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THE CHARLESTON HOSPITAL DISPUTE: ORGANIZING PUBLIC EMPLOYEES AND THE RIGHT TO STRIKE†

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INTRODUCTION

On March 20, 1969, approximately 400 nonprofessional employees (e.g., nurses' aides and orderlies), members of Local 1199B National Organizing Committee of Hospital & Nursing Home Employees, Retail Wholesale & Department Store Union (RWDSU), AFL-CIO,¹ began picketing the Medical College of South Carolina in Charleston to protest the discharge of twelve employees who had been engaged in organizational activities on behalf of the Union and their fellow nonprofessional employees.² The picketing also was an attempt to inform the public about the abominable wages and working conditions that existed at the Hospital³ as well as to gain recognition for the Union as the bargaining representative of the employees.

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¹ This local union was chartered by Local 1199, Drug and Hospital Union, (RWDSU), AFL-CIO, which represents more than 30,000 hospital workers in the metropolitan New York area. Late in 1969, Local 1199B became one of the charter locals of a new nationwide division of hospital and nursing home employees. This entity is known as the National Union of Hospital and Nursing Home Employees, a division of RWDSU, AFL-CIO. For recent commentary on the phenomenal growth and success of this new union, see Raskin, *A Union With Soul*, N.Y. Times, Mar. 22, 1970, § 6 (Magazine), at 24; Kempton, *Book Review*, N.Y. REV. OF BOOKS, Apr. 9, 1970, at 6.

² The major dispute concerned hospital employees, almost all black, and almost all female, employed by the Medical College. Although it was not widely reported at the time, some 100 nonprofessional employees, again almost all black and female, employed by the Charleston County Hospital, were also involved in the controversy. Although many of the problems encountered during the protracted strike were the same in both hospitals, that portion of this article dealing with the legal problems in the dispute in Charleston will refer to those at the State Medical College [hereinafter the Hospital].

With regard to the "status" of the employees, it was alleged by the Hospital, although never proved, that it was an instrumentality of the state, thereby rendering its employees "public." For the purposes of this article, this allegation is accepted as being true.

The right-to-work statute in South Carolina did not play any significant part in the determination of the dispute. However, South Carolina is one of the nineteen right-to-work states. The statute and its effect upon the dispute are discussed at pp. 261-62 *infra*.

³ For example, the overwhelming majority of the nonprofessional employees were

The rest of the story is now history. The strike lasted for 113 turbulent days, bringing the city of Charleston to its knees as a result of almost daily marches, rallies and boycotting of schools and downtown merchants. The city had been under martial law, with tanks and armed troops parading through the streets. A dusk-to-dawn curfew was in effect throughout most of the strike, during which time *nobody* was allowed on the streets.⁴ At the end, however, the twelve discharged employees were reinstated to their jobs; the minimum hiring rate was raised to \$1.60 an hour; wages for other employees were raised from 30 to 75 cents an hour; a shop committee of employees was recognized; a formal grievance procedure was adopted and dues to the Union are now being checked off by the Hospital on behalf of members of the Union.⁵

There were many complex factors present during the struggle which served to protract the strike. Some were political and economic in nature (*e.g.*, South Carolina's reputation for antiunionism, together with the state's inducements of low wages and tax abatements to northern industry); others were sociological or even racial in nature.⁶ However, despite these obvious factors, the state through its agents, including the governor and attorney general, maintained the posture that it was not opposed to the principle of collective bargaining, but contended

earning \$1.30 an hour when the strike began. Very few, if any, of the employees had ever received a wage increase or a promotion. There was no grievance procedure to speak of at the Hospital, other than the administrator's "door being always open to any individual who wished to discuss a problem."

⁴ For a good, capsule glimpse of some of the forces involved in the historic struggle and some of the behind-the-scenes maneuvering which led to a resolution of the strike, see Wechsler, *They Walked in the Sun*, N.Y. Post, July 24, 1969, at 37.

⁵ In addition to the "immediate" gains, a warm and strong alliance has developed between the Union and the Southern Christian Leadership Conference. As the struggle wore on, disparate elements in the civil rights and labor movements became united and lined up solidly behind the Union and the strikers. Rev. Ralph David Abernathy, President of SCLC, who was jailed twice during the long, bitter struggle, called the outcome a victory for the forces of "soul power and union power." Moreover, the effects of the enormous struggle in Charleston were, no doubt, instrumental in bringing about swiftly conducted elections at six hospitals in Baltimore, Maryland, including the giant Johns Hopkins Medical Center, all of which the Union won. Notably, the elections were held in Maryland in the absence of any state legislation providing for same. See Raskin, *supra* note 1, at 38 n.1.

⁶ The Department of Health, Education and Welfare, early in June 1969, found the Hospital to be in noncompliance with civil rights regulations that are requisite to federal funding. See 42 U.S.C. § 2000d (1964). The Hospital was found to have discriminated against Negroes by denying them equal education, employment and health opportunities. The Hospital was directed to develop an affirmative program in equal employment opportunity or else face the loss of at least twelve million dollars in federal funds. The Hospital, after a last minute attempt by Senator Strom Thurmond to have HEW drop the directive, reluctantly agreed. See Wooten, *U.S. Orders Carolina Hospital to Rehire 12 Negroes*, N.Y. Times, June 12, 1969, at 39, col. 5.

that it *could* not enter into an agreement with a union because there was no legislation in South Carolina permitting the state, or any subdivision thereof, to do so.⁷ Moreover, they argued, it was questionable whether these employees, since they were alleged to be employed by the state, had a right at all to join a union. Finally, they argued, public employees do not have the right to strike notwithstanding the absence of prohibitory legislation. Thus, it was maintained throughout the "informal negotiations," that the strike was illegal and should be ended forthwith.⁸

The historic strike in Charleston is far from being an isolated example of what is happening in hospitals⁹ and in public employment generally today,¹⁰ or in our society as a whole for that matter. The rise of public employee militancy must be considered in the context of the profound economic, political and social changes which are taking place throughout society.¹¹ This country is engaged in a war which has

⁷ This is essentially the concept of sovereignty, which is discussed at pp. 261-62 *infra*.

