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California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes

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CALIFORNIA ASSEMBLY ADVISORY COUNCIL'S RECOMMENDATIONS ON IMPASSE RESOLUTION PROCEDURES AND PUBLIC EMPLOYEE STRIKES

INTRODUCTION

Governmental employee unions are the fastest growing sector of organized labor in the United States.[1] California, which has over 890,000 public employees,[2] is feeling the repercussions generated by employees who are frustrated with the laws which govern and restrict their right to collectively bargain. In the words of Loren V. Smith, general manager of the California State Employees Association (CSEA):

> Our golden state—the richest, most populous state in the nation—once in the forefront of progressive action, today trails virtually every other large state in dealing with its own employees.[3]

This growing sense of frustration has been manifested, most dramatically, in a number of public employee strikes. In California there were over 60 strikes, or other work actions in the nature of strikes, between the beginning of 1969 and mid-summer, 1972.[4]

California public employees are currently covered by a patchwork quilt of laws regulating their rights to collectively negotiate, or at least meet and confer, with their employers in regard to wages, hours, and working conditions. These laws include: the Winton Act[5] which covers public school teachers; the George Brown Act[6] covering employees of State Colleges and Universities, and employ-

1. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT 5 (1969) [hereinafter cited as ACIR].

2. PUBLIC SECTOR LABOR RELATIONS INFORMATION EXCHANGE, U.S. DEP'T. OF LABOR, STATE PROFILES: CURRENT STATUS OF PUBLIC SECTOR LABOR RELATIONS 10 (1971) [hereinafter cited as STATE PROFILES].

3. Smith, *California Experience: Avoidance of Public Employee Strikes*, in THE ROLE OF THE NEUTRAL IN PUBLIC EMPLOYEE DISPUTES 48 (H. Anderson ed. 1972).

4. Cebulski, *An Analysis of 22 Illegal Strikes and California Law*, 18 CALIFORNIA PUBLIC EMPLOYEE RELATIONS (CPER) 2, 3 (August 1973) [hereinafter cited as Cebulski].

5. CAL. EDUC. CODE §§ 13080-90 (West Supp. 1973).

6. CAL. GOV'T. CODE §§ 3525-36 (West Supp. 1973).

ees of the State of California; and the Meyers-Milias-Brown Act (MMBA)[7] governing most county and municipal employees,[8] one provision of which[9] grants authority to local governments to promulgate rules and regulations applicable to their employee-employer relations, thereby prompting the enactment of a number of unique local ordinance throughout the state.[10]

All of these Acts and ordinances contain differing policies regarding the extent of their recognition of traditional collective bargaining principles.[11] With the exception of sections 1961-1963 of the Labor Code which specifically prohibits strikes by fire-fighters, the present statutes governing public employment neither authorize nor prohibit strikes in the public sector.[12]

Criticism of these overlapping and confusing statutes,[13] coupled with the rising tide of public sector work stoppages, led the California Assembly to pass House Resolution 51[14] which established the Assembly Advisory Council on Public Employee Relations. This Council was charged with the duty to review the effectiveness of the present statutes pertaining to employee-employer relations; to study the trends of other states and the needs of California in this area; and to issue a report containing specific proposals for settling disputes between public jurisdictions and their employees.[15]

Based on testimony adduced at three public hearings held during the summer of 1972, and the experience and research of the

7. CAL. GOV'T. CODE §§ 3500-10 (West Supp. 1973).

8. In addition to the above cited statutes, California fire-fighters are covered by § 1960-63 of the Labor Code. Executive Order 71-3, issued by Governor Reagan on Feb. 23, 1971, states an employer-employee policy for state civil service employees and non-academic employees of the state colleges and universities.

9. CAL. GOV'T. CODE § 3507 (West Supp. 1973).

10. *See* Ross & De Gialluly, *Implementation of the Meyers-Milias-Brown Act by California's Counties and Larger Cities*, 8 CPER 6 (March 1971).

11. In regard to impasse resolution procedures the MMBA provides for voluntary recourse to mediation, CAL. GOV'T. CODE § 3505.2 (West Supp. 1973); the Winton Act provides that the parties may adopt non-binding dispute settlement procedures including fact-finding, CAL. EDUC. CODE § 13087.1 (West Supp. 1973).

12. CAL. EDUC. CODE § 13088 (West Supp. 1973) (Winton Act) and CAL. GOV'T. CODE § 3509 (West 1966) both provide that nothing in these respective acts shall be construed as making § 923 of the Labor Code applicable to public employees. Section 923 of the Labor Code has been judicially interpreted as sanctioning, *inter alia*, concerted activities and strikes by private sector employees. Los Angeles Metropolitan Transit Authority v. The Brotherhood of Railroad Trainmen, 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960).

13. *See* Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 23 HASTINGS L.J. 719 (1971-72).

