

1973

Public Employee Collective Bargaining in Florida -- Past, Present and Future

Raymond G. McGuire

Florida State University College of Law

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Law Commons](#)

Recommended Citation

Raymond G. McGuire, *Public Employee Collective Bargaining in Florida -- Past, Present and Future*, 1 Fla. St. U. L. Rev. 26 (2014) .
<http://ir.law.fsu.edu/lr/vol1/iss1/2>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

PUBLIC EMPLOYEE COLLECTIVE BARGAINING IN
FLORIDA—PAST, PRESENT AND FUTURE

RAYMOND G. MCGUIRE*

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	28
II. COLLECTIVE BARGAINING RIGHTS OF PUBLIC EMPLOYEES IN FLORIDA	34
<i>A. Pre-1968 Constitutional Revision</i>	34
<i>B. Post-1968 Constitutional Revision</i>	40
<i>C. Post-1968 Legislative Developments</i>	56
III. ANALYSIS OF H.R. 3314	59
<i>A. Summary of Bill</i>	59
1. <i>Mechanisms for Administration</i>	59
<i>a. The Public Employee Relations Commission</i>	59
<i>b. Regulation of Public Employee Organizations</i>	60
2. <i>Representation Procedures</i>	60
3. <i>Collective Bargaining Procedures</i>	61
4. <i>Impasse Resolution</i>	62
5. <i>Unfair Labor Practices</i>	63
6. <i>Strikes and Strike Penalties</i>	63
7. <i>Miscellaneous</i>	64
<i>B. Matters of Representation</i>	64
1. <i>Procedure for Selecting a Bargaining Agent</i>	64
2. <i>Procedures for Unit Determination</i>	73
<i>C. Matters of Collective Bargaining</i>	77
1. <i>Mechanics of Bargaining</i>	77
2. <i>The Structure and Subjects of Bargaining</i>	79
<i>a. Structure of Bargaining</i>	79
<i>b. Subjects of Bargaining</i>	86
3. <i>Procedures for Impasse Resolution</i>	90
<i>D. Administration of the Collective Bargaining Agreement</i>	96
1. <i>Relationship of the Collective Bargaining Agree- ment to Civil Service Systems</i>	96
2. <i>Analysis of Grievance Procedure</i>	99
<i>a. Minority Unions</i>	101
<i>b. Individuals</i>	102

c. <i>Civil Service System</i>	104
d. <i>Bargaining</i>	105
E. <i>Unfair Labor Practices</i>	107
1. <i>Employer Practices</i>	107
2. <i>Employee Organization Practices</i>	110
3. <i>Unfair Labor Practice Procedures</i>	110
F. <i>Status of Strikes and Strike Penalties</i>	111
G. <i>Procedure for Appeals</i>	115
H. <i>Analysis of Miscellaneous Provisions</i>	119
1. <i>Local Option</i>	119
2. <i>Government in the Sunshine</i>	121
3. <i>"Check-Off"</i>	123
IV. <i>SUMMARY AND CONCLUSIONS</i>	125
A. <i>The Impact on Union Membership</i>	126
B. <i>The Effect on the Fisc</i>	127
C. <i>The Impact on Control of Public Institutions</i>	128

PUBLIC EMPLOYEE COLLECTIVE BARGAINING IN FLORIDA—PAST, PRESENT AND FUTURE

I. INTRODUCTION

During the 1960's, unrest among public employees in Florida, as well as in the rest of the nation, increased significantly.¹ Although there was no recorded public employee work stoppage in Florida in the period prior to 1960, a total of twenty-five strikes idled some 31,000 public employees, causing a loss to the public employers of over 400,000 man-days during the 1960-1969 period.² The most significant of these work stoppages involved a strike which was called by the Florida Education Association³ in February 1968, and which was joined by over 35,000 public school teachers.⁴ Although "job actions" by teachers were not at that point unknown in Florida⁵ and were

*Associate Professor of Law, Florida State University. B.S., Canisius College, 1960; LL.B., Harvard, 1964; LL.M., Columbia, 1968.

The author served as a consultant to the Committee on Manpower and Development of the Florida House of Representatives during the 1971 and 1972 legislative sessions. The assistance in the preparation of this article of Mr. Thomas G. Pelham, a member of the Florida Bar, is gratefully acknowledged.

1. *See* Work Stoppages in Government, 1958-68, BNA GOV'T EMPLOYEE REL. REP. REFERENCE FILE 71:1011 (1970). It is reported that:

Over the period, 1958 to 1968, the number of government strikes rose from 15 to 254, workers involved from 1,700 to 202,000, and man-days of idleness from 7,500 to 2.5 million.

... Since 1966 the rate of increase [of strikes] has accelerated. The number of work stoppages and workers involved were each 25 percent higher in 1967 than in 1966. In 1968, strikes exceeded those of the previous year by 40 percent and there were 50 percent more workers involved than in 1967.

Id.