⁸ The Hospital obtained a temporary restraining order, *ex parte*, from the state court the day the picketing began, banning *all* picketing "at or near the Hospital." The following day the order was amended, again *ex parte*, to permit ten persons to picket "not less than twenty yards from each other." These orders remained in effect throughout the strike. Several hundred persons were arrested and tried for contempt of the court's order. The contempt trials proceeded after the case had been removed to the federal court and ultimately remanded, but no decision was ever rendered by the trial court, probably because of the infirmity of the original restraining order. See *Carroll v. Princess Anne*, 393 U.S. 175 (1968) (holding that entry of restraining order *ex parte* is void).

⁹ Speaking of union organizing, one hospital spokesman stated that the "hospital industry is on fire." BNA, LABOR RELATIONS YEARBOOK 175 (1967). In addition to the National Union of Hospital and Nursing Home Employees, there are three other international unions that are actively organizing in the hospital industry. They are the American Federation of Government Employees (AFGE), American Federation of State, County and Municipal Employees (AFSCME) and the Building Service Employees International Union (BSEIU). For an excellent discussion and analysis of the growth of unions in the hospital industry within the past decade, see A. SOMERS, HOSPITAL REGULATION: THE DILEMMA OF PUBLIC POLICY ch. IV (1969).

¹⁰ From 1962-1968 the number of persons employed by federal, state and local governments has jumped from 6.5 million to 9.5 million. BNA, LABOR RELATIONS YEARBOOK 451 (1969). Today, one of every six persons gainfully employed is a public employee. It is estimated that at the end of this decade, one of every four persons employed will be a public employee. See Weisenfeld, *Public Employees—1st or 2nd Class Citizens?*, 16 LAB. L.J. 685, 687 (1965).

Professor Harold Davey asserts that the seventies will be looked upon "in the year 2000 as 'The decade of the public sector,' taking its place along with the 1880's and the 1930's as one of the three most significant periods in the labor relations history of the nation." See Davey, *Resolving of Unrest in the Public Sector*, 20 LAB. L.J. 529 (1969).

For good analyses of why and how public employees unionism has emerged as a dominant force in our society, see Benodin, *Cross Currents in Public Employee Bargaining*, in SORRY . . . NO GOVERNMENT TODAY 181-84 (R. Walsh ed. 1969); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969).

¹¹ Professors Wellington and Winter suggest further that "just as the increase in the size of economic units in private industry fostered unionism, so the enlarging of govern-

seriously divided the people. Our cities are seething with racial tensions. Colleges and universities, formerly secure in their "ivory towers," are beginning to respond to student challenges and are permitting students to have a voice in the decision-making process that affects their lives.

Since employment in the public sector will probably be the most vital area of collective bargaining during the next decade and since it *must* be affected by the diverse forces which are present in our contemporary society, this article will examine the major problems which are confronting the public sector — first, as they existed in the Charleston strike and, secondly, and perhaps more importantly, how those problems have been treated in the past, and how they are being resolved in various parts of the country. Specifically, an examination will be made of the right of public employees to join and belong to labor unions, the right of public employees to engage in collective bargaining, the right of public employees to strike and the effect, if any, that right-to-work statutes have on these problems. Finally, the adoption of a program which would enhance collective bargaining in the public sector will be urged — a program which should vastly reduce the tensions and strife that presently exist in government employment.

THE RIGHT OF PUBLIC EMPLOYEES TO FORM AND JOIN A UNION

Throughout the Charleston strike, informal "negotiations" were carried on between representatives of the Hospital and the state of South Carolina, on the one hand, and representatives of the Union and the community, on the other.¹² One of the issues raised by the state was whether the Hospital employees involved could remain employees because they had joined a union. The state had no statute relating to collective bargaining for public employees¹³ but was re-

mental bureaucracy has encouraged public employees to look to collective action for a sense of control over their employment destiny." Wellington & Winter, *supra* note 10, at 1115. Frank Zeidler, former mayor of Milwaukee, suggests that the reasons may be partly psychological. See Zeidler, *Rethinking the Philosophy of Employee Relations in the Public Service*, in SORRY . . . NO GOVERNMENT TODAY 198 (R. Walsh ed. 1969).

¹² Because the Hospital steadfastly maintained its opposition to "recognizing" the Union, the negotiations were necessarily "informal" and without prejudice to the Hospital's position. Meetings between various groups were going on all the time. On occasion, individuals in the community purporting to be speaking "for the power structure" would seek out representatives of the Union or the SCLC (which was heavily involved in all the negotiations) in an attempt to work out a feasible settlement. Ultimately, however, it was around-the-clock, face-to-face meetings between representatives of the Hospital and of the Union which resulted in the final settlement.

¹³ South Carolina, of course, has a right-to-work law which clearly states: "It is hereby declared to be the public policy of this State that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any

lying on an opinion rendered by its attorney general in 1954,¹⁴ which held that a local school board could pass a regulation which would permit it to refuse employment to a teacher because of membership in a labor union.

Fortunately, three cases had been decided recently which affirmed the constitutional right of public employees to join a labor union. Despite such authority, however, the state steadfastly maintained its position and actually threatened to discharge all employees who had joined the union. Because of their obvious importance to the subject matter at hand, a consideration of those cases and other recent developments follows.

The McLaughlin, Woodward and Atkins Cases

*McLaughlin v. Tilendis*¹⁵ arose in Illinois after a local school board had dismissed one non-tenured teacher and had refused to hire another non-tenured teacher because of their membership in a union. The teachers sought an injunction in federal district court to prevent the school district from discriminating against teachers who engage in these activities. The court dismissed the case on the ground that the plaintiffs had no constitutional right to join a union. The Court of Appeals for the Seventh Circuit reversed, holding that the first amendment *does* confer upon individuals the *right* to form and join a labor union, and that the complaint, which alleged a violation of plaintiffs' rights under the Civil Rights Act of 1871,¹⁶ does state a claim for relief. Furthermore, the court held that the supremacy clause of the Constitution¹⁷ forbids the state from interposing the Illinois Tort Immunity Act¹⁸ as a defense to a cause of action based on a federal statute.

