFERENCE FILE (BNA) 71:1055.
38. *Id;* [1980] GOV'T EMPL. REL. REP. REFERENCE FILE (BNA) 71:1017.
39. [1978] GOV'T EMPL. REL. REP. (BNA) 768:14.
40. *Id.*
41. [1980] GOV'T EMPL. REL. REP. REFERENCE FILE (BNA) 71:1017.
42. [1977] GOV'T EMPL. REL. REP. (BNA) 725:18.
43. [1978] GOV'T EMPL. REL. REP. (BNA) 768:14.
44. *Id.*

strike "if conditions make it impossible for teachers to provide quality education."[45]

California Teacher Strikes

The Limited Effectiveness of Current Impasse Procedures

In an attempt to deal with the problems arising out of increased teacher unionism and militancy, the California legislature in 1975 adopted the Rodda Act,[46] which recognized the right of teachers to organize and bargain[47] and established a Public Employment Relations Board (PERB).[48] In addition, the Rodda Act, although ignoring the issue of right to strike, provided impasse procedures, specifically mediation and factfinding.[49] These mechanisms have a useful and necessary function in the bargaining process, particularly in the public sector. Factfinding can serve to delineate the limits of unsettled issues as well as factual and policy considerations essential to a fair compromise, with due regard for the public interest. Mediation facilitates the bargaining process, helping to restore an atmosphere of cooperation and clarifying the proposals of opposing parties. Mediation can also serve to delineate the issues remaining in dispute and the range and scope of differences between the parties' positions.

A crucial problem with these two mechanisms, however, lies in the fact that the recommendations made by mediators and factfinders may not be acceptable to the principal parties. If either party finds the recommendations unacceptable, the impasse continues. Since the Rodda Act provides no further procedure, a strike is often the only alternative.

Although it is probably too soon to gauge the overall effect of the Rodda Act on teacher strikes, available data indicates that the number of strikes by public school teachers has continued to increase since its passage. Prior to the enactment of the Act, there had been a total of thirty-seven teacher strikes in California, the first one occurring in 1968.[50] There

45. *Id.*
46. Cal. Gov't Code §§ 3540-3549.3 (West 1980).
47. *Id.*
48. *Id.* § 3541.
49. *Id.* §§ 3548-.8.
50. Staff, *Unionization of Municipal Employees: The California Experience* 6 Calif. Public Employee Reports 120 (Inst. reprint 353, 1971).

were nine strikes by public school teachers in 1975, six strikes in 1976, eighteen strikes in 1977,[51] and twenty-three strikes in 1978.[52] And closer examination of the strikes occurring under the Rodda Act reveals the relative ineffectiveness to date of its impasse provisions. A study of sixteen strikes in the public schools from July 1, 1976, (the effective date of the Rodda Act) to March 15, 1977, concludes that impasse procedures were not fully utilized in any of the strikes.[53] The failure of bargaining agents to utilize statutory provisions for resolution of conflicts further calls into question the effectiveness of the Act in achieving its stated purpose of "promot[ing] the improvement of personnel management and employer-employee relations within the public school systems in the state of California. . . ."[54]

A task force composed of staff members from various state legislative committees was appointed by the legislature in 1977 to review the effectiveness and implementation of the Rodda Act.[55] In a report submitted to the legislature in June 1978, the task force noted a consensus among teachers that "the entire impasse procedure [is] of greater benefit to school boards than [teachers]."[56] The task force also found that impasse procedures had not been fully utilized because teachers generally believed that the time required for mediation and factfinding was too long.[57] Furthermore, bargaining conflicts were reportedly intensified by unrealistic expectations of what collective bargaining could accomplish under the Rodda Act.[58] School boards regarded the legislation as an usurpation of board control; teachers, on the other hand, regarded collective bargaining as a mechanism to obtain contracts covering all education-related matters. The task force concluded that these

51. Staff, *Strikes of Certified Employees: 1972-77*, 36 CPER 21-22 (1978).

52. Bogue and Stern, *supra* note 1, at 22.

53. Currier, *A Case Study: 16 Public School Job Actions and the Use of Impasse Procedures*, 33 CPER 16 (1977).

54. CAL. GOV'T CODE § 3540 (West 1980).

55. Staff, *Recent Developments in California Public Jurisdictions*, 37 CPER 40, 67 (1978).

56. The report noted that negotiations were further complicated by the problem of ascertaining available school financial resources; school boards sought, for example, to delay wage offers until projected property tax revenues were apparent while teachers preferred to conclude negotiations before the end of the school term. *Id.* at 67.