14. CAL. ASSEMBLY, HOUSE RES. 51 (1972).

15. *Id.*

Council members,[16] the Council issued a comprehensive report, including legislative recommendations, in March, 1973.[17]

In addition to recommendations for a single law to replace the present scheme of divergent statutes applicable to various employee groups, and the establishment of a Public Employee Relations Board (PERB) to administer the new law, the Council made specific proposals regarding dispute settlement procedures and strikes.[18]

The Council's proposed establishment of a mandatory "arsenal of weapons" approach to be used in resolving labor disputes, should the parties fail to voluntarily provide their own procedures, is in marked contrast to present statutory schemes. These proposals, if enacted, would displace many of the current practices in public employee negotiations in California. Further, the Council's recommendation that public employes be given the legal right to strike should generate considerable discussion among members of the State Legislature, public sector labor organizations, the legal community and the public at large.

This article will focus on the Council's discussion of the controversial issues of dispute settlement procedures and strikes, and the effect that the proposed legislation, if enacted, would have on the practice of collective bargaining in California's public sector.

STRIKES

In addition to the elliptical prohibitions of stikes contained in the California statutes governing public employees,[19] a number of California courts of appeal have denied these employees the legal right

16. The Council was chaired by Professor Benjamin Aaron, Director of the Institute of Industrial Relations at U.C.L.A. The other members of the Council were Howard S. Block, a Santa Ana Attorney; Morris L. Meyers, a San Francisco arbitrator and mediator; Don Vial, Chairman of the Center for Labor Research and Education, Institute of Industrial Relations, U.C. Berkeley; and Donald H. Wollett, Professor of Law at U.C. Davis.

17. California State Assembly, Final Report of the Assembly Advisory Council on Public Employee Relations (March 15, 1973) [hereinafter cited as Final Report].

18. *See Advisory Council on Public Employee Relations*, 17 CPER 15 (June 1973) (summary of the Council's recommendations) or Final Report, *supra* note 17 at 6-24.

19. CAL. EDUC. CODE § 13088 (West Supp. 1973); CAL. GOV'T. CODE § 3509 (West 1966). *See* note 12, *supra*.

to strike.[20] These cases hold that public employee strikes are contrary to the common law and against public policy. Furthermore, the decisions state that the courts shall continue to declare public employees' strikes illegal until such time as the legislature specifically confers upon public employees the right to strike.[21]

Not only is a strike by public employees illegal, but a binding agreement negotiated after a public employee (teachers') strike in Los Angeles has been held to be void. The Court of Appeals for the Second District ruled in *Grasko v. Los Angeles City School Board of Education*[22] that

> . . . it was contrary to public policy for public school employees who were conducting an illegal strike to exact a consideration for the cessation of that illegal activity. The subject agreement was therefore void (not merely voidable) and the trial court properly enjoined its threatened consummation.[23]

The District Courts of Appeal which have ruled on the issue are unanimous in their holding that public employee strikes are illegal. Thus, it is apparent that these judicial pronouncements will continue to be the law until such time as the California Supreme Court decides to review the legality of public employee strikes, or legislation is enacted to change the applicable statutes.[24]

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20. Los Angeles Unified School Dist. v. United Teachers—Los Angeles, 24 Cal. App. 3d 142, 100 Cal. Rptr. 806 (2nd Dist. 1972); Trustees of the California State Colleges v. Local 1352, San Francisco State College Federation of Teachers, 12 Cal. App. 3d 863, 92 Cal. Rptr. 134 (1st Dist. 1970); City of San Diego v. American Federation of State, County & Municipal Employees, Local 127, 8 Cal. App. 3d 308, 87 Cal. Rptr. 258 (4th Dist. 1970); Almond v. County of Sacramento, 276 Cal. App. 2d 32, 80 Cal. Rptr. 518 (3rd Dist. 1969).

21. Los Angeles Unified School Dist. v. United Teachers—Los Angeles, 24 Cal. App. 3d 142, 145, 100 Cal. Rptr. 806, 808 (2nd Dist. 1972). For the view that California public employees do have the right to strike absent any specific legislative denial of that right, *see* 2 CPER 51 (August 1969) for the Superior Court decision granting San Diego city workers the right to strike. However, this lower court decision was subsequently reversed by City of San Diego v. American Federation of State, County and Municipal Employees, Local 127, 8 Cal. App. 3d 308, 87 Cal. Rptr. 258 (4th Dist. 1970).

22. 31 Cal. App. 3d 290, 107 Cal. Rptr. 334 (2nd Dist. 1973).

23. *Id.* at 298, 107 Cal. Rptr. at 339. Contrary to this ruling the actual practice of collective bargaining may often involve the situation where, "[t]he unions are in a position, as a practical matter, to offer the public employers a de facto, if not Willistonian, consideration to support the agreement reached in bargaining. This is their own promise not to strike . . . . While this may not be a legal consideration, it is nevertheless a valuable one. . . ." Smith, *Comment of Russell A. Smith on a Paper Delivered by Howard S. Block on Criteria in Public Sector Interest Disputes*, in Proceedings of the Twenty-Fourth Annual Meeting, National Academy of Arbitrators, at 181 (1971).