In *AFSCME v. Woodward*,¹⁹ a group of North Platte, Nebraska

labor union or labor organization." S.C. CODE ANN. §§ 40-46, 40-46.8 (1962) (emphasis added). The attorney general's response to his state's own law protecting the right of *all* employees to work regardless of membership or nonmembership in a labor union was simply, "[t]he law doesn't apply to public employees."

¹⁴ OP. ATT'Y GEN. No. 1778 (Dec. 23, 1964).

¹⁵ 398 F.2d 287 (7th Cir. 1968).

¹⁶ 17 Stat. 13 (1871), *as amended*, 42 U.S.C. § 1983 (1964), which provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

¹⁷ U.S. CONST. art. VI, cl. 2.

¹⁸ ILL. REV. STAT. ch. 85 (1967).

¹⁹ 406 F.2d 137 (8th Cir. 1969).

municipal street department employees brought an action in federal court, again under the Civil Rights Act of 1871, seeking damages and injunctive relief against the city commissioner, who allegedly discharged them for having joined a union. The court dismissed the action. On appeal, the Eighth Circuit reversed, citing *McLaughlin* as well as *Thomas v. Collins*.²⁰ In support of its conclusion, the court recited a long line of cases in which it had been held that the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of liberty assured by the due process clause of the fourteenth amendment, which embraces freedom of speech.²¹

At first blush, *Atkins v. Charlotte*²² appears to be a great victory for public employees everywhere. A three-judge district court *did* strike down as unconstitutional a section of a North Carolina statute which prohibited public employees, in this case firefighters, from joining unions.²³ Characterizing the section as "unnecessary to the protection of valid state interests,"²⁴ the court based its conclusion on the authority of *United States v. Robel*²⁵ and other cases contained therein. However, the court went further and found a related section of the act,²⁶ which provides that "contracts between units of government and labor unions . . . concerning public employees are . . . illegal," as protective of a "valid state interest" and upheld its constitutionality. The court apparently inferred from a legitimate state interest, *i.e.*, the protection of property and life from destruction by fire, that collective bargaining by the city of Charlotte with a union of firefighters *necessarily* destroys that protection. The fallacy of the court's reasoning is patently obvious.

²⁰ 323 U.S. 516 (1945). In this case, the Supreme Court struck down a Texas statute which required union organizers to register with the state and obtain an official card before soliciting for membership. In so doing, the Court reminded the states that they may not infringe upon the constitutional right of a union organizer to publicly advocate self-organization and collective bargaining. 323 U.S. at 533. For a related "freedom of association" case in the civil rights arena, see *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

²¹ See 406 F.2d at 139; see also *United States v. Robel*, 389 U.S. 258 (1967), wherein Mr. Chief Justice Warren, speaking for the Court, stated that "our decisions leave little doubt that the right of association is specifically protected by the First Amendment." *Id.* at 263 n.7.

²² 296 F. Supp. 1068 (D.N.C. 1969).

²³ N.C. GEN. STAT. § 95-97 (1963). Alabama, Georgia and Virginia have similar statutes. See ALA. CODE tit. 26, § 391 (1958); GA. CODE ANN. §§ 54-909 & 54-9923 (1953); VA. CODE ANN. §§ 40-65 (1950) & 40-64.2 (1970). In light of these recent decisions, it is likely that they will fall when attacked in the courts.

²⁴ 296 F. Supp. at 1071.

²⁵ 389 U.S. 258 (1967).

²⁶ N.C. GEN. STAT. § 95-9C (1963).

Other Recent Developments

In addition to recent cases which uphold the right of public employees to join a union and to seek monetary damages as well as injunctive relief under the Civil Rights Act of 1871 for any interference with that right,²⁷ there has been a discernible trend toward judicial recognition that first amendment rights of public employees extend beyond the naked right to join a union.²⁸ For example, in *State ex rel. Missey v. Cabool*,²⁹ the Supreme Court of Missouri held that not only were public employees entitled to reinstatement for having been discharged because of union activities, but also that *they have a constitutional right* to meet and confer with city officials about labor relations issues. Likewise, in *Indianapolis Education Association v. Lewallen*,³⁰ a federal district court found a duty on the part of a city school board to bargain with teacher representatives even in the absence of enabling legislation.

More recently, the Court of Appeals for the Seventh Circuit declared a section of the Chicago Police Department rules unconstitutional because it prohibited policemen from criticizing their superiors. The Police Department had argued that the rules were necessary because a police force is quasi-military in nature and depends upon rigid internal discipline for successful performance. The court was not impressed with this argument.³¹

In light of the decisions in *McLaughlin, Woodward and Atkins*, as well as the Supreme Court's language in *Robel*, there should no longer be a question as to the public employee's constitutional right to join a labor union. Consequently, any state statute which mandates the contrary should be struck down by the courts. The old concept that "public employment is a privilege and not a right" is all but dead. Once having established that right, however, the correlative right of collective bargaining for public employees, which is the next step, must be, but as yet has not been, firmly established.

²⁷ See, e.g., *Service Employees Int'l Union, AFL-CIO v. Butler*, 306 F. Supp. 1080 (W.D. Pa. 1969).

²⁸ It has been argued that we are nearing the time when men in the military will be granted the right to belong to a union and have the right of collective bargaining. See Sullivan, *Soldiers in Unions—Protected First Amendment Right?*, 20 LAB. L.J. 581 (1969); see also K. HANSLOWE, *THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT* 116-17 (1967).

²⁹ 441 S.W.2d 35 (Mo. 1969).

³⁰ 71 L.R.R.M. 2898 (S.D. Ind. 1969). See pp. 262-66 *infra* for a full discussion of public employee bargaining, with or without enabling legislation.

³¹ *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970).

COLLECTIVE BARGAINING IN THE PUBLIC SECTOR

The Concept of Sovereignty

As indicated earlier, South Carolina has no legislation which either permits or forbids collective bargaining by public employees. Nevertheless, it was argued that it would be illegal for the state to enter into a collective bargaining agreement (no less collective bargaining) with a union because without legislation it does not possess the authority to do so.