57. *Id.* at 68.

58. *Id.*

distorted views would lead to inevitable confrontations.[59]

In sum, it is likely that teachers will resort to strikes less frequently as experience with bargaining increases and all parties acquire a more realistic view of the provisions of the Rodda Act. It is apparent, however, that the absence of express statutory authority for a right to strike has had little effect on the incidence of strikes.

Judicial Interpretation and Avoidance of the Strike Legality Question

Although the California courts of appeal have held that strikes by public employees are illegal in the absence of express legislative authorization,[60] the California Supreme Court, as noted earlier, has not yet addressed the issue. The court repeatedly denied review to appellate decisions holding that such strikes are illegal, but in 1979 it relented.[61] In a controversial 4-3 decision, however, the court again reserved opinion on the legality of public sector strikes.[62]

In *San Diego Teachers Association v. Superior Court*,[63] approximately 3,000 teachers in the San Diego Unified School District went on strike to express their dissatisfaction with the manner in which contract negotiations were progressing.[64] The school district obtained a temporary restraining order against the strike and was granted a preliminary injunction prohibiting teachers from engaging in an "illegal work stoppage."[65] After the injunction was issued, both parties filed unfair practice charges against each other[66] with PERB's predecessor, the Education Employment Relations Board.[67] The

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59. *Id.*

60. *See* note 4 *supra.*

61. San Diego Teachers Association v. Superior Court, 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979).

62. *Id.* at 7, 593 P.2d at 842, 154 Cal. Rptr. at 897. *See generally,* Bowen, *Supreme Court Strike Case—Injunction Authority Shifts to PERB,* 41 CPER 2 (1979).

63. 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979).

64. Staff, *Recent Developments in California Public Jurisdictions,* 34 CPER 37 (1977).

65. 24 Cal. 3d at 3, 593 P.2d at 840, 154 Cal. Rptr. at 895. *See* Staff, *supra* note 64, at 7.

66. 24 Cal. 3d at 3, 593 P.2d at 840, 154 Cal. Rptr. at 895. The unfair practice charges were filed pursuant to Government Code section 3541.5 which gives PERB exclusive jurisdiction to determine whether charges of unfair practices are justified, and, if so, what remedies are appropriate. CAL. GOV'T CODE § 3541.5 (West 1980).

67. Prior to January 1, 1978, PERB was known as the Education Employment

trial judge issued contempt orders against the Association and its president, Hugh Boyle, for conducting the strike in violation of the temporary restraining order.

The issue presented to the California Supreme Court was the propriety of the restraining order and injunction in view of the possibility that PERB, pursuant to the Rodda Act, may have sole jurisdiction over the dispute.[68] The court examined three questions essential to resolution of this issue: 1) whether PERB had authority to declare that the strike was an unfair practice under the Rodda Act; 2) whether PERB could provide relief equivalent to relief obtained through court action; and 3) whether the legislature intended to grant exclusive jurisdiction to PERB over strikes determined to be unfair practices.[69]

The supreme court held that a strike could be found an unfair practice on two possible grounds: refusal to negotiate in good faith as required by Government Code section 3543.6(c),[70] or refusal to participate in the impasse procedure provided by section 3543.6(d).[71] In reaching the first conclusion, the court noted that a strike in the private sector does not itself constitute a failure to bargain in good faith since it is a well-recognized bargaining tool.[72] Thus, the court stated that if a public employee "strike were held *legal* it would not constitute a failure to negotiate in good faith. As an *illegal* pressure tactic, however, its happening could support a finding that good faith was lacking."[73] As the dissent pointed out, the court indirectly shifted authority to PERB to validate a public strike simply by failing to enjoin it.[74] In view of the

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Relations Board.

68. 24 Cal. 3d at 3, 593 P.2d at 840, 154 Cal. Rptr. at 895.