24. Three major public sector collective bargaining bills were introduced

Current statutory scheme and case law notwithstanding, the Council recommends that public employees be given the legal right to strike when the bargaining parties have been unable to reach an agreement,[25] and after they have exhausted the "arsenal of weapons"[26] approach to a negotiated settlement. However, under the Council's proposed statute, any person affected by the strike, including public employers, citizens and taxpayers, could ask the court for injunctive relief to prevent or stop the strike.[27] The issuance of an injunction, including a temporary restraining order, would have to be based on:

> . . . findings of fact supported by evidence elicited at a hearing that the strike or lockout imminently threatens public health or safety . . . . If the Court does not make these findings . . . the strike or lockout should be permitted to commence or continue; but the court should have discretion to maintain jurisdiction of the case until the dispute is resoloved.[28]

Over the past decade the merits of legalizing public employee strikes have been extensively debated by the commentators[29]

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in the first session of the 1973-74 California Legislature. The Moretti Bill (AB 1243) which is directly based on the Council's proposed legislation, passed the Assembly 42 to 30 and was sent to the Senate, where it was still in committee as the session adjourned on September 14, 1973. The Dills Bill (SB 32) provides for statutory impasse resolution procedures including mediation and fact-finding; but in regard to strikes, the Bill states that its enactment shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees (thereby maintaining the status quo on the issue of public sector strikes). The Dills Bill passed the Senate 21 to 14 but was still in an Assembly Committee as the session closed. It is likely that both bills will receive further attention when the Legislature reconvenes on January 7, 1974. Governor Reagan has indicated that he would veto the Morretti Bill because of its "legalized strike" provisions but sign the Dills Bill if it retains its anti-strike position in its final form. *See* 18 CPER 29 (August 1973). The Moscone Bill (AB 400) which was based on the Council's recommendations but only applied to public school teachers passed both houses of the Legislature. The Bill was vetoed by Governor Reagan on October 1, 1973, partly because he thought that it would "legalize" teacher strikes.

25. Final Report, *supra* note 17, at 238.

26. *See* text accompanying notes 53-56, *infra.*

27. Final Report, *supra* note 17, at 239.

28. *Id.*

29. *Compare* Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1969-70) (support of a limited right to strike as essential to effective collective bargaining) *with* Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1968-69) (against public employee strikes because of disproportionate power theory).

and the Council's report should add fuel to the fire. The Council argued that public sector strikes should be legalized for a number of reasons.

A credible strike possibility provides the necessary motivation for the parties to negotiate an agreement rather than face the inherent difficulties involved in a strike or lockout situation. The theory that uncertainty within the context of ongoing bargaining provides negotiators with necessary motivation is widely subscribed to by labor relations experts[30] and has been succinctly stated by Charles T. Douds:

> Collective bargaining thrives on uncertainty as to what each of the parties will do in the event of an impasse . . . . The uncertainty on both sides of the bargaining table gives meaning to collective bargaining.[31]

At present, public employers experience little uncertainty in bargaining where strikes are prohibited and the final disposition of the impasse is a management prerogative. The burden of uncertainty is placed entirely upon the employees, and consequently the employees often doubt that the dispute will be fully considered or settled fairly.

Another closely related argument the Council advances against the strike ban is that outlawing public sector strikes may encourage strikes rather than deter them. The Council argues that "[b]ecause some public employers—confident that their employees will not strike illegally—fail to respond in good faith to proposals made by employee rerpesentatives . . . , "[32] they thereby encourage the frustrations that lead to strikes.

> Strike prohibitions are not simply ineffectual, though they are undeniably that. What is far more serious, they warp this vital process. They bring employees to the bargaining table, but as inferiors. Simultaneously they provide false reassurance to management representatives and induce less than genuine negotiations. Ironically, they create the very tensions, exacerbate the very situations, provoke the very strikes they were allegedly formulated to prevent.[33]

Reporting that only a small minority of the witnesses who testified at the public hearings or submitted written statements sup-

30. *See* Douds, *Pennsylvania Experience: Background of Public Employee Law*, in THE ROLE OF THE NEUTRAL IN PUBLIC EMPLOYEE DISPUTES 51 (H. Anderson ed. 1972) [hereinafter cited as Douds].

31. *Id.* at 58.

32. Final Report, *supra* note 17, at 232-33.

33. Address by Jerry Wurf, President of American Federation of State, County and Municipal Employees, AFL-CIO, to United States Conference of Mayors, June 19, 1967, *cited in* Note, *Labor-Management Relations and Public Employees Engaged in Protective Functions: Policemen and Firemen as Sui Generis*, 5 GA. L. REV. 540, 549 (1970-71).

ported a blanket prohibition of these strikes, while another minority favored banning strikes by police and fire-fighters, the Council stated that a majority of witnesses believed that " . . . state and local employees should have the right to strike in order to make genuine collective bargaining possible."[34]

Some authorities have proposed a compromise between the extreme positions of giving public employees complete freedom to strike and the present absolute prohibition of strikes in the public sector, based on whether or not the employees are essential or non-essential to the community welfare.[35] Rejecting this suggestion, the Council stated:

> It is relatively easy to gain consensus that police and fire protection are essential services, and that some minor clerical functions are not. But in respect of the great number of services that lie between the two poles of absolute essentiality and absolute non-essentiality there is not even the beginning of consensus, only disagreement.[36]