The state was relying on the ancient concept of "sovereignty." Although lexicographers have defined sovereignty as "the supreme, absolute, and uncontrollable power by which any independent state is governed" or the "supreme political authority,"³² Professor Hanslowe says that

[w]hat this position comes down to is that governmental power includes the power, through law, to fix the terms and conditions of government employment, that this power cannot be given or taken away or shared and that any organized effort to interfere with this power through a process such as collective bargaining is irreconcilable with the idea of sovereignty and is hence unlawful.³³

Of course, in modern times, "the concept has been widely modified, if not wholly abandoned."³⁴ As others have suggested, "the [sovereignty] doctrine does not preclude the enactment of legislation specifically authorizing the government to enter into collective-bargaining relationships with its employees."³⁵

Today, there are more than thirty states which have enacted legislation permitting, in some cases, *all* its public employees the right to engage in collective bargaining, while others have laws which have granted the right to limited groups such as teachers, municipal employees or firefighters.³⁶ As a matter of fact, even South Carolina enacted a law several years ago which extended collective bargaining rights to one particular group of public employees.³⁷ Moreover, it was

³² BLACK'S LAW DICTIONARY 1568 (4th rev. ed. 1968).

³³ K. HANSLOWE, *supra* note 28, at 14-15.

³⁴ *Id.* In the words of former Secretary of Labor Willard Wirtz, "[the] doctrine is wrong in theory; what's more, it won't work." See Stieber, *A New Approach to Strikes in Public Employment*, in SORRY . . . NO GOVERNMENT TODAY 242, 246-47 (R. Walsh ed. 1969).

³⁵ W. HART, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE 44 (1961).

³⁶ For a discussion of state laws which grant collective bargaining rights to public employees, see notes 47-61 and accompanying text *infra*.

³⁷ S.C. CODE ANN. § 54-21 (1962). This section grants the right to employees of the state's Ports Authority. It could be argued that a legislative enactment on behalf of some public employees and not others denies the omitted employees equal protection of the

argued in the Charleston dispute that it was the declared public policy of the state to prohibit denial of the right of *any* worker to choose a bargaining agent.³⁸ Since this policy is not *specifically* limited to employees in private industry, state and local officials necessarily have the authority to meet with representatives of such employees who join a union for the purpose of discussing wages, hours and working conditions.³⁹

In the face of this persuasive evidence, the attorney general nevertheless asserted that the remedy lies with the state legislature. He maintained the position that in the absence of enabling legislation, the state is powerless to enter into an agreement with a union.

Absence of Legislation — A Bar to Collective Bargaining for Public Employees?

The modern view has rejected this concept. The startling upsurge and development of public employee collective bargaining in recent years has not awaited the passage of enabling legislation. Municipal and state attorneys have been required to find ways to justify collective bargaining in the absence of express authorization.⁴⁰

For example, the Attorney General of Idaho concluded that municipalities have the power to enter into collective bargaining agreements if they so desire and if no local ordinance forbids it. The opinion was based on a section of the Idaho Code which gives municipalities the power to "contract and be contracted with."⁴¹ Similarly, the Arizona Board of Education agreed to engage in collective bargaining

law in violation of the fourteenth amendment. It is conceivable that the courts will adopt this approach in the future.

³⁸ S.C. CODE ANN. § 40-46 (1962) (the right-to-work law).

³⁹ This position has been adopted by the Attorney General of Indiana, another right-to-work state. See OP. ATT'Y GEN. NO. 22 (Oct. 6, 1966), reported in R. RUBIN, A SUMMARY OF STATE COLLECTIVE BARGAINING LAW IN PUBLIC EMPLOYMENT 17 (1968). See also Potts v. Hay, 229 Ark. 830, 318 S.W.2d 826 (1958); Transit Local 1338 v. Dallas Pub. Transit Bd., 430 S.W.2d 107 (Tex. Civ. App. 1968); Beverly v. Dallas, 292 S.W.2d 172 (Tex. Civ. App. 1956); wherein courts of Arkansas and Texas held that their respective right-to-work laws apply to public employees.

The legislatures of nineteen states have, in their wisdom, enacted right-to-work laws. See 4 BNA STATE LAB. LAWS (1969).

⁴⁰ The explosion in public employee bargaining within the last few years has caught several institutions off guard. For example, a Commissioner of the Bureau of Labor Statistics reported that it was "planning" to do a study of collective bargaining agreements covering all public employees. Moore, *Long-Range Program Objectives for BLS*, 92 MONTHLY LAB. REV., Oct. 1969, at 4. The Bureau has recently indicated that it is "nowhere near a completion of that study." Meanwhile, public employee organization continues to grow at the rate of 1,000 new members per day. See Anderson, *Recent Developments Involving Public Employee Organization and Bargaining*, in PUBLIC EMPLOYEE ORGANIZATION AND BARGAINING 19 (BNA ed. 1968).

⁴¹ The opinion, issued in 1959, is reported in R. RUBIN, *supra* note 39, at 17.

with a union that was selected by a majority of the teachers, despite the fact that Arizona did not have an enabling statute, although it had a right-to-work statute.⁴² It is likewise a notorious fact that cities such as Philadelphia, Toledo, and Dayton have engaged in full-scale bargaining with unions for years *in the absence of legislation*.⁴³ Finally, it was only after a bitter struggle over the right of recognition of sanitation workers, culminating with the death of Rev. Martin Luther King, that *de facto* bargaining was accomplished in Memphis, Tennessee.⁴⁴

In addition to the opinion of attorneys general and the sheer necessity of "dealing with unions" by governments because of emergency situations, like those in Memphis and Charleston, or because of economic power, a number of courts have likewise concluded that *any* governmental body has the implied authority to enter into collective bargaining with its employees in the absence of express legislative authority.⁴⁵

It would appear, therefore, that the conventional opinion, adhering to the view that unless the public employer is expressly authorized to recognize and bargain collectively with unions it cannot be required to do so, is on the wane. In those instances where state and local governments fail to enact legislation to extend collective bargaining to their public employees in the future, it can only be hoped that the modern view will prevail. Moreover, it would seem that such interpretations will soon become less imperative as increasing numbers of state and local bodies enact collective bargaining statutes for public employees.