2. FLA. HOUSE COMM. ON LABOR AND INDUSTRY, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT 15 (1970) [hereinafter cited as STUDY REPORT]. The statistics, according to the report, have been "derived from information available." Their accuracy is somewhat questionable. In Table II it is indicated that there were six work stoppages in Florida during 1968. *Id.* In Table IV selected strikes of county and municipal employees are listed. *Id.* at 18. The table, however, fails to mention the state-wide teacher strike of 1968. A report issued by the Bureau of Labor Statistics charts nineteen strikes in Florida up to the end of 1968, involving over 33,000 employees, resulting in over 380,000 idle man-days. *See* Work Stoppages in Government, 1958-68, *supra* note 1, at 71:1023-25.

3. The Florida Education Association (F.E.A.) is an affiliate of the National Education Association (N.E.A.), the largest professional association or union of teachers in the country. *See* note 22 *infra*.

4. For a summary of the reasons leading to the strike, see St. Petersburg Times, Feb. 15, 1968, p. 1A, col. 1; *id.*, Feb. 16, 1968, p. 10A, col. 3.

5. In September 1967, 2,800 teachers in Broward County resigned in a pay dispute; in the same month, a threatened strike by 2,000 Pinellas County teachers was averted by a court injunction; and in December 1967, over 700 teachers in Bay County struck for five days because of salary reductions. STUDY REPORT 16.

on the increase in other sections of the country,⁶ Florida was the first state in the nation to experience a state-wide teachers' strike.⁷

The emotional shock experienced by the public during and after the teachers' strike provoked a re-examination of the laws regulating the relationship of public employees and public employers.⁸ Although the school boards had used the traditional judicial remedies available to the struck public employer, these had to be sought by each local school board to meet what was essentially a state-level problem.⁹ More importantly, the duties and obligations of local school boards with respect to teachers and their associations had been poorly defined prior to the walk-out;¹⁰ subsequent to the return of the teachers,

6. See Work Stoppages in Government, 1958-68, *supra* note 1, at 71:1021 Table 8. In public schools and libraries, the number of idle man-days as a result of work stoppages increased from 1,400 in 1959 to 2,193,800 in 1968. See also National Education Association Memorandum on Teacher Strikes, Work Stoppages, and Interruptions of Service, 1970-71, *id.* at 71:1051 (1972).

7. See St. Petersburg Times, Feb. 18, 1968, p. 1A, col. 1.

8. See note 13 *infra*. Unless otherwise indicated, citations throughout this article to Florida statutory provisions will be to the current edition of the Florida Statutes where there has been no change of substance in the language involved.

9. Although a number of suits were filed seeking temporary injunctions against F.E.A. local affiliates, few of them survived to trial and appeal. See St. Petersburg Times, Feb. 17, 1968, p. 8A, col. 2 and 3B, col. 1; *id.*, Feb. 18, 1968, p. 1A, col. 2. The constitutionality of FLA. STAT. § 839.221 (1971), to the extent it prohibited strikes against the government, however, was litigated in Pinellas County Classroom Teachers Ass'n v. Board of Pub. Instruction, 214 So. 2d 34 (Fla. 1968). This case arose out of a refusal of defendant's members to honor what the court found were binding employment contracts at the commencement of the 1967-1968 academic year. Since the court found in that case that the prohibition on strikes by public employees was constitutional, there was little point in appealing the injunction issued by trial courts. See 21 U. FLA. L. REV. 403 (1969).

Florida's Department of Education did become indirectly involved in legal proceedings. State School Superintendent of Education, Floyd Christian, reportedly requested the Attorney General to intervene on behalf of the state in a federal court action brought by the Dade County Classroom Teachers' Association to have the statutory prohibition of strikes declared unconstitutional. No single action was brought, however, to enjoin all teachers from striking; and in no action was the Florida Department of Education the party plaintiff.

10. Collective bargaining between local school boards and "professional associations" of teachers had been taking place prior to 1968, either pursuant to special legislation or without specific legislative authorization. The authority of the school board to bargain, however, was questionable under then existing law. See pp. 40-47 *infra*. Section 230.22 (1), however, envisioned at least a species of bargaining. The problems were circumvented to some extent by calling the collective bargaining exchanges "professional negotiations" and the resultant contract a "professional affairs agreement." But little agreement existed on the answers to interpretative problems arising under FLA. STAT. § 230.22 (1971). Could a school board recognize one employee organization as an exclusive representative of all employees; was the board obliged to bargain or merely consult; was "check-off" of organization dues permitted? These questions were eventually raised in Dade County Classroom Teachers' Ass'n v. Ryan, 225 So.

the status of the former strikers and the Florida Education Association local chapters was the subject of several lawsuits.¹¹ As a result of the strike and the ensuing litigation, therefore, the need for a clarification of the reciprocal rights and duties of teachers' organizations and school boards became obvious.