This conclusion seems correct not only because of the inherent difficulties in categorizing public employees as either essential or non-essential but because "a limited right to strike for 'non-essential' employment categories would, in the last analysis, be an empty gesture to those employees with limited bargaining power."[37]

An analysis of the Council's recommendations and supporting arguments in relation to some of California's recent public sector collective bargaining experiences, appears to support the Council's logic. A recent comparative study[38] of 22 illegal strikes in California concluded that:

> [t]he law may deter some strikes, and the injunction may have a sobering effect on others, and, therefore the law may not be entirely without effect. However, these 22 strikes provide the inescapable conclusion that the present law does not realize its purpose—it does not prevent public employee strikes.[39]

34. Final Report, *supra* note 17, at 232, citing *Collective Bargaining in American Government: Report of the Western Assembly*, 13 CPER 16 (June 1972).
35. Burton & Krider, *supra* note 29.
36. Final Report, *supra* note 17, at 230.
37. T. GILROY & A. SINICROPI, DISPUTE SETTLEMENT IN THE PUBLIC SECTOR: THE-STATE-OF-THE-ART 116 (U.S. Dep't. of Labor, Public Sector Labor Relations Information Exchange, 1972) [hereinafter cited as GILROY & SINICROPI].
38. Cebulski, *supra* note 4.
39. *Id.* at 17.

This study emphasized that present laws do not deter strikes, and furthermore, that once an illegal strike is instituted the law has very little effect in compelling the strikers to return to work. Part of the reason for this is that many public employers hesitate to request an injunction because they believe that the employees would continue to strike, thereby forcing the employer to either initiate contempt proceedings and subject his employees to quasi-criminal penalties, or stand idly and ineffectually by as the illegal strike continues. Either of these alternatives, if pursued, would have a deleterious effect on future employee-management relations once the strike is settled.

An example of the struggle the judiciary has had in applying "no-strike" laws can be seen in *Los Angeles Unified School Dist. v. United Teachers*,[40] a case involving the 1970 Los Angeles teachers' strikes, wherein the appellate court noted that on April 13, 1970, the superior court judge granted a temporary restraining order against the teachers[41] and "despite the restraining order, a teachers' strike commenced on April 13, 1970."[42] The appellate court's written opinion itself suggests the impotency of the present law to act as a deterrent on public employees who have decided to strike, as it reports the commencement of the month-long strike concurrent with the issuance of the restraining order. When public employees strike in defiance of court orders,

> [n]ot only is the law itself considerably weakened . . . but court orders, upon which enforcement rests, may appear to lose prestige. Courts understandably may begin to exercise their inherent discretion to deny or modify orders rather than issue injunctions and restraining orders which go unheeded by employees and unenforced by employers.[43]

Also, "no-strike laws" are, in practical application, a nullity, since oftentimes the final agreement reached by the parties provides for the reinstatement of the striking employees, with amnesty for those who were found in contempt of court for disregarding an injunction.[44]

Legislation which would take into account the dynamics of collective bargaining, specifically the motivational spur to bargain created by the apprehension of a credible strike threat, and which provides a detailed procedure for resolving disputes within a frame-

40. 24 Cal. App. 3d 142, 100 Cal. Rptr. 806 (2nd Dist. 1972).
41. *Id.* at 144, 100 Cal. Rptr. 807.
42. *Id.*
43. Cebulski, *supra* note 4, at 17.
44. *Id.* at 13. *See also* 3 CPER 35 (November 1969). A strike by policemen and firefighters in Vallejo, California ended with all the striking employees being reinstated.

work of continuing negotiations, encouraged by skilled neutrals, would be a more effective deterrent to strikes than the present myopic prohibitions.

But, so long as public school teachers regard the Winton Act's "meet and confer" provisions as "meet and defer", or as long as some police officers view their system of labor relations as "collective begging,"[45] it will be extremely difficult to establish a viable and effective bilateral system of labor relations. Without the provision for the right to strike in a statutory scheme, public employees will very likely continue to see themselves as second class employees, and public employers will continue to exacerbate the situation by declining to give sufficient consideration to the employees' viewpoint because they believe that the employees will not strike in violation of the law. If both sides to the negotiations realize that, should they fail to reach agreement, there is an imminent possibility of a strike or a lockout, then the negotiators and neutrals would be compelled to bargain within the context of reality rather than polite exchanges of viewpoints in which management has the ultimate authority.

IMPASSE RESOLUTION PROCEDURES

In addition to legalizing the strike, within certain boundaries, as a means of reducing the incidence of strikes, the Council discussed and made recommendations on the implementation of dispute settlement procedures in order to achieve more harmonious public sector labor relations. The settlement of impasses within the framework of ongoing negotiations is probably the best way to avert strikes and also to build a relationship of mutual trust and respect between employees and management.

At the outset, a distinction must be drawn between impasses arising out of interest disputes and those resulting from rights disputes. Rights disputes, commonly referred to as grievances, arise from a disagreement on the application or interpretation of an existing collective bargaining agreement, whereas interest impasses result from a disagreement between the parties over the specific terms to be included in a new or renegotiated agreement.