69. *Id.* at 7, 593 P.2d at 842, 154 Cal. Rptr. at 897.

70. Section 3543.6(c) provides: "It shall be unlawful for an employee organization to: (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative." CAL. GOV'T CODE § 3543.6 (West 1980).

71. Section 3543.6(d) provides: "It shall be unlawful for an employee organization to: (d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548)." CAL. GOV'T CODE § 3543.6(d) (West 1980).

72. 24 Cal. 3d at 8, 593 P.2d at 843, 154 Cal. Rptr. at 898.

73. *Id.* (emphasis in original).

74. The dissent expressed criticism of this portion of the majority decision, stating:

> The majority thereby indirectly accomplished precisely the result which the legislature so carefully and specifically sought to prevent—the conferral of a right to strike on public school employees. Therefore, despite

court's own reluctance to address the issue of public employee strike legality, this apparent deference to PERB authority is surprising. It is questionable whether PERB does have authority to declare a strike illegal when the legislature and the courts have thus far declined to decide the issue.

In discussing the second ground upon which a strike may be declared an unfair practice, the refusal to participate in impasse procedures, the court referred again to the possibility that strikes in the public sector may be lawful: "An unfair practice consisting of 'refus[al] to participate in good faith in the impasse procedure' . . . could be evidenced by a strike that *otherwise was legal.*"[75]

Turning to the issue of whether PERB could provide relief equivalent to that available in the trial court,[76] the court found that the Rodda Act gives PERB implied authority to issue a complaint and then to petition the court for an injunction.[77] In reply to the school district's argument that PERB's decision to seek an injunction would reflect only a "narrow concern for the negotiating process . . . and would ignore strike-caused harm to the public and particularly the infringement on children's rights to an education,"[78] the court gave some instruction of its own:

> That argument erroneously presupposes a disparity between public and PERB interests. The public interest is to minimize interruptions of educational services. Yet did not an identical concern underlie enactment of the EERA? The Legislature was aware of the increase in public employee work stoppages despite the availability and use of injunctions and other sanctions to prevent or punish them . . . It does not follow from the disruption at-

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> the majority's declaration that it leaves the "question" of public strikes open for future decision, the public as employer seeking to enjoin such strikes may henceforth find the courtroom doors firmly closed.

Id. at 21, 593 P.2d at 851, 154 Cal. Rptr. at 906.

75. *Id.* at 8, 593 P.2d at 843, 154 Cal. Rptr. at 898 (emphasis added).

76. The court pointed out that finding equivalent relief was necessary in order to require the school district to exhaust administrative remedies under the Rodda Act before seeking judicial relief. *Id.* at 9, 593 P.2d at 843, 154 Cal. Rptr. at 898.

77. *Id.* Although section 3541.3 authorizes PERB to "petition the Court for appropriate temporary relief or restraining order . . . only [u]pon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice," the court interpreted this provision as granting PERB the implied authority to issue complaints upon its own initiative. *Id.* at 9, 593 P.2d at 843, 154 Cal. Rptr. at 898.

78. *Id.* at 11, 593 P.2d at 845, 154 Cal. Rptr. at 900.

> tendant on a teachers' strike that immediate injunctive relief and subsequent punishment for contempt are typically the most effective means of minimizing the number of teaching days lost from work stoppages . . . Harsh, automatic sanctions often do not prevent strikes and are counterproductive. PERB's responsibility for administering the EERA requires that it use its power to seek judicial relief in ways that will further the public interest in maintaining the continuity and quality of educational services.[79]

The court thus indicated that PERB, although it has the authority to do so, should not seek judicial sanctions each time a public employee strike occurs. Instead, the court encouraged PERB to try alternative means to resolve labor disputes in order to further the "public interest." Yet the decision stops short of specifying what types of relief it should seek to achieve the goal of reducing strikes while minimizing labor strife. Perhaps the court believed this issue, like that of strike legality, is one best left to legislative resolution. In any event, the decision does not clearly define the role PERB should play in future labor disputes.

The court next examined the issue of whether PERB has exclusive jurisdiction over remedies against strikes it finds are unfair practices.[80] In deciding that PERB has such jurisdiction, the court rejected an argument raised in an amicus brief that PERB's initial jurisdiction extends only to unfair practices and not to strikes.[81] An explanation of the argument requires discussion of several provisions of the Rodda Act.