A legislative response to the problem provoked by increasing demands for bargaining rights by public employees, symbolized by the teachers' strike, was delayed by the legislature's preoccupation with constitutional revision and governmental reorganization. An early attempt at comprehensive public employee bargaining legislation, the Fleece Bill,¹² was introduced, but failed to pass, in the 1969 session. Seventeen general bills, five proposed constitutional amendments and five local bills relating to collective bargaining were introduced in the

2d 903 (Fla. 1969). See notes 44 & 45 and accompanying text *infra*. FLA. STAT. § 230.22 (1971) provides:

General powers of school board.—The school board, after considering recommendations submitted by the superintendent, shall exercise the following general powers:

(1) DETERMINE POLICIES.—The school board shall determine and adopt such policies as are deemed necessary by it for the efficient operation and general improvement of the district school system. In arriving at a determination of policies affecting certificated personnel, the school board may appoint or recognize existing committees composed of members of the teaching profession, as defined in the professional teaching practices act, §§ 231.54, 231.55, 231.57-231.59. When such committees are involved in the consideration of policies for resolving problems or reaching agreements affecting certificated personnel the committee membership shall include certificated personnel representing all work levels of instructional and administrative personnel as defined in the school code.

(2) ADOPT RULES AND REGULATIONS.—The school board shall adopt such rules and regulations to supplement those prescribed by the state board as in its opinion will contribute to the more orderly and efficient operation of the district school system.

(3) PRESCRIBE MINIMUM STANDARDS.—The school board shall adopt such minimum standards as are considered desirable by it for improving the district school system.

(4) CONTRACT, SUE, AND BE SUED.—The school board shall constitute the contracting agent for the district school system. It may, when acting as a body, make contracts, also sue and be sued in the name of the school board; provided, that in any suit, a change in personnel of the school board shall not abate the suit, which shall proceed as if such change had not taken place.

(5) PERFORM DUTIES AND EXERCISE RESPONSIBILITY.—The school board may perform those duties and exercise those responsibilities which are assigned to it by law or by regulations of the state board and, in addition thereto, those which it may find to be necessary for the improvement of the district school system in carrying out the purposes and objectives of the school code.

11. See *National Educ. Ass'n v. Lee County Bd. of Pub. Instruction*, 260 So. 2d 206 (Fla. 1972); *Board of Pub. Instruction v. State ex rel. Allen*, 219 So. 2d 430 (Fla. 1969).

12. Fla. H.R. 117 (1969).

1970 session.¹³ All of the local bills passed but were vetoed by the Governor; the general bills and proposed constitutional amendments failed to pass during the session.¹⁴ The Committee on Labor and Industry substitute for the original Fleece Bill, H.R. 3556, died in the Appropriations Committee.¹⁵

During the 1971 session, H.R. 3556 was reintroduced as H.R. 206 by Representatives Fleece and Baumgartner.¹⁶ For various reasons,¹⁷ the bill never left the Committee on Manpower and Development (the successor committee to the Committee on Labor and Industry). At the commencement of the 1972 session, an amended version of

13. The number, committee reference, and final disposition of these bills are listed in STUDY REPORT 83 Table V. Many of these were companion bills: Fla. H.R. 3556 (1970) was prefiled as the 1970 committee substitute for Fla. H.R. 117 (1969); the Subcommittee on Collective Bargaining later combined it with Fla. H.R. 3203 (1970), drafted by the Labor Law Committee of the Florida Bar, and it became Fla. H.R. 3556 (1970); Fla. H.R. 3617 (1970) was restricted to collective bargaining by policemen and firemen; Fla. H.R. 959 (1970) was a "meet and confer" type proposal, although comprehensive in its terms; Fla. H.R. 4943 (1970), a mild version of Fla. H.R. 3556 (1970), applied only to Pinellas, Hillsborough, Duval, and Dade Counties; Fla. H.R. 5013 (1970) and its companion, Fla. S. 1250 (1970), as well as Fla. H.R. 5011 (1970), and its companion, Fla. S. 1352 (1970), addressed themselves to grievance procedures for public employees; four other bills, Fla. H.R. 5012 (1970) and its companion, Fla. S. 1475 (1970), Fla. H.R. 3279 (1970), and Fla. H.R. 3149 (1970), were concerned with the regulation or prohibition of "check-off" provisions.

Five joint resolutions were introduced: Fla. S.J. Res. 1306 (1970), Fla. S.J. Res. 1336 (1970), Fla. S.J. Res. 1297 (1970), Fla. H.R.J. Res. 5037 (1970), and Fla. H.R.J. Res. 5016 (1970); all called for constitutional amendments which would have prohibited bargaining by public employees. None were passed.

Five local bills, which authorized collective bargaining by certain groups of public employees in certain municipalities, all passed the legislature but were vetoed by Governor Kirk. They were Fla. S. 1569 (1970), a comprehensive local act applicable only to employees of the City of Jacksonville; Fla. H.R. 3761 (1970), authorizing impartial mediation to resolve disputes between firemen and their employer in Pinellas County; Fla. H.R. 5518 (1970) and Fla. H.R. 5507 (1970), requiring school boards in Pinellas and Hillsborough Counties to bargain with a professional organization designated by a majority of the teachers in Pinellas and Hillsborough Counties respectively; and finally, Fla. H.R. 5233 (1970), authorizing collective bargaining by firefighters in Palm Beach County. In his veto message to the Secretary of State, Governor Kirk criticized the legislature's "piecemeal" approach to the problem of public employee relations. He stated that a public policy which "pretends" to grant collective bargaining rights to public employees is unfair, purposely misleading, and results in a frustration which ultimately manifests itself in the form of striking employees, garbage piled in the streets, unguarded prison doors, empty classrooms, and "on and on." Governor Kirk advocated instead a policy which "clearly defines the limits in which public employees can press their legitimate grievances with management." Governor Kirk did not elaborate on the precise legislative form such a policy should take. See Letter From Governor Kirk to Secretary of State Adams, July 5, 1970, on file with Secretary of State of Florida.