45. Solomon, *Summary of Conference* in THE ROLE OF THE NEUTRAL IN PUBLIC EMPLOYEE DISPUTES 18 (H. Anderson ed. 1972).

Rights disputes

In the private sector, the most common method of handling rights disputes is through arbitration, whereby the parties voluntarily commit themselves to accept the arbitrator's decision.[46] Although arbitration of grievances in the private sector has been very successful, the argument is made that such a practice is inappropriate for resolving disputes in the public sector because a public employer cannot delegate his authority to an arbitrator.

Contrary to this contention, the Wisconsin Supreme Court has held that the submission of a public employee grievance to arbitration did not constitute an unlawful delegation of legislative power.[47] Furthermore, many of the States which have enacted legislation governing public employee grievance disputes provide for voluntary arbitration, and in cases of police or fire-fighter grievances arbitration is made compulsory.[48]

The current trend in California is for the parties themselves to provide in their agreement for binding arbitration as the final disposition of public employee grievances.[49] The Council rejected the suggestion that their recommended legislation should include a provision for mandatory arbitration of rights disputes. Preferring to allow the parties themselves to decide the issue, the Council simply stated that legislation should establish the unqualified legality of public sector grievance arbitration and that the courts would be required to enforce the arbitration award pursuant to the Code of Civil Procedure.[50]

Since grievance arbitration is essentially an adjudicative, rather than negotiating process, the Council's recommendation that the parties have the authority to include in their agreement procedures for binding arbitration of rights disputes would decrease the possibility that these disputes would lead to a strike. Furthermore, the morale of the aggrieved employee would undoubtedly improve

46. Final Report, *supra* note 17, at 179.

47. Local 1226, Rhinelander City Employees, AFSCME v. City of Rhinelander, 35 Wis. 2d 209, 151 N.W.2d 30 (1967).

48. GILROY & SINICROPI, *supra* note 37, at 18-21.

49. For illustrations of agreements providing for grievance arbitration, *see* the following editions of CALIFORNIA PUBLIC EMPLOYEE RELATIONS: 15 CPER 39 (November 1972); 12 CPER 56 (March 1972); 10 CPER 26 (August 1971); 7 CPER 43 (November 1970).

50. Final Report, *supra* note 17, at 185-94. "It should be sufficient to specify in the statute that proceedings to enforce agreements to arbitrate and to enforce arbitration awards may be brought pursuant to Title 9 (Commencing with § 1280) of Part 3 of Code of Civil Procedure." *Id.* at 194.

where the final disposition of the grievance rests with an impartial neutral rather than with the employer.

Interest disputes

Before grievances reach impasse, they are often satisfactorily resolved by a discussion between an employee and his supervisor. If the immediate parties to the grievance cannot resolve the issue, usually a representative of the employee, often a business agent of the union, will confer with a middle-level manager, both parties working for an equitable solution.

If these representatives fail to reach a solution, the grievance is negotiated in further meetings by ever-higher level representatives of the parties. This process continues until either the grievance is settled or it reaches impasse and must be submitted to arbitration.

In contrast, interest dispute issues, which may eventually reach impasse in negotiations, are more or less negotiable variables within the context of ongoing bargaining. Most of these issues will never reach impasse because the bargaining process functions so that compromises can be made and a bargain struck. Therefore, if the bargaining process can be prolonged, and the dispute subjected to negotiations, it is likely that the parties will eventually reach an agreement. Mediation and fact-finding are the techniques most commonly used to continue the bargaining process beyond impasse in the hopes of thereby effectuating a settlement.

Professing a strong belief in the desirability of voluntarily negotiated agreements, the Council stated that the law should allow the parties to agree to a mutually satisfactory procedure for dispute settlement.[51] Should the parties fail to provide their own settlement procedure, they would be required to use the dispute settlement procedure outlined in the Council's proposed legislation. However, the parties would be allowed to withdraw from this mandatory settlement procedure whenever they reached agreement on an alternative, binding, method of dispute resolution.[52]

51. Final Report, *supra* note 17, at 225.
52. *Id.* at 236-37.

The Council's impasse resolution procedure[53] could be invoked by either party or by declaration of the Public Employee Relations Board (PERB) that the negotiations have reached a point where differences are insurmountable and that further meetings would be useless. Thereafter, a mediator would be appointed and if he is unable to help the parties achieve settlement within 15 days, either party may request that the dispute be submitted to a fact-finding panel.

Working within specific guidelines,[54] the fact-finding panel must make its advisory recommendations, privately and in writing, to the parties within 30 days. If the parties do not immediately accept the recommendations, they resume negotiations for ten days before the PERB, the panel, or the parties may make the recommendations public. This ten day negotiation session is provided so that the parties may negotiate or even mediate the fact-finders' recommendations.[55] Should the impasse remain unresolved, the employee organization must call a meeting where, by a secret ballot, the employees vote on whether or not they will agree to accept the fact-finders' recommendations. Similarly, the employers' legislative body votes on the same question. If both votes are affirmative the impasse is resolved. However, if one or both votes are negative, the parties may strike or lockout after written notification is given to the other party, immediately announced to the public, and five calendar days have passed. If court proceedings undertaken by a request for an injunction determine: 1.) that the strike (lockout) would immediately threaten public health or safety; and 2.) that there are no alternative methods for providing the services to the public, the court could then enjoin the strike and direct both parties to accept the fact-finders' recommendations.[56]

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53. The detailed 14-step impasse resolution procedure is set out completely in the Council's report. Final Report, *supra* note 17, at 236-240.