Laws Governing Collective Bargaining by Public Employees

Section 2 (2) of the National Labor Relations Act states that "the term 'employees' [does] not include any State or political subdivision thereof."⁴⁶ Thus, even though his counterpart in private industry has

⁴² BNA GOV'T EMPL. REL. REP. NO. 231, at B-8 (1968).

⁴³ See Wasserman, *Resolving of Unrest in the Public Sector*, 20 LAB. L.J. 553, 556 (1969). Mr. Wasserman, an official of AFSCME, notes further that the "history, development and growth of [the] union is predicated on *de facto* bargaining; that is, bargaining without the benefit of law." *Id.* at 557.

⁴⁴ Apparently Memphis has not learned its lesson well. Even today, the city refuses to recognize or bargain with representatives of its police and fire services. See BNA GOV'T EMPL. REL. REP. NO. 248, at B-9 (1968).

⁴⁵ See, e.g., *Indianapolis Educ. Ass'n v. Lewallen*, 71 L.R.R.M. 2898 (S.D. Ind. 1969); *Norwalk Teachers Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951); *Illinois Educ. Ass'n v. Board of Educ.*, 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966); *Louisville Fire Fighters v. Burke*, BNA GOV'T EMPL. REL. REP. NO. 357, at B-12 (Ky. Cir. Ct. 1970); *IBEW v. Farmington*, 75 N.M. 393, 405 P.2d 233 (1965); *Civil Serv. Forum v. N.Y.C. Transit Authority*, 3 Misc. 2d 346, 151 N.Y.S.2d 402 (Sup. Ct. Kings County 1956).

⁴⁶ 29 U.S.C. § 152(2) (1964).

enjoyed the protection of the Act since its passage in 1935, the right of the public employee to enjoy the fruits of collective bargaining has been left to the whim and caprice of the states and municipalities. The first state to enact comprehensive legislation for employees in the public sector was Wisconsin, and that was not accomplished until 1959.⁴⁷ The "enlightened" state of New York did not enact its Taylor Law until 1967.⁴⁸ More depressing is the fact that even today only nineteen states have comprehensive collective bargaining laws defining public employment labor relations.⁴⁹ Twenty-one other states have granted the right to *some* employees at the local level to organize and bargain collectively.⁵⁰

A cursory examination of the various state laws reveals immediately a wide variety of dealings with public employees. Some states allow their employees to organize and deal collectively with the state, while forbidding employees of local jurisdictions the same rights. Other states allow local employees the right to organize and bargain but forbid the same right to state employees. Some laws extend only to certain groups of employees such as teachers, firefighters or nurses. Others simply make it lawful for public officials to "meet and confer" with employee representatives.

Arvid Anderson, Chairman of the Office of Collective Bargaining in New York City and former Chairman of the Wisconsin Employee Relations Board, warns that unless the states move swiftly to enact legislation that provides orderly procedures to deal with the causes of public employee unrest, the federal government most likely will.⁵¹ Mr. Ander-

⁴⁷ See R. RUBIN, *supra* note 39, at 48; see also McKelvey, *Fact-Finding: Promise or Illusion?*, 22 IND. & LAB. REL. REV. 528, 531 (1969). The original Wisconsin law covered only municipal employees. WIS. STAT. § 111.70 (1959). The act was not amended to cover state employees until 1967.

⁴⁸ N.Y. CIV. SERV. L. §§ 200-12 (McKinney supp. 1970). Until the passage of this law, all public employees in New York State had no effective means of enjoying collective bargaining because the state's labor relations act was expressly inapplicable to governmental employees. See N.Y. LAB. L. § 715 (McKinney 1963). It is interesting to note, however, that Mayor Wagner, in the late fifties, established by executive order one of the first codes of labor relations, in this instance for employees of the city of New York. See Walsh, *Background*, in SORRY . . . NO GOVERNMENT TODAY 154, 155 (R. Walsh ed. 1969).

⁴⁹ See ABA Comm. on State Labor Law, BNA GOV'T EMPL. REL. REP. RF-5, at 61-201 (1970).

⁵⁰ See Walsh, *supra* note 48, at 154. For a complete analysis of all the state statutes, see M. MOSKOW, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 72-79 (1970); Goldberg, *Labor-Management Relations Laws in Public Service*, MONTHLY LAB. REV., June 1968, at 48. For the full text of each statute, see BNA GOV'T EMPL. REL. REP. RF-2, at 51-1011.

⁵¹ Address by Arvid Anderson, Symposium on Labor-Management Relations in the Public Sector, the University of Kentucky Labor Education Center, Nov. 14, 1969. On April 30, 1970, Congressman Gilbert of New York introduced a bill, entitled "A National Public Employees Relations Act," to fill the void left by the states. H.R. 17383, 91st Cong., 2d Sess. (1970).

son argues that, since the Supreme Court in *Maryland v. Wirtz*⁵² has reaffirmed broad federal authority under the commerce clause⁵³ to regulate conditions of employment for state and local schools by bringing them under the Fair Labor Standards Act,⁵⁴ all that would be required to extend the principles of the Taft-Hartley law⁵⁵ to state and local employees would be for Congress to delete the exemption for state and local political subdivisions.

The major federal "legislation" in the area of collective bargaining for United States Government employees is Executive Order No. 11491.⁵⁶ Although the order grants the right of collective bargaining to "employee organizations of their own choice" (not called "unions"), employees have discovered that the executive branch retains the right to determine which issues are bargainable. The executive order is not, by any means, the "Magna Carta" for federal employees in the sense that the Wagner Act⁵⁷ was for employees in the private sector. The recent postal workers' strike certainly attests to this proposition. However, in the wake of that strike, Congress enacted the Postal Reorganization Act,⁵⁸ which establishes the United States Postal Service as an independent government agency and is expected to usher in a new era of collective bargaining for some employees in the federal sector.

The outlook in other arenas is also encouraging. Various governor's commissions have been created within the past few years to recommend and, in some cases, revise public employee laws.⁵⁹ A recent survey reveals that, in the year 1969 alone, nine states enacted legislation granting broad collective bargaining rights to various groups of public employees.⁶⁰ In 1970, Hawaii and Pennsylvania enacted the first com-

⁵² 392 U.S. 183 (1968).