14. See note 13 *supra*.

15. FLA. H.R. JOUR. 81 (1970).

16. FLA. H.R. JOUR. 17 (1971).

17. See note 118 *infra*.

H.R. 206¹⁸ was introduced by the Committee on Manpower and Development as the committee bill. It passed the House but died in a conference committee at the end of the session. S. 423, however, which authorized collective bargaining between firefighters and their employers, was enacted into law as section 447.20-.35 of the Florida Statutes.

This flurry of legislative activity in Florida has had its parallel in numerous other states. Since the passage of Wisconsin's municipal employee act in 1959,¹⁹ a total of thirty-three states and the District of Columbia have enacted legislation which authorizes some species of public employee collective bargaining.²⁰ The states have, however, barely kept pace with the phenomenal growth of public employment,²¹ public employee unions,²² and the expectations and demands of the organized public sector.

All of the factors that ordinarily favor union growth—a large public payroll,²³ significant urban centers,²⁴ comparatively poor salaries and working conditions,²⁵ and apparent employer insensitivity²⁶— are

18. See note 118 *infra*.

19. Wis. Laws 1959, ch. 509.

20. For a summary of this legislation, see Seidman, *State Legislation on Collective Bargaining by Public Employees*, 22 LAB. L.J. 13 (1971).

21. See *The U.S. Economy in 1980: A Preview of BLS Projections*, Monthly Lab. Rev., April 1970, pp. 3, 17.

22. From 1960 to 1970, the American Federation of State, County and Municipal Employees increased its membership from 180,000 to 500,000 members and was expected to add another 100,000 before the end of 1970. See D. WOLLETT & D. SEARS, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT xii (Labor Relations and Social Problems, Unit Four, 1971). President Wurf reported to the General Convention of the American Federation of State, County and Municipal Employees in May and June 1972 that the Federation's membership had been growing at the rate of 1,000 new members a week and had surpassed 550,000. See Chase, *State, County and Municipal Employees Convention*, 1972, Monthly Lab. Rev., Aug. 1972, pp. 38-39.

The American Federation of Teachers, an AFL-CIO affiliate, has gone from 60,000 members in 1961 to 225,000 members in 1971. See O'NEILL, UNIONIZATION OF MUNICIPAL EMPLOYEES 1 (1970). And the most dramatic increase occurred in the National Education Association, which jumped from 465,000 to 1,000,000 members during the 1960's. See D. WOLLETT & D. SEARS, *supra*.

23. In the latest detailed census figures available, Florida, in October 1967, had 276,128 employees at the local and state level. Florida, ranking eighth in population, ranked ninth in its number of public employees. See U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CENSUS OF GOVERNMENTS, 1967, Vol. 7: *State Reports*, No. 9: *Florida*, at 8. By 1971 the number of nonfederal, public employees had increased to 351,661. See U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, PUBLIC EMPLOYMENT IN 1971, at 14.

24. Eight standard metropolitan statistical areas (SMSA) are located in Florida: (1) Fort Lauderdale-Hollywood; (2) Jacksonville; (3) Miami; (4) Orlando; (5) Pensacola; (6) Tallahassee; (7) Tampa-St. Petersburg; (8) West Palm Beach. See U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CENSUS OF GOVERNMENTS, *supra* note 23, at 9.

25. In October 1971, the average monthly earnings of full-time state and local government employees were \$645.00, eighty-five dollars below the national average of

present to some degree in Florida. Whether the growth exacerbates existing employee discontent and employer hostility will, in large measure, depend on the legal context in which the employer-union relationships are formed and carried on.

The purpose of this article is to analyze the collective bargaining rights and responsibilities of public employees and the duties of their employers, at both the municipal and state level, as these rights existed prior to the 1968 Constitution; to review the current status of the law regulating those rights and responsibilities; and finally to summarize the major features of the various proposals introduced during the past few legislative sessions as perhaps indicative of the collective bargaining law of the future. The final section of the article will consist almost entirely of a critical analysis of H.R. 3314. Although no assurances can be given at this point that the bill will become law, an exegesis of its major sections will be useful for several reasons. Not only has a version of this bill been introduced at the beginning of each of the past four legislative sessions and been the subject of debate, but it is the only collective bargaining bill that has been seriously debated.²⁷ Finally, a discussion of H.R. 3314 in terms of the issues it has confronted and attempted to resolve will provide useful insights into a spectrum of problems that must be understood before an intelligent judgment can be passed on the provisions of any future collective bargaining legislation. Although such technical discussion may fail to attract the general reader, the points there raised will be of interest to the legislator and labor law specialist.