54. The fact-finders specified guidelines include the following:

1. the lawful authority of the employer; 2. stipulation of the parties; 3. the interests and welfare of the public and financial ability of the employer to meet these costs; 4. the wages, hours, and working conditions of comparable public or private employees; 5. the "cost of living;" 6. the overall compensation presently received by the employees including benefits; 7. and any other relevant factors. Final Report, *supra* note 17, at appendix 28-29.

55. Mediation around the fact-finders' report could prove very helpful because when the fact-finding follows mediation the parties sometimes tend to hedge in bargaining in hopes that the fact-finder will be more favorable to their side than the mediator has been.

56. Final Report, *supra* note 17, at 237-40.

The Council's recommended "arsenal of weapons" approach to settling impasses would provide the necessary bargaining framework to keep the negotiations alive while trained intermediaries use the techniques of mediation and fact-finding to help the parties reach their own agreement.

Mediation

Mediation is the most popular form of injecting a neutral force into the negotiations once an impasse is reached. Nearly all of the 34 states having public employee relations laws provide for mediation in cases of impasse.[57] Mediation also has a high proven record of results.[58] A recent study of dispute settlement procedures reported that

> [a] sampling of the major writers in the field indicates that mediation undoubtedly is employed more than any other method for public sector negotiation disputes and is often considered to be *the most successful process.*[59]

It appears that mediation often has the effect of educating relatively inexperienced public sector negotiators about the bargaining process itself.[60] Negotiators in the public sector, unlike the mediator or even private sector negotiators, often have very little experience with the process and behavioral aspects of collective bargaining. "In short, it has been found that the mediator plays a crucial role not only in bringing about a settlement but in providing a resource to the parties in developing their appreciation of the nuances of the bargaining process."[61] It is quite possible that as mediators help the parties become more skillful negotiators their reliance on mediation will diminish and the parties will be able to more readily negotiate settlements.

Fact-finding

Fact-finding, the next step in the Council's "arsenal of weapons"

57. GILROY & SINICROPI, *supra* note 37, at 57.
58. In New York over 60 percent of the public school teachers' interest disputes were settled by mediation. Drotning & Lipsky, *The Outcome of Impasse Procedure in New York Schools Under the Taylor Law,* 26 ARB. J. 87, 92 (1971).
59. GILROY & SINICROPI, *supra* note 37, at 57 (emphasis added).
60. GILROY & SINICROPI, *supra* note 37, at 58.
61. *Id.*

approach to dispute settlement, is a process that is often confused with mediation and advisory arbitration. In practice, fact-finders do often mediate,[62] and the issuance of a fact-finder's recommendations is similar to an advisory arbitrator's award. But while public sector fact-finding has ingredients of both processes, it remains distinct in that "[t]he role of the fact-finder-neutral is situational and often he must direct his efforts from the interests of the parties to those of the public . . . ."[63]

Fact-finding has also been recommended as a substitute for the strike. This form of fact-finding would necessitate the parties agreeing to accept the fact-finder's recommendations as binding (voluntary binding arbitration) or the State Public Employee Relations Board having the authority to impose a settlement derived from the fact-finder's report. This procedure is advocated in the hope that fact-finding can fill the void left by a strike ban, in the event that mediation fails.[64] Despite the difficulties in defining what a fact-finder is and deciding what he does, there is some evidence that fact-finders are becoming an increasingly popular tool in resolving impasses and that they can be credited with a high rate of successful dispute settlement.[65]

Arbitration

The Council discussed the possibility of using arbitration as a means of impasse resolution but did not recommend compulsory arbitration as part of their proposed legislation. Rejecting the suggestion that the law should mandate arbitration, the Council reasoned that if the parties felt that their interests would be best served by settling their disputes by arbitration they could provide for this result in their negotiated agreement.

Legislation in 23 states provides for arbitration primarily as an approach to resolve disputes involving police and fire-fighters.[66] Binding arbitration would provide the needed finality to dispute settlement and it appeals to many as a substitute for the strike. Where the public employee strike cannot be tolerated, it would seem that binding arbitration would be the logical substitute for

62. McKelvey, *Factfinding in Public Employment Disputes: Promise or Illusion?*, 22 IND. & LAB. REL. REV. 528, 531 (1968-69).
63. GILROY & SINICROPI, *supra* note 37, at 58-59.
64. *Id.* at 58.
65. Fact-finding has been adopted by 20 states and the percentage of cases going to fact-finding that are resolved is ninety percent. GILROY & SINICROPI, *supra* note 37, at 58-59.
66. GILROY & SINICROPI, *supra* note 37, at 11-12, 60.