Government Code section 3541.5 vests exclusive jurisdiction in PERB over unfair practices.[82] A separate provision, section 3549, states that the Rodda Act "shall not be construed as making the provisions of section 923 of the Labor Code applicable to public school employees."[83] Labor Code section 923 gives workers the right to engage in "concerted

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79. *Id.*

80. *Id.* at 12, 593 P.2d at 845, 154 Cal. Rptr. at 900.

81. *Id.* at 12-13, 593 P.2d at 846, 154 Cal. Rptr. at 901. Section 3541.5 provides in pertinent part: "The initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board." CAL. GOV'T CODE § 3541.5 (West. 1980).

82. *Id.*

83. CAL. GOV'T CODE § 3549 (West 1980).

activities for the purpose of collective bargaining or other mutual aid or protection"[84] without employer interference. As the court pointed out, section 923 has been construed as conferring a right to strike.[85]

Amicae contended that a strike violates section 3549 and since section 3541.5 gives PERB initial jurisdiction only over *unfair practices,* PERB has no jurisdiction over stirkes. The court disposed of this argument on two grounds: First, the court pointed out "section 3549 does not prohibit strikes but simply excludes the applicability of Labor Code section 923's protection of concerted activities."[86] Second, the court concluded since the Rodda Act does not specify "unfair practices" but only "unlawful" acts, there is no distinction between an unfair practice and any other violation of the Act.[87]

Finally, the court declined to decide the issue of whether the school district would have been without a remedy had PERB decided not to seek either injunctive relief or to issue an unfair practice complaint.[88] The court did, however, state its view on the limited usefulness of court injunctions in curbing strike activities and again emphasized the need for PERB to employ alternative forms of relief:

> But the EERA gives PERB discretion to withhold as well as pursue, the various remedies at its disposal. Its mission to foster constructive employment relations [section 3540] surely includes the long-range minimization of work stoppages. PERB may conclude in a particular case that a restraining order or injunction would not hasten the end of a strike (as perhaps neither did here) and, on the contrary, would impair the success of the statutorily mandated negotiations between union and employer. A court enjoining a strike on the basis of (1) a rule that public employee strikes are illegal, and (2) harm resulting from the withholding of teachers' services cannot with expertise tailor its remedy to implement the broader objectives entrusted to PERB.[89]

After concluding that PERB has exclusive initial jurisdic-

84. CAL. LAB. CODE § 923 (West 1976).
85. 24 Cal. 3d at 6, 593 P.2d at 842, 154 Cal. Rptr. at 897.
86. *Id.* at 13, 593 P.2d at 846, 154 Cal. Rptr. at 901.
87. *Id.*
88. *Id.*
89. *Id.* (footnotes omitted).

tion to decide whether a strike is an unfair practice and what remedies, if any, should be pursued, the court limited its holding to "injunctions against strikes by public school employee organizations recognized or certified as exclusive representatives . . ."[90]

The dissent. Justice Richardson, joined by Justices Clark and Manuel, attacked the majority's decision in unusually strong language, declaring that "we owe the public a full explanation of whatever rights and remedies, if any, it retains to protect itself."[91] The dissent then proceeded to review prior decisions concerning the legality of public employee strikes.

In *Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen,*[92] the court held that transit authority employees had the right to strike since the act creating the transit authority provided that employees should have the right to bargain collectively and to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[93] The right to strike was implicit in this statutory language and was declared a necessary and "integral part of the bargaining process."[94]

The dissent in *San Diego Teachers Association,* however, highlighted other language in *Los Angeles Metropolitan Transit Authority:* "[I]n the absence of legislative authorization public employees in general do not have the right to strike. . . ."[95] The dissent argued that several courts of appeal opinions issued subsequent to *Los Angeles Metropolitan Transit Authority* have relied on this statement in concluding that California's public employees have no right to strike.[96] Such reliance on the statement seems misplaced, however, in light of the fact that it was made in the context of an opinion in which the court held that transit authority employees *did* have the right to strike in spite of the absence of clear statutory language granting the right.