\$730.00, and lower than the earnings of public employees in twenty-seven other states. See U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, PUBLIC EMPLOYMENT IN 1971, at 12.

26. Employer insensitivity is difficult to document, but is nonetheless a very real factor in the push for collective bargaining rights. Intimations of the kind of employer attitude that provokes employee resentment and contributes to the organization of public employees can be found in the repeated refusal of local governments to bargain with employee organizations, *see, e.g.*, notes 89 & 91 *infra*, and in the refusal of two governors to permit collective bargaining by state agencies, with former Governor Kirk expressing his order in terms calculated to irritate employees seeking bargaining rights, *see* note 118 *infra*.

Public employers at the municipal level are certainly not convinced that public employees have the right to engage in collective bargaining. An aide to the Mayor of Orlando, in response to illegal picketing of City Hall by off-duty firemen to compel recognition of their bargaining representative by the City, was quoted as stating that the union's activity was "fruitless . . . because there is nothing in the Florida Constitution that says we must recognize any union as a collective bargaining agent." St. Petersburg Times, Nov. 4, 1971, p. 2B, col. 1.

27. Of all the bills filed, this was the only one to reach the floor of the House. See note 13 *supra*.

II. COLLECTIVE BARGAINING RIGHTS OF PUBLIC EMPLOYEES IN FLORIDA

A. Pre-1968 Constitutional Revision

Prior to 1943, both the Florida Statutes and the Constitution of 1885 were silent on the right of public employees to bargain collectively or to strike against their employers. As a common law state, however, Florida presumably followed the traditional rule that, in the absence of direct legislative mandate, public employers had no obligation to bargain with the collective bargaining representative of their employees.²⁸ In addition, public employees not only had no right to, but were effectively prohibited from, engaging in concerted work stoppages against a public employer.²⁹

These principles were so well established in state and federal law that they were not seriously challenged until relatively recently.³⁰ The controverted issues during the 1940's and 1950's centered more on the right of public employees to *form* or *join* labor organizations³¹ and the right of a willing public employer to recognize or bargain with a union of his employees.³²

Many states, in response to the vigorous organizing activities of unions in the late 1930's and early 1940's, passed labor codes designed to regulate the increased union organizing and striking activities characteristic of the 1935-1945 decade.³³ These statutes were of limited

28. See, e.g., *Manchester v. Manchester Teachers Guild*, 100 N.H. 507, 131 A.2d 59 (1957); *New York City Transit Authority v. Loos*, 2 Misc. 2d 733, 154 N.Y.S.2d 209 (1956), *aff'd*, 3 App. Div. 2d 740, 161 N.Y.S.2d 564 (1957); *Cleveland v. Amalgamated Ass'n of St. Employees*, 41 Ohio Op. 236, 57 Ohio L. Abs. 173, 90 N.E.2d 711 (1949); cf. *Miami Water Works Local 654 v. City of Miami*, 157 Fla. 445, 450-51, 26 So. 2d 194, 196-98 (1946) (dictum). But see Dole, *State and Local Public Employee Collective Bargaining in the Absence of Explicit Legislative Authorization*, 54 IOWA L. REV. 539, 544-45 (1969), in which the author argues persuasively that the general power to contract possessed by state and local governmental employees should include the power to negotiate and sign collective bargaining agreements. Various reasons, summarized in Annot., 37 A.L.R.3d 1147 (1971), have been used by courts in justifying the almost universal prohibition of public employee strikes.

29. See *Miami Water Works Local 654 v. City of Miami*, 157 Fla. 445, 451, 26 So. 2d 194, 197 (1946) (dictum); *Dade County v. Amalgamated Ass'n of St. Employees*, 157 So. 2d 176, 183 (Fla. 3d Dist. Ct. App. 1963) (dictum), *appeal dismissed*, 166 So. 2d 149 (Fla. 1964), *cert. denied*, 379 U.S. 971 (1965). See also *Pinellas County Classroom Teachers Ass'n v. Board of Pub. Instruction*, 214 So. 2d 34 (Fla. 1968).

30. See, e.g., *Anderson Fed'n of Teachers Local 519 v. School City of Anderson*, 252 Ind. 558, 251 N.E.2d 15, 18 (1969) (dissenting opinion of DeBruler, C.J.), *rehearing denied*, 252 Ind. 558, 254 N.E.2d 329, *cert. denied*, 399 U.S. 928 (1970); *School Dist. v. Holland Educ. Ass'n*, 380 Mich. 314, 157 N.W.2d 206 (1968). See also Dole, *supra* note 28.

31. See *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951); [1959-1960] FLA. ATT'Y GEN. BIENNIAL REP. 241.

32. See generally Dole, *supra* note 28.

33. See 94 U. PA. L. REV. 114 n.7 (1945).

usefulness in the private sector since many of them invaded areas pre-empted by the National Labor Relations Act.³⁴ But in the attempt to regulate labor-management relations in the private sector, laws were enacted which arguably affected employees in the public sector.