the strike.[67]

Under the Council's proposed legislation, a strike would be intolerable when a judge determines: 1.) that the strike imminently threatens public health or safety; and 2.) that there is no other feasible method of protecting public health or safety.[68] In light of these two "intolerable strike" criteria, the Council's procedures would provide for compulsory binding arbitration (without labelling it as such) in most cases involving police or fire-fighters, because there are very few substitutes for protecting the public from fire and crimes for any length of time, other than existing forces, and secondly, a strike by the police or fire-fighters would *necessarily* endanger the health and safety of the community. Binding arbitration would be the result of the Council's procedures in literally all impasses involving the protective services, without the need of an arbitrator, because of the Council's proposal that, concomitant with enjoining an intolerable strike, the court directs both parties to accept the fact-finder's recommendations.[69] The court simply imposes the "arbitration award" on the parties as if they had agreed to be bound by the fact-finders' recommendations.[70]

Although there is much conflicting discussion on the "best" method for resolving impasses in public sector collective bargaining, support for the Council's recommendations can be derived from the following excerpt, from the classic study in the area, *Pickets at City Hall.*[71]

> [W]e are unanimous in our conviction that good faith negotiations, aided if necessary by mediation and fact-finding, will in public as in private employment peacefully settle . . . [most] . . . issues in which labor and management share an interest. Making these procedures a legal requirement is the best and surest safeguard against strikes by government employees.[72]

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67. Note, *Labor Management Relations and Public Employees Engaged in Proctective Functions: Policemen and Firemen as Sui Generis*, 5 GA. L. REV. 540, 548 (1971).

68. Final Report, *supra* note 17, at 239.

69. *See* text accompanying note 56, *supra.*

70. Standoher, *A New Alternative to the Strike-Aribitration Choice*, 17 CPER 22 (June 1973) (A comparative analysis of traditional arbitration and the Assembly Advisory Council's proposals).

71. THE TWENTIETH CENTURY FUND, PICKETS AT CITY HALL: REPORT AND RECOMMENDATIONS OF THE TWENTIETH CENTURY FUND TASK FORCE ON LABOR DISPUTES IN PUBLIC EMPLOYMENT (1970).

72. *Id.* at 26.

THE COUNCIL'S RECOMMENDATIONS IN CONTEXT: OTHER STATE LEGISLATION AND TRENDS

There has been considerable activity among state legislatures in the area of public sector collective bargaining.[73]

Oftentimes legislation is written after an advisory committee, similar to the California Assembly Advisory Council, is appointed to study the needs of the particular state.[74] The experience of Pennsylvania indicates one of the reasons why there is considerable interest in this sphere of labor law.

Charles T. Douds, the Chief of Staff of the Commission which recommended Pennsylvania legislation, explained that "[i]t often requires a crisis or a critical series of events . . . to impel a government to move on a difficult and controversial issue."[75] In Pennsylvania, there was just such a series of events, which included a month-long strike of garbage collectors in York and a three-day teachers' strike in West Mifflin. Consequently, when 20,000 school teachers from throughout Pennsylvania demonstrated their support for collective bargaining for teachers and other public employes at the State Capitol, the Governor appointed a study commission to recommend legislation for a public employee bargaining law for Pennsylvania.[76]

The Pennsylvania Employee Relations Act of 1970 covers state and local employees, except police and firemen already governed by a statute requiring binding arbitration of impasses.[77] Pennsylvania law prohibits strikes by employees necessary to the functions of courts, guards at prisons or mental hospitals, and by all public employees engaged in the process of collective bargaining, which includes parties engaged in mediation and fact-finding.[78] Strikes are allowed by all other public employees except where the health, safety or welfare of the public would be endangered.[79]

The requirement that the "arsenal of weapons" be exhausted befor a strike can be instituted, and the express provisions for enjoin-

73. "We know of 129 bills in 43 states concerning public employee labor relations which have been considered during the 1971 legislative sessions. . . . [A] total of twenty-one bills became law this year." STATE PROFILES, *supra* note 2, at iii.

74. *See* Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891 (1968-69).

75. Douds, *Summary of Conference* in THE ROLE OF THE NEUTRAL IN PUBLIC EMPLOYEE DISPUTES 5 (1972).

76. *Id.* at 6.

77. PA. STAT. ANN. tit. 43, § 1101.2002 (Supp. 1973).

78. PA. STAT. ANN. tit. 43, §§ 1101.1101-02 (Supp. 1973).

79. PA. STAT. ANN. tit. 43, § 1101.1003 (Supp. 1973).

ing a strike if it jeopardizes the public, is quite similar to the Council's approach and recommendations for California.