In arguing that public employee strikes are unlawful, the dissenters also noted that lower court opinions issued subse-

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90. *Id.* at 14, 593 P.2d at 847, 154 Cal. Rptr. at 902.
91. *Id.* at 15, 593 P.2d at 847, 154 Cal. Rptr. at 902 (Richardson, J., dissenting).
92. 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960).
93. *Id.* at 692, 355 P.2d at 913, 8 Cal. Rptr. at 6.
94. *Id.*
95. *Id.* at 687, 355 P.2d at 908, 8 Cal. Rptr. at 2.
96. 24 Cal. 3d at 15, 593 P.2d at 847, 154 Cal. Rptr. at 902.

quent to the adoption of legislation governing public employee relations have generally found there was no intent on the part of the legislature to authorize strikes;[97] the courts have concluded that the absence of explicit authorization indicates legislative intent to prohibit strikes in the public sector.[98]

Another case in point is *Almond v. County of Sacramento*.[99] In *Almond*, public employees sought to compel the county civil service commission to rescind its decision to dismiss striking employees.[100] The court of appeal relied on *Los Angeles Metropolitan Transit Authority* in holding that the Meyers-Milias-Brown Act (MMB)[101] did not expressly grant public employees the right to strike.[102] In reaching this conclusion, the court emphasized that Labor Code section 923, permitting employees to engage in concerted activities for the purpose of collective bargaining free from employer interference, was specifically excluded from MMB.[103] The court asserted that the exclusion of this statutory language from MMB implied the denial of the right to strike.[104] The *Almond* court noted, however, that even if collective bargaining language was included in the legislation, a right to strike was not thereby conferred.[105] Thus, the court in *Almond* offered no clear statement as to what type of language would demonstrate a legislative intent to authorize strikes by public employees.

The dissent in *San Diego Teachers Association* quoted extensively from the court of appeal opinion in *City of San Diego v. American Federation of State, County & Municipal Employees*[106] in which the city appealed an order denying its application for a temporary injunction restraining city employees from engaging in a strike.[107] Relying in part on the decision in *Almond v. County of Sacramento*, the court of ap-

97. *Id.*
98. *Id.*
99. 276 Cal. App. 2d 32, 80 Cal. Rptr. 518 (1969), *hearing denied.*
100. *Id.* at 32, 80 Cal. Rptr. at 519.
101. CAL. GOV'T CODE § 3500 (West 1980).
102. 276 Cal. App. 2d at 38, 80 Cal. Rptr. at 522.
103. A provision of Meyers-Milias-Brown states: "[t]he enactment of this Chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees." CAL. GOV'T CODE § 3509 (West 1980).
104. 276 Cal. App. 2d at 35, 80 Cal. Rptr. at 520.
105. *Id.* at 35 n.2, 80 Cal. Rptr. at 520 n.2.
106. 8 Cal. App. 3d 308, 87 Cal. Rptr. 258 (1970).
107. *Id.* at 309, 87 Cal. Rptr. at 259.

peal held that the rule established by previous cases was controlling and that no statute in California authorized public workers to strike.[108] In so holding, the court stated:

> The common law rule [that] public employees do not have the right to bargain collectively or to strike is predicated expressly on the necessity for and lack of statutory authority conferring such right. Where a statute authorizes collective bargaining and strikes it includes them within the methods authorized by law for fixing the terms and conditions of employment. Those who advocate the right of public employees to strike should present their case to the legislature.[109]

As in *Almond*, the court in *City of San Diego* offered no clear guidance as to what language would confer a right to strike. Moreover, the court's position that the right to strike must be conferred by express language is arguably unsound; the right to strike has been granted to employees in the private sector on the basis of judicial interpretation of legislation providing general collective bargaining rights for private sector workers.[110]

Of particular significance to the dissent in *San Diego Teachers Association* was *Pasadena Unified School District v. Pasadena Federation of Teachers*,[111] in which the appellate court held that a school district could recover damages from a striking teachers' union. The court in *Pasadena Unified* found that the teachers' association induced the teachers to breach their employment contract, giving rise to damage liability. In this regard, the court stated: "[T]he Legislature has consistently withheld from teachers the right to strike. The obligation not to interrupt or deny services on the basis of a strike is, therefore, a term of plaintiff's contract with each of its teachers."[112] The court's award of damages was also based on its theory that an unlawful strike is a tort for which damages may be recovered.[113]