In Florida, for example, the legislature, during the 1943 session, enacted legislation to regulate the activities of union officials and certain aspects of labor-management relations within the jurisdiction of the state.³⁵ Among the rights created by the new law were the rights of employees to self-organization.³⁶ Although the statute did not explicitly include public employees within the class of employees entitled to exercise the right, neither did it expressly exclude them. In the same session, the House and Senate approved Joint Resolution No. 13, which amended section 12 of the declaration of rights of the 1885 Constitution in order to protect workers from employment discrimination resulting from membership or nonmembership in a labor organization.³⁷ Again the reference to "employees" was generalized; public employees were neither included nor excluded from the section.

The possible applicability of chapter 447 and section 12 of the constitution to public employees was considered by the Florida Supreme Court in 1946. In *Miami Water Works Local 654 v. City of Miami*,³⁸

34. 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1970) [hereinafter cited as NLRA]. The doctrine of federal pre-emption in labor disputes has been the subject of myriad law review articles, many of which are listed in *THE DEVELOPING LABOR LAW 784-85 n.17* (C. Morris ed. 1971). For a recent illuminating analysis of this very complex area, see Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

The Supreme Court began to articulate the doctrine of federal pre-emption in *Hill v. Florida ex rel. Watson*, 325 U.S. 538 (1945), a case drawing into question the constitutionality of § 447.04 of the Florida Statutes. This statute purported to stipulate qualifications that had to be met by union business agents before they could act as collective bargaining representatives of employees in the state. The Court invalidated an injunction by a Florida court prohibiting a union and its business agents from acting as bargaining agents until the registration requirements were met on the ground that the state law interfered with rights guaranteed by the NLRA.

35. See FLA. STAT. ch. 447 (1971). The chapter, entitled "Labor Organizations," guarantees employees the right to join labor organizations, the right to engage in collective bargaining, and the right to engage in concerted activities; it also sets up a licensing and registration system for business agents and labor organizations and prohibits various kinds of strikes, boycotts and picketing activities.

36. FLA. STAT. § 447.03 (1971) provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

37. Fla. H.R.J. Res. 13 (1944) provides:

The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

38. 157 Fla. 445, 26 So. 2d 194 (1946). A local composed of municipal employees

the union petitioned the court to find and declare that section 12 of the declaration of rights of the Florida constitution and chapter 447 of the Florida Statutes required the City to accord the union the right to bargain in matters of wages, hours of work, and conditions of employment. The court held that neither the statute nor the constitution required the City to recognize the union for purposes of collective bargaining.

It found, for several reasons, that the statute "was meant to be operative only in the field of *private* business and industry."³⁹ First, the statute did not expressly purport to regulate government employment. Secondly, the statute authorized collective bargaining, provided for strikes, and prescribed penalties for unlawful labor practices, "strange and incongruous terms when attempted to be squared with the governmental process as we know it, or when projected into the field of municipal legislation."⁴⁰ In addition, the Miami City Charter already regulated the employees' conditions of employment. Thirdly, if the legislature had intended to abandon or revise provisions of the City Charter regulating conditions of municipal employment, "there is no reason to believe that it would not have said so in that many words, instead of leaving the matter to sheer speculation and conjecture."⁴¹ The court held, therefore, that chapter 447 did not supplant or amend, either directly or by implication, the Miami City Charter.

The court also rejected the argument that section 12 gave the right of collective bargaining to the union. As construed by the court, the right-to-work amendment did not confer the right of collective bargaining upon any group. The proviso to the section was interpreted as merely "an expression of the popular will that if the right of collective bargaining is given, an assertion of the rights contained in the main clause of the section shall not operate to deny or abridge the right to bargain collectively."⁴² Since neither federal⁴³ nor state legislation gave the union the right to bargain collectively with the City, the constitutional provision was held inapplicable to the case at bar.

in the Department of Water and Sewers instituted suit for a declaration of its collective bargaining rights in its relationship with the City of Miami. It was alleged that for over a year the City had refused to deal with the local on the ground that bargaining with a union would constitute a violation of the City Charter.

39. *Id.* at 450, 26 So. 2d at 197.

40. *Id.*

41. *Id.* at 451, 26 So. 2d at 197-98.

42. *Id.* at 452, 26 So. 2d at 198.

43. NLRA § 2(2), 61 Stat. 137 (1947), 29 U.S.C. § 152(2) (1970). This section excludes states or their political subdivisions from coverage of the NLRA.

The supreme court's decision in *Miami Water Works* has been subsequently interpreted as holding either that public employers have no constitutional right to engage in collective bargaining with their employees⁴⁴ or that public employees have no constitutional right to engage in collective bargaining with their employers.⁴⁵ These interpretations find no support in the formulations used to express the precise holdings of the court and only slight support in the obiter dicta included in Justice Sebring's opinion. The precise holdings were, first, that chapter 447 did not amend the Miami City Charter and that the Charter *did not place a legal duty* on the city to recognize the petitioner-union for purposes of collective bargaining;⁴⁶ and secondly, that section 12 did not give the *right* of collective bargaining to any group.⁴⁷

Some language was included in the opinion indicating that the City of Miami had "no authority to enter into negotiations with [a] labor union . . . and to make such negotiations the basis for fiscal appropriations."⁴⁸ But the court's judgment did not require a finding on the right of the municipal employer to enter into negotiations since the City had indicated quite clearly it had no wish to bargain with the union. Further, no authority was cited in support of Justice Sebring's dictum. No part of the opinion expressly limits the right of public employees to bargain. The only limitation derives from the

44. See [1959-1960] FLA. ATT'Y GEN. BIENNIAL REP. 241, 244. The report states: "Government has no power or authority to recognize any labor union as the representative of the employees of such government, or to bargain collectively or negotiate with any labor organization concerning hours, wages or conditions of employment, or to make such negotiations the basis for fiscal appropriations."