Hawaii's recent public employee act,[80]

> provides for certification, negotiation, mediation, fact-finding with publicity for recommendations and, if the dispute continues 30 days after impasse the parties may mutually agree to arbitration by a panel of three arbitrators. If there is no agreement to arbitrate 60 days after the fact-finding board has made its finding and recommendations public, the employer submits his recommendations for settlement of the dispute and the report of the fact-finding board to the appropriate legislative body, after which the employees are free to strike unless the public employer feels there is danger to the public health and safety, in which case the board makes a recommendation and if it finds the health or safety is endangered, "the board shall set requirements that must be complied with to avoid or remove any such imminent or present danger."[81]

Municipal employees in Vermont are permitted to strike if the strike does not endanger the public safety, health, or welfare. Vermont's state employees are denied the legal right to strike but strikes by teachers cannot be enjoined unless the court finds that the commencement or continuance of a strike "poses a clear and present danger to a sound program of school education . . . ."[82]

Alaska uses a three category classification system to determine the legality of strikes by its public employees. Policemen, firefighters, jail and prison guards and hospital employees are forbidden to strike under any circumstances. A second group consists of those employees whose services may be interrupted for a period of time. Typical employees in this category would be garbage collectors and teachers. The employees in the second category are allowed to strike after mediation has proved ineffective in settling the dispute. However, these strikes are limited by a possible judicial determination that the strikes endanger the health, safety and welfare of the public. All other public employees would be permitted to strike for extended periods if a majority of the bargaining unit votes to do so.[83]

80. HAWAII REV. STAT. ch. 89, §§ 1-20 (Supp. 1972).
81. Douds, *supra* note 30, at 58.
82. VT. STAT. ANN. tit. 21, § 1730 (Supp. 1973) (municipal employees); VT. STAT. ANN. tit. 3, § 903(b) (1972) (state employees); VT. STAT. ANN. tit. 16, § 2010 (Supp. 1973) (teachers).
83. ALASKA STAT. tit. 23, § 23.40.200 (1972).

These various state laws and the Council's recommendations should be analyzed not in terms of "legalizing the right to strike," but with reference to their requirements that a legal strike can occur only after the parties have made a good faith attempt to reach a negotiated agreement and in making such an attempt have also exhausted the elaborate procedures provided to help them accomplish their negotiating task. In addition, each of these liberalized state laws specifically provides for injunctive relief if it can be proven that the commencement or continuation of a strike would be inimical to the public.

Opinion among writers in this area is divided on the issue of whether or not "the Hawaii and Pennsylvania laws [are] . . . indicative of a trend toward legalized strikes."[84] The question is not what is philosophically pleasing, which of course depends on personal biases, but rather which approach is most likely to achieve the desired goal of effective public employee-management relations and elimination of the disruptions to the community inherent in strikes by public employees. Unfortunately it is still too early to make a definite statement in answer to that question. As a recent study on dispute settlement procedure in the public sector, commissioned by the United States Department of Labor, points out:

> The debate on public employee strikes has continued for a decade. It will, no doubt, continue until experience and an analysis of that experience provides better answers than can now be provided.[85]

Although the correctness of a State's decision to liberalize its laws governing public employee strikes and provide for statutory impasse resolution procedures is still in doubt, the fact that the aforementioned states have changed their strike prohibitions and that many states are currently considering new public employee relations legislation does indicate the trend may be in the direction, if not to the degree, of the Council's recommendations.

Conclusion

In light of the growing militancy of public employee unions,[86] and the ever-increasing number of strikes in the public sector, it seems that the innovative collective bargaining laws of Hawaii, Vermont, Alaska and Pennsylvania and the similar proposals of the California Assembly Advisory Council are a more realistic way of dealing with labor relations problems in the public sector. Since

84. Gilroy & Sinicropi, *supra* note 37, at 62.
85. *Id.*
86. For a discussion of the reasons behind this growing militancy *see* ACIR, *supra* note 1, at 10.

the present laws neither legalize the right of public employees to strike, nor provide for an "arsenal of weapons" approach to resolve impasses; and since there have been repeated public employee strikes,[87] the Council's recommendation that employees could legally strike only after they have used the impasse resolution procedures outlined in the Report, or alternative procedures, would force public employees to use, at least initially, negotiating tactics and neutrals rather than economic warfare.

Currently, when an employee organization is met with sufficient frustration, which seems inherent in a "meet and confer" system,[88] the organization will advocate a strike despite its illegality. Present law cannot prevent strikes nor does it provide for a meaningful alternative for negotiations which have reached impasse. But if the parties were required to use step-by-step procedures to resolve their differences before they could strike or lockout, it is possible that an agreement would be reached before a strike commenced. Without mandating compulsory procedures or outlawing strikes, the Council's proposals, if adopted, should make it far easier to control public sector strikes while reducing their incidence.

In contrast to the present timid California public employee relations laws, the Advisory Council's recommendations are straightforward and imaginative. Although the current California political climate may not be conducive to innovative changes in regard to public sector collective bargaining laws,[89] the Assembly Advisory Council's Report should have a key role in shaping future legislation in California and perhaps elsewhere.

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87. Not only is the number of public sector strikes increasing in California, but the rate seems to be also increasing, as compared with New York. Bowen & Aussieker, *Teacher Negotiations in a Changing Environment*, 11 CPER 2, 15-16 (November 1971).

88. It was estimated that 75% of the strikes by public school teachers in California from February, 1969 to June, 1971 resulted from frustrations with the "meet and confer" provisions of the Winton Act. *Id.* at 7.

89. *See* note 24, *supra*.