The court in *Pasadena Unified* did note, however, that labor unions are privileged to induce breach of employment

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108. *Id.* at 316, 87 Cal. Rptr. at 264.
109. *Id.* at 313, 87 Cal. Rptr. at 261-62.
110. *Id.* at 310, 87 Cal. Rptr. at 259.
111. 72 Cal. App. 3d 100, 140 Cal. Rptr. 41 (1977), *hearing denied.*
112. *Id.* at 113, 140 Cal. Rptr. at 48.
113. *Id.* at 112, 140 Cal. Rptr. at 48.

contracts or to interfere with contractual relationships by engaging in concerted activities, insofar as the object and the manner of the activity are legal.[114] Nonetheless, the court found that it was bound by prior case law holding that public employee strikes in California are illegal per se. Although the court conceded that "[t]here is no square holding of our Supreme Court passing upon the legality of strikes by public employees,"[115] it relied on the supreme court's statement in *Los Angeles Metropolitan Transit Authority* that in the absence of legislative authorization, public employees do not have the right to strike.[116] The court noted further that the Rodda Act, like MMB, withholds application of Labor Code section 923 from public school employees.[117] Since section 923 guarantees workers in the private sector the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection,"[118] the court concluded that the exclusion of a similar provision from the Rodda Act indicated an intent of the legislature to "retain the existing rule making public employee strikes unlawful."[119]

The *San Diego Teachers Association* dissent agreed with the conclusions reached by the court in *Pasadena Unified*, declaring:

> We *unanimously* denied a hearing in the *Pasadena* case. If there are lurking majority reservations regarding an important principle of law which has been treated as settled for so long, surely there is an obligation to set forth those views openly and candidly.[120]

According to the dissent, the lower court decisions have established "without equivocation" that public sector strikes are unlawful in California.[121] The dissent was critical of the majority's reluctance to address this issue, stating:

> [D]espite past unanimity of judicial opinion on the subject, the majority finds it "unnecessary here to resolve *the question* of the legality of public employee strikes. . . ."

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114. *Id.* at 111, 140 Cal. Rptr. at 47.
115. *Id.* at 105, 140 Cal. Rptr. at 44.
116. *Id.*
117. *Id.* at 106, 140 Cal. Rptr. at 45.
118. CAL. LAB. CODE § 923 (West 1971).
119. 72 Cal. App. 3d at 107, 140 Cal. Rptr. at 45.
120. 24 Cal. 3d at 18, 593 P.2d at 849, 154 Cal. Rptr. at 904.
121. *Id.* at 14, 593 P.2d at 847, 154 Cal. Rptr. at 902.

> Contrary to the majority's suggestion, however, there remains no such "question" to decide, for prior cases which have carefully and thoughtfully analyzed and resolved the issue have ruled that public employee strikes are unlawful in the absence of legislation to the contrary.[122]

The majority countered, however, that the issue of strike legality was expressly left open in *City and County of San Francisco v. Cooper*,[123] a case that involved the validity of legislative measures granting salary increases to striking public employees.[124] A taxpayer challenged those measures, contending that adoption was forced by an illegal public employee strike.[125] The court held that "[i]n the absence of applicable constitutional, legislative, or charter proscriptions, a duly enacted legislative measure cannot be invalidated on the ground that it was enacted as a result of an illegal strike."[126]

The *Cooper* court refused, however, to resolve the controversy concerning the legality of public sector strikes. Although it briefly considered arguments raised by the employee unions that present legislation governing public employees could be read so as to implicitly authorize public sector strikes by not expressly prohibiting them,[127] the court stated that it was not necessary to resolve this controversy in the present case.[128]

The dissent's reliance on the above-mentioned appellate decisions is not compelling. Those decisions that have declared strikes by public employees illegal under California law have reached a conclusion that is arguably correct but inadequately grounded. They appear to follow blindly the incorrect notion that *express* statutory authority is required to legitimize the public employee strike. Yet, the case that every court of appeal cites for this proposition, *Los Angeles Metropolitan Transit Authority*, actually held to the contrary. In reality, it seems that a right to strike can be implied from certain language, *i.e.*, language granting collective bargaining rights or the right of employees to engage in concerted activities. Moreover, the courts have not yet addressed the question of