45. "Thus [after reviewing *Miami Water Works Local 654*] it is the established public policy in Florida that public employees and labor unions do not have any right to bargain collectively, to picket, or to strike against government, whether the government involved is state, county or municipal in character." *Id.* at 244 "Having determined that . . . the Union has not demonstrated error upon the [circuit] court's application of the Florida law which prohibits collective bargaining by and strikes against the governmental entity, we must affirm the decree upon . . . appeal" *Dade County v. Amalgamated Ass'n of St. Employees*, 157 So. 2d 176, 183 (Fla. 3d Dist. Ct. App. 1963), *appeal dismissed*, 166 So. 2d 149 (Fla. 1964), *cert. denied*, 379 U.S. 971 (1965). The district court of appeal quoted with approval a part of the order of the circuit judge which stated: "Unless clearly authorized to do so by the enactment of legislation, the plaintiffs would not be authorized and are not now authorized to enter into collective bargaining agreements, within the labor relations meaning of the term, with the defendants." *Id.* at 181. It is possible that the circuit court interpreted a demand for the "right to engage in collective bargaining in the labor relations sense" as including the right to strike, since the union in that case claimed the right to strike against the County. *Id. But cf. Pinellas County Classroom Teachers Ass'n v. Board of Pub. Instruction*, 214 So. 2d 34, 36 (Fla. 1968).

46. 157 Fla. at 451, 26 So. 2d at 198.

47. *Id.* at 452, 26 So. 2d at 198.

48. *Id.* at 451, 26 So. 2d at 197.

absence of an obligation on the part of the municipal employer to respond to a union's bargaining demand.

Even if the opinion is read as limiting the right of bargaining by a municipality because of inherent limitations in the powers delegated to it by the legislature, the decision would still stand merely as one interpreting a statutory scheme, not as an authoritative interpretation of constitutional rights. The legislature could then eliminate the alleged disability by expressly conferring on municipal government the power to engage in collective bargaining.

Whatever its ambiguities, the *Miami Water Works* decision temporarily laid to rest the question of the right of public employees to engage in collective bargaining; the decision did not, however, expressly prohibit union membership for government employees. But the court's refusal to acknowledge a right of collective bargaining, coupled with the prohibition of strikes against the government, seemed to foreclose any meaningful union activities for this employee group.

The issue of the legality of union membership remained unsettled until 1959 when the Florida legislature defined the limits of union membership for government employees. The 1959 statute prohibits government employment of any person who participates in any strike or asserts the right to strike against the government at any level or who is "a member of an organization of government employees that asserts the right to strike against" the government, "knowing that such organization asserts such right."⁴⁹ Government employees

49. FLA. STAT. § 839.221 (1971) provides in its entirety:

Governmental officers and employees; prohibited participation in strikes or membership in organizations that assert right to strike against government employer.—

(1) No person shall accept or hold any office, commission or employment in the service of the state, of any county or of any municipality, who:

(a) Participates in any strike or asserts the right to strike against the state, county or any municipality or

(b) Is a member of an organization of government employees that asserts the right to strike against the state, county or any municipality, knowing that such organization asserts such right.

(2) All employees who comply with the provisions of this section are assured the right and freedom of association, self-organization, and the right to join or to continue as members of any employee or labor organization which complies with this section, and shall have the right to present proposals relative to salaries and other conditions of employment through representatives of their own choosing. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a vocational or a labor organization.

(3) In the event that any public utility owned and operated by a private person, firm or corporation is taken over on or after May 1, 1959, by the state, a county or a municipality but in fact said person, firm or corporation maintains

who comply with these provisions, however, are guaranteed "the right to join or to continue as members of any employee or labor organization which complies with this section, and shall have the right to present proposals relative to salaries and other conditions of employment through representatives of their own choosing."⁵⁰

The nature of this right to present proposals relating to conditions of employment was somewhat unclear. According to one opinion of the Attorney General,⁵¹ the provision did not place government employees in a bargaining position similar to that of employees in private industry. Indeed, the Attorney General's interpretation of the statute would prohibit public employee membership in any organization that did not specifically disavow any claim to collective bargaining rights on behalf of such employees.⁵² In the Attorney General's opinion, the statute merely gave public employees the right to submit recommendations which their public employers had no obligation to adopt or even to consider. The Florida Supreme Court, on the other hand, later stated in *Pinellas County Classroom Teachers Ass'n v. Board of Pub. Instruction*,⁵³ that section 839.221(2) guarantees "the right to bargain as a member of a union or labor organization . . ."⁵⁴ Unfortunately, the court did not elaborate on this statement, which was not essential to its holding that the circuit court had authority to enjoin public school teachers from striking.