⁵³ U.S. CONST. art. I, § 8.

⁵⁴ 29 U.S.C. § 201 *et seq.* (1964).

⁵⁵ Labor Management Relations Act, 61 Stat. 136 (1947), *amended and codified*, 29 U.S.C. § 141 *et seq.* (1964).

⁵⁶ 34 Fed. Reg. 17605 (1970). This recent order replaced Executive Order No. 10988, 27 Fed. Reg. 551 (1962), promulgated by President Kennedy. The improvements over its predecessor have been described as "insignificant." See Address by Plato E. Papps, in BNA GOV'T EMPL. REL. REP. No. 367, at A-8 (1970).

⁵⁷ National Labor Relations Act, 49 Stat. 449 (1935), *amended and codified*, 29 U.S.C. § 151 *et seq.* (1964).

⁵⁸ 39 C.F.R. § 111 *et seq.* (1970).

⁵⁹ See, e.g., Maryland Study Commission, BNA GOV'T EMPL. REL. REP. No. 278, at AA-1 (1969); Connecticut Commission, BNA GOV'T EMPL. REL. REP. No. 81, at D-5 (1965); Pennsylvania Commission, BNA GOV'T EMPL. REL. REP. No. 251, at E-1 (1968).

⁶⁰ Mitchell & Sorenson, *State Labor Legislation Enacted in 1969*, MONTHLY LAB. REV., Jan. 1970, at 48, 51-52. Four of the nine states, Nebraska, South Dakota, New Hampshire and Nevada, enacted public employment legislation for the first time in 1969; whereas Maine, Oregon, Michigan, Vermont, and Washington substantially broadened their coverage last year.

prehensive laws granting the right to strike for *all* public employees, except where such strike would endanger public health and safety.⁶¹ However, with the exception of these few states, public employees do not have the right to strike. The question is: in the light of past experience, does this constitute sound labor relations policy?

STRIKES BY EMPLOYEES IN THE PUBLIC SECTOR

The Effectiveness of "No Strike" Legislation

Although our national labor policy, as set forth in the National Labor Relations Act⁶² and the Norris-LaGuardia Act,⁶³ considers the right to strike as a fundamental proposition for employees in private employment, there is something sacrosanct about public employment which makes strikes against the government a cardinal sin.

New York's Taylor Law is typical of state statutes as they relate to the issue of the right to strike. The applicable section of this law provides that "[n]o public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage or condone a strike."⁶⁴ At the federal level, strikes by employees of the United States are strictly prohibited on the theory that any such strike would endanger the nation's health and security.⁶⁵ Moreover, until recently, the mere "assertion" of the right to strike by a federal employee carried with it certain criminal sanctions.⁶⁶

The Taylor Law⁶⁷ has not been very successful in preventing strikes. Ten days after the law took effect, New York City teachers went on strike. Since that time the teachers have gone out again and so have the city's sanitation workers. The recent strike by federal postal workers to win long-overdue wage increases is an indication that

⁶¹ Hawaii Act 171, L. 1970 (effective July 1, 1970); Pa. S.B. 1333, L. 1970 (effective Oct. 21, 1970).

Additionally, Vermont permits strikes by municipal employees so long as they do not endanger the health, safety and welfare of the public. VT. STAT. ANN. tit. 21, § 1704 (Supp. 1969). Montana also prohibits strikes in private or *public* hospitals *only* if there is another strike at a hospital within a radius of 150 miles. MONT. REV. CODES ANN. tit. 41, § 2209 (Supp. 1969).

⁶² 49 Stat. 449 (1935), *amended and codified*, 29 U.S.C. § 151 *et seq.* (1964).

⁶³ 47 Stat. 70 (1932), *amended and codified*, 29 U.S.C. §§ 101-115 (1964). This act is also referred to as the Federal Anti-Injunction Act.

⁶⁴ N.Y. CIV. SERV. L. § 210 (McKinney supp. 1970).

⁶⁵ See Taft-Hartley Act § 305, 61 Stat. 160 (1947); *cf.* 5 U.S.C. § 7311 (Supp. IV 1969).

⁶⁶ A three-judge panel of a federal district court declared that portion of the statute which prohibited the "assertion" of the right to strike by any federal employee to be in violation of the first amendment. See National Ass'n of Letter Carriers v. Blount, 305 F. Supp. 546 (D.D.C. 1969). The Government recently withdrew its petition for certiorari. See BNA GOV'T EMPL. REL. REP. NO. 365, A-10 (1970).

⁶⁷ In 1967, this legislation replaced the unworkable Condon-Wadlin Act, 1958 N.Y. Sess. Laws, ch. 790, because of the stringency of the latter's penalties.

employees of the federal government can no longer be counted upon to sit idly by while their brethren in state and local government, not to mention private industry, continue to make substantial gains by striking. Recent studies prove that the frequency and duration of strikes by public employees have increased.⁶⁸ In short, when employees are convinced that they are receiving unfair treatment they will strike, regardless of permissive or prohibitory legislation.⁶⁹

The public employee unions are beginning to revise former policy positions and are now asserting the right to strike. For example, in 1966 the International Executive Board of AFSCME adopted this position:

AFSCME insists upon the right of public employees . . . to strike. To forestall this right is to handicap the free collective bargaining process. Whenever legal barriers to the exercise of this right exist, it shall be our policy to seek the removal of such barriers. Where one party at the bargaining table possesses all the power and authority, the bargaining becomes no more than formalized petitioning.⁷⁰

In 1967, the essentially conservative New York Civil Service Employees Association rescinded their nineteen year no-strike pledge.⁷¹ Likewise, the American Federation of Government Employees, the Firefighters, the Postal Workers Unions, and such "professional" employee organizations as the National Education Association⁷² and the American Nurse's Association⁷³ have followed this path.

Leading Authorities and Officials Support Public Employee Right to Strike

The trend toward permissibility of strikes by public employees is by no means restricted to public employee unions. The leading authority who asserts this position is Theodore Kheel, noted mediator

⁶⁸ See BLS BULL., WORK STOPPAGES IN GOVERNMENT, 1958-1967 (1968) (Table I); see also WORK STOPPAGES IN GOVERNMENT, 1958-1969, CONG. QUARTERLY 843-44 (1970). According to these studies, the number of strikes each year by public employees has substantially increased over those of the previous year and the number of persons involved each year has dramatically risen.