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122. *Id.* (citation omitted) (emphasis in original).
123. 13 Cal. 3d 898, 534 P.2d 403, 120 Cal. Rptr. 707 (1975).
124. *Id.*
125. *Id.* at 904, 534 P.2d at 407, 120 Cal. Rptr. at 710.
126. *Id.* at 911, 534 P.2d at 411, 120 Cal. Rptr. at 715.
127. *Id.* at 912, 534 P.2d at 411-12, 120 Cal. Rptr. at 715-16.
128. *Id.* at 912, 534 P.2d at 412, 120 Cal. Rptr. at 716.

whether the right to strike may be implied from other statutory language. In particular, no court has examined whether the Rodda Act contains language implying the right of public school teachers to strike. Because the legislation governing public school teachers does not contain an express prohibition against strikes, it can be argued that a right to strike is implicit, although parallel arguments have not fared well thus far. By declining to address this issue in *San Diego Teachers Association*, the majority opinion actually raises more questions than it answers.[129]

The role PERB will play in future strikes by public employees is not yet well-defined. In the aftermath of the *San Diego Teachers Association* decision, PERB received numerous requests to intervene in either ongoing or potential strikes by public school employees. From April through June 1979, PERB was asked to seek injunctive relief in six strike-related incidents.[130] By the end of the year, PERB had received a total of thirty-seven requests for injunctive relief, half the number of such requests received during the first three years of the Board's existence.[131]

In response to the *San Diego Teachers Association* declaration that the Rodda Act gives PERB "discretion to withhold, as well as pursue, the various remedies at its disposal," and that "PERB's responsibility for administering the EERA requires that it use its power to seek judicial relief in ways that will further the public interest,"[132] PERB has attempted to employ alternative means for resolving labor disputes in lieu of traditional forms of judicial relief.[133]

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129. *See* Bowen, *supra* note 62, at 7. As the dissent there pointed out, it is not clear whether an employer may seek court relief if PERB either declines to seek injunctive relief or to issue an unfair practice complaint against striking employees. Also left unanswered is the issue of whether PERB has been given the authority to impliedly authorize a strike by refusing to act. On the other hand, it is not clear whether PERB has the authority to declare that a public employee strike is illegal. The court indicated that such a finding may be a prerequisite to finding a refusal to bargain in good faith. Thus far, PERB has avoided confronting this issue by deciding unfair practice cases on the basis of a refusal to participate in impasse procedures, the second ground listed by the court as applicable to a public employee strike situation.

130. *See* Filliman, *Enjoining School Strikes—A New Direction for PERB*, 44 CPER 2, 3 (1979).

131. 4 PUBLIC EMPLOYMENT RELATIONS REPORTER No. 10, 5 (January, 1980) [hereinafter cited as PERR].

132. 24 Cal. 3d at 13, 593 P.2d at 846, 154 Cal. Rptr. at 901.

133. PERB has, for example, declined to seek injunctions in situations where a

In spite of PERB's attempts to implement creative procedures to resolve public school disputes, PERB has been harshly criticized by representatives of both labor and management.[134] On the one hand, school employees would prefer that PERB attempt to resolve disputes at the bargaining table rather than seek judicial relief; on the other, school district officials would favor court injunctions without PERB involvement.[135] The court in *San Diego Teachers Association* clearly hoped that PERB jurisdiction would result in fewer strikes. In fact, the opposite has occurred, for there were ten teachers' strikes in California within four months after publication of the decision.[136] Yet PERB has been unfairly blamed because it is clear that the court's decision only served to underscore the legislature's failure to enact comprehensive legislation delineating the rights of employees in the public school system. The Rodda Act, like most state public employee labor relations statutes, stops short of effective dispute resolution mechanisms and fails to deal adequately with the strike issue. Furthermore, the strike issue is central since, although long-range benefits may be secured by workers, a strike harms all parties including the striker. The threat of a strike is therefore a potent influence on both sides for maintaining order at the bargaining table and reaching mutually acceptable terms. Statutory provision of alternative mechanisms for resolving disputes, however, would increase the opportunity of avoiding strike action altogether.