Meanwhile, the previously mentioned opinion of the Attorney General, as well as several other similar opinions, gave currency to

a substantial financial or operating control, said persons then employed or to be employed shall be excluded from the operation of this section.

(4) Upon the acquisition of any public utility system from a private person, firm or corporation by any state, county or municipal government, then and in that event the employees of such private person, firm or corporation other than executive or management staff, shall be eligible to be included in classified civil service and other benefit provisions and systems of that governmental unit.

50. FLA. STAT. § 839.221 (2) (1971).

51. [1959-1960] FLA. ATTY GEN. BIENNIAL REP. 241.

52. *Id.* at 245. The Attorney General found that the constitution of the union involved, a Teamsters local, asserted the right to strike. Although the executive board of the local promised not to strike the government unit involved, and the President of the International Brotherhood of Teamsters affirmed the resolution in a telegram, the Attorney General held that the "constitution of the brotherhood of teamsters is controlling." *Id.* The absence of an assertion of the right to strike would not have been sufficient. The opinion indicated that a specific disavowal of the right to strike against government in the constitution would be necessary to comply with FLA. STAT. § 839.221 (1971). *Id.* at 246. The opinion then advised the union, indirectly, that it would be well advised to avoid admitting public employees to membership. *Id.* at 246-47.

53. 214 So. 2d 34 (1968).

54. *Id.* at 36. The court was not required to rule on the constitutionality of FLA. STAT. § 839.221 (1971), since the lower court based its judgment "on the general powers of equity to prevent the breakdown of an essential aspect of government because of an unauthorized work stoppage by its employees." 214 So. 2d at 36.

the mistaken interpretation of *Miami Water Works* which read it as placing a constitutional prohibition on collective bargaining by public employees. Except for the Florida Supreme Court's gratuitous comment on the meaning of section 839.221(2) in the *Pinellas County Teachers Ass'n* case, there was little reason to believe, prior to 1968, that the *Miami Water Works* "doctrine" would be overturned. In 1968, however, the Florida constitution, including the right-to-work amendment on which the court had partially based its decision in the *Miami Water Works* case, was revised. Shortly thereafter, the Florida Supreme Court was confronted with the task of construing the new right-to-work amendment.

B. Post-1968 Constitutional Revision

In 1968, the people of the State of Florida approved a revised constitution. Section 12 was, in part, replaced by article I, section 6, dealing specifically and exclusively with collective bargaining rights.⁵⁵ The purpose of the legislature in recommending to the people the language changes in section 6 remains unclear.⁵⁶ No specific purpose can be divined from the separation of the section 12 clause into a separate section 6;⁵⁷ nor does the elimination of the proviso structure appear significant.⁵⁸

The Florida Supreme Court first interpreted article I, section 6, in *Dade County Classroom Teachers' Ass'n v. Ryan*.⁵⁹ The supreme

55. The new section states:

Right to work.—The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

56. See note 64 *infra*.

57. The applicable portion of § 12 of the declaration of rights of the 1885 Constitution states: "[P]rovided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer." Although expressed as a proviso to the right-to-work portion, the old section recognized the right to bargain and commanded that it neither be denied nor abridged—precisely what the new art. I, § 6, of the 1968 Revised Constitution does.

58. Both versions create or acknowledge a "right" to engage in collective bargaining. The addition of the final sentence prohibiting strikes by public employees adds a new part that was not present in the 1885 Constitution, but apart from the importance of the sentence as a self-contained and separable limitation on public employees (and local and state government), what color or meaning it lends to the first sentence is problematic.

59. 225 So. 2d 903 (Fla. 1969). Since the technical posture the parties were forced to assume on appeal influenced the phrasing of the opinion, if not the outcome of the case, the origins of the litigation require close attention.

In November 1968, the Dade County Education Association, together with two teachers employed by the Board of Public Instruction of Dade County (Ryan was one

court noted that in the trial below the circuit court made extensive findings of fact and conclusions of law, including the following:⁶⁰

[T]he process of collective bargaining contravenes the laws and statutes of the State of Florida, citing *Miami Water Works Local No. 654 v. City of Miami*, 157 Fla. 445, 26 So. 2d 194, 165 A.L.R. 967, and *Dade County v. Amalgamated Association of Street Electric Railway and Motor Coach Employees* (Fla. App.), 157 So. 2d 176, and that the revised Constitution of 1968 does not change the rule of the above cited cases.

The lower court's remedial order had enjoined the board from giving effect to certain disputed policy changes and from recognizing the Teachers' Association as the representative of nonmember teachers.⁶¹ The Teachers' Association appealed the final order to the supreme court. In an opinion written by Chief Justice Ervin, a unanimous court rejected the lower court's construction of article I, section 6. Stating that the circuit court had "[painted] with too broad a brush in eliminating all collective bargaining by public employees . . .," the