⁶⁹ In those states in which local governments are required to recognize and bargain with unions, recognitional strikes have virtually been eliminated. On the other hand, it has been argued that those states which require only that employers "meet and confer" with the union, have perhaps aggravated the strike problem. See Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 439 (1970).

⁷⁰ Policy Statement on Public Employee Unions; Rights and Responsibilities, Adopted by International Executive Board of AFSCME, AFL-CIO, July 26, 1966, in SORRY . . . NO GOVERNMENT TODAY 67-68 (R. Walsh ed. 1969).

⁷¹ See A. THOMPSON, STRIKES AND STRIKE PENALTIES IN PUBLIC EMPLOYMENT 9 (1967).

⁷² *Id.* at 9-10.

⁷³ A. SOMERS, *supra* note 9, at 62.

and labor attorney. At a labor conference concerning public employment last year, Mr. Kheel stated that "[t]he most effective technique to produce acceptable terms to resolve disputes in voluntary agreements between groups is collective bargaining even though it involves conflict and the possibility of work disruption. There is no alternative."⁷⁴

Donald H. Wollett, former counsel to the National Education Association, wrote in 1964, that "strikes are impermissible in any governmental bargaining system."⁷⁵ In 1968, he admitted that "[e]xperience has taught me that I was wrong. It is no longer clear to me why the legality of a strike by bus drivers, for instance, should depend on whether their employer is a municipal corporation or a privately owned company."⁷⁶

Representative of this philosophy in the academic community are the following remarks of Professor Clyde Summers:

No democratic society has been successful in preventing strikes by public employees. We're going to have them or we're going to be involved in different kinds of economic conflict that will be more difficult to handle. . . . We can bear wide ranges of economic conflict without collapsing, and we must learn to use these situations in a constructive fashion when they arise.⁷⁷

Sterling Spero, one of the forerunners of the contemporary views of public employee unions, prophesied more than twenty years ago that

[w]hen the state denies its own employees the right to strike merely because they are its employees, it defines ordinary labor disputes as attacks upon public authority and makes the use of drastic remedies, *and even armed forces* the only method for handling what otherwise might be simple employment relations.⁷⁸

Raymond Male, Commissioner of Labor and Industry, New Jersey, speaking on behalf of public employees' right to strike, noted that "it

⁷⁴ Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 942 (1969). Mr. Kheel goes on to suggest that where a "bona fide emergency" exists and there is a threat to the health and safety of the community, then perhaps a cooling-off period similar to that provided for under Taft-Hartley might be invoked.

⁷⁵ Wollett, *The Public Employee at the Bargaining Table: Promise or Illusion?*, 15 LAB. L.J. 8, 12 (1964).

⁷⁶ Wollett, *The Taylor Law and the Strike Ban*, in PUBLIC EMPLOYEE ORGANIZATION AND BARGAINING 35 (BNA ed. 1968). Similarly, it may be argued that nurses in private hospitals are as essential to the health of their patients as nurses in public hospitals. The same thing is true for employees of public utilities. They are perhaps even more "essential" than their brethren in public employment.

⁷⁷ Address by Professor Clyde Summers, Sixth Annual Midwest Labor Law Conference, Columbus, Ohio, Oct. 3, 1969.

⁷⁸ S. SPERO, *THE GOVERNMENT AS EMPLOYER* 16 (1948) (emphasis added).

may be more critical to have the weapon available to workers to alert management, government, the customers of the government, and the public that they must do something; they cannot go on ignoring the problem."⁷⁹ James C. O'Brien, Personnel Director of the Department of Health, Education and Welfare has predicted the possibility of official approval of federal employee strikes "especially in situations not too closely tied to the national welfare."⁸⁰ United States Civil Service Commissioner Robert E. Hampton recently told the Convention of the National Association of Internal Revenue Employees that the "Commission soon will review the law prohibiting strikes by federal employees to determine whether the provisions are relevant to the times in light of the postal and air traffic controllers strikes earlier this year."⁸¹

The last word on this subject was perhaps uttered by Arvid Anderson a few years ago at the Twenty-First Annual Conference on Labor at New York University:

I am convinced that those who seek the resolution of all public employee disputes or critical private sector disputes with guarantees against a strike under any conditions are seeking an illusion in a free society. The only absolute guarantee against strikes in public employment or in critical private services is a police state.⁸²

Progress at the State Level

Four states have already codified the right of public employees to strike, absent certain emergency conditions.⁸³ In addition, the legislature of the state of Maryland⁸⁴ is studying a proposal by a task force

⁷⁹ Male, *Labor Crises and the Role of Management*, in DEVELOPMENTS IN PUBLIC EMPLOYEE RELATIONS 104, 109 (1965). In other words, by giving government employees a false sense of security, the strike prohibition very often provokes the very result it seeks to prevent. See, e.g., *School Dist. v. Holland Educ. Ass'n*, 380 Mich. 314, 157 N.W.2d 206 (1968), wherein the Supreme Court of Michigan denied an injunction against a teacher's strike, questioning the school district's "good faith" during the negotiations.

⁸⁰ See A. THOMPSON, *supra* note 71, at 10. Professor Jean McKelvey shares Mr. O'Brien's views and predicted more than a year ago that the states would soon legalize strikes by public employees. See McKelvey, *supra* note 47, at 543. Moreover, if the federal and state governments fail to provide this right to public employees it would seem that, here too, public employees are being denied equal protection of the law. See note 37 *supra*; see also *Anderson Fed. of Teachers v. School City*, — Ind. —, —, 251 N.E.2d 15, 18 (1970) (dissenting opinion).

⁸¹ Address by Robert E. Hampton, National Ass'n of Internal Revenue Employees Convention, Buffalo, New York, Sept. 4, 1970.

⁸² PROCEEDINGS OF N.Y.U. 21ST ANN. CONF. ON LABOR 460 (T. Christenson ed. 1969). Moreover, as has been pointed out by Allan Weisenfeld in reference to the 1969 steelworkers' strike in Bilbao, Spain, "even in totalitarian societies where all strikes are legally prohibited, strikes nevertheless occur." Weisenfeld, *Public Employees Are Still Second Class Citizens*, 20 LAB. L.J. 138, 139 (1969).