ALTERNATIVES

Some alternatives to the full right to strike exist, and while it is not within the scope of this comment to deal in depth with such alternatives, the reader should be aware of the potential benefits of interest arbitration and non-stoppage or graduated strikes.[137]

Interest arbitration is a desirable alternative to the strike

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strike has merely been threatened. PERR, *supra* note 131. In several cases, PERB appointed state mediators and conducted informal conferences in order to forestall or curtail strike action. Filliman, *supra* note 130, at 7-8.

134. PERR, *supra* note 131.

135. *Id.* at 5-6.

136. *Id.* at 4.

137. Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARVARD L. REV. 459 (1975).

since it protects employees from the heavy costs of a strike[138] by providing for an arbitrated settlement of disputes in the negotiation of new contracts.[139] Moreover, interest arbitration provides a more reasonable atmosphere for settlement since the arbitrator, a neutral third party, serves as a substitute decision-maker without the loss of bargaining leverage by one side and not the other. Where both parties agree to abide by the arbitrator's decision, the outstanding issues can be determined within the parameters of the proposals of each side, including consideration of relevant criteria for protecting the public interests.[140] All interests are better served by arbitrated agreements than by those agreements reached before or after a strike.

Other alternatives to conventional strikes are the non-stoppage or the graduated strikes.[141] During a non-stoppage strike, employees continue to work as usual, but both the employees and the employer are required to contribute a portion of the wages, otherwise payable, to a special fund. Although this arrangement pressures both parties to reach a settlement, there is no disruption of public services.[142] In a graduated strike, employees reduce their number of working hours and suffer comparable reductions of wages. This mechanism exerts more direct pressure on the employer and on the community than does the non-stoppage strike, since the quantum of services is reduced. It avoids, however, the shock of a complete shutdown of services.[143] If the law offered these types of alternatives to the conventional strike, disruptions caused by strikes would be reduced and the public's need for government services and the government's procedures for allocating resources would be better accommodated.[144]

CONCLUSION

Strikes by California public school teachers illustrate common issues and problems in the public employment sector that result from inadequate legislative provisions for dispute

138. *Id.* at 466.
139. *Id.* at 459.
140. *Id.* at 467.
141. *Id.* at 469.
142. *Id.* at 475.
143. *Id.* at 474.
144. *Id.* at 475.

resolution and from failure to effectively use impasse mechanisms that are available. Moreover, California public school employees, particularly teachers, have organized and politicized their demands with the strike tool more often and in larger numbers than other groups of local or state employees.

Many states have enacted labor laws aimed specifically at public employees but the legislation to date is less than comprehensive and it is inadequate to resolve long-range practical problems which result from impasse at the bargaining table. Moreover, the issue of the right to strike as a bargaining tactic remains unresolved with respect to most public employees.

Although public employee organizations may be subject to liability for strike damages or fines, the question of the legality of a strike becomes almost academic when a strike does occur. Pronouncing strikes unlawful merely adds to the strife and hostilities, precipitating disregard and contempt for the law and drawing adverse reactions from the public and from the employees. Since fines and damage awards increase the costs and risks to employees, the scope of the strike often increases as the stakes rise and the parties are less able to save face or effect a reasonable settlement. Without effective alternatives, it is unrealistic to expect strike activity to subside.

Prohibiting strikes has not prevented them. Legalizing them, on the other hand, need not result in proliferation since, in reality, the ability to reach satisfactory agreements depends on the relative economic strength of each party at the bargaining table. Absent a right to strike, public employees remain in a disadvantaged position. A statutory framework of comprehensive and effective mechanisms for dispute resolution, however, might also lessen the frequency and duration of strikes or forestall impending strikes.

The public has a basic interest in the outcome and conduct of public sector bargaining and consequently it has an interest in effective statutory machinery to govern the bargaining process. The legislature neglects its duty when it avoids the problems of impasse and abandons those problems to the judiciary by failing to enact comprehensive labor legislation. The key to elimination or significant reduction of strikes is the adoption of a labor policy for public employees that will achieve the goal of providing peaceful and effective

methods for dispute resolution while granting both sides equal bargaining power during negotiations.

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