⁸³ See note 61 and accompanying text *supra*.

⁸⁴ Maryland Study Commission, BNA GOV'T EMPL. REL. REP. NO. 278, at AA-1 (1969).

which has recommended that strikes by public employees be permitted except "where the health and safety of the general public is endangered."

In 1969, the Labor Law Committee of the Ohio State Bar Association recommended repeal of the Ferguson Act⁸⁵ which prohibits strikes by public employees.⁸⁶ It recommended that certified unions be given the right to strike in nonessential occupations.⁸⁷ Additionally, Connecticut,⁸⁸ Michigan⁸⁹ and New Jersey⁹⁰ are studying recommendations by their respective state commissions which revise present public employment laws; these recommendations *are silent on the banning of strikes*.

It is desirable and probable that this "softening" trend by the states will continue and accelerate over the next few years. It is not inconceivable that by the end of this decade almost all public employees will enjoy the right to strike except where the public health and welfare would be endangered.

The Canadian Experience

In 1967, the Dominion of Canada enacted labor legislation on behalf of all of its federal employees.⁹¹ This legislation may very well prove to be a model for this country's future labor relations with its government employees. The Act covers more than 200,000 employees, from scientists to general laborers, exempting only the Royal Canadian Mounted Police. It is administered by a tripartite board composed of government, labor and neutral members. The provisions with respect to impasse procedures are most unusual. Prior to the commencement of bargaining the bargaining agent has an option: it may decide either to refer all contract disputes to binding arbitration or it may choose to submit to a conciliation procedure with the ultimate right to strike. The right to strike is inhibited only slightly by considerations of national safety or security.

⁸⁵ OHIO REV. CODE ANN. §§ 4117.01-4117.04 (Baldwin 1969).

⁸⁶ See Burton & Krider, *supra* note 69, at 437.

⁸⁷ Professors Burton and Krider suggest that the governmental services can be divided into these categories:

(1) *essential services* — police and fire — where strikes immediately endanger public health and safety; (2) *intermediate services* — sanitation, hospitals, transit, water, and sewage — where strikes of a few days might be tolerated; (3) *non-essential services* — streets, parks, education, housing, welfare and administration — where strikes of indefinite duration could be tolerated.

Id. at 427.

⁸⁸ Connecticut Commission, BNA GOV'T EMPL. REL. REP. No. 81, at D-5 (1965).

⁸⁹ Michigan Commission, BNA GOV'T EMPL. REL. REP. No. 181, at F-2 (1967).

⁹⁰ New Jersey Commission, BNA GOV'T EMPL. REL. REP. No. 229, at D-6 (1968).

⁹¹ Public Service Staff Relations Act, Can. Stat., ch. 72 (1967).

Thus far, the Act has worked quite well. Very few unions have in fact opted for the right to strike.⁹² A national postal union, however, did exercise the strike option a few years ago. After conciliation efforts failed to bring the parties together, 25,000 federal postal workers struck the nation for twenty-two days. Although the public was terribly inconvenienced during this period, no state of emergency was declared, nor were the Royal Mounted Police called in to break the strike. On the contrary, a special mediator was appointed by the tripartite board, and he helped the union and the government reach a voluntary agreement.⁹³

CONCLUSIONS AND RECOMMENDATIONS

With the exception of the Southern states, there is an indisputable trend in this country toward recognition of the right of public employees to deal with their employers through representatives of their own choosing. However, many states which have chosen to enact such legislation provided inadequate machinery for true collective bargaining.

There is no substitute for *meaningful* collective bargaining. The double standard in our national labor policy, as it relates to the private sector and the public sector, should be eliminated. Accordingly, the policy of our Government, which encourages "the practice and procedure of collective bargaining and . . . the exercise . . . of full freedom of association, self-organization, and designation of representatives . . . for the purpose of negotiating the terms and conditions of . . . employment,"⁹⁴ must be made applicable to public employees. The National Labor Relations Act can be simply amended so that "employees of any State or political subdivision thereof" will no longer be exempt from the Act.

As an alternative, it is suggested that the federal government take a long, hard, serious look at the public employee legislation enacted by the Canadian government. Bargaining to finality in the public sector in Canada has proved to be not only desirable but also workable. It can work here too.

Finally, it is probable that the issue of the right to strike for public employees will recede into the background and become incidental to the bargaining process once sanctions designed to prevent them are removed. As some have predicted,

⁹² See Arthurs, *Collective Bargaining in the Public Service of Canada*, 67 MICH. L. REV. 971 (1969).

⁹³ *Id.* at 992-93.

⁹⁴ National Labor Relations Act § 1, 29 U.S.C. § 151 (1964).

[s]trikes in the public sector will be no more frequent, probably less, than in the private sector and cause no greater inconvenience and dislocation. . . . It is the denial of the right to strike in the public sector . . . which invites strike threats. Anti-strike laws create a tendency on the part of public managers to rely on them to bail them out, and hence, they tend to contribute little to help solve the problems before the bargainers.⁹⁵

However, until such time as this basic right is uniformly accepted, it is recommended that the states follow the approach recently adopted by Hawaii and Pennsylvania, *i.e.*, permit strikes by all public employees except where such a strike immediately endangers public health and safety.⁹⁶

We must accept the fact, and accept it now, that strikes will not be eliminated in a free society. Once our governments realize this basic fact of economic life, we can begin to make collective bargaining work in the public sector. Time and energy devoted to the prevention of strikes by public employees is time and energy we can ill afford to spend. Improving the procedures and practice of collective bargaining for public employees across the country is a wiser investment in the future.

⁹⁵ Weisenfeld, *supra* note 82, at 143-44.

⁹⁶ The National Committee for Equal Justice for Public Employees has just been established to coordinate a drive in the states to enact legislation permitting strikes by public employees except where the public health and safety is involved. Former Attorney General Ramsey Clark is the chairman of the Committee. See BNA GOV'T EMP'L. REL. REP. No. 363, at B-8 (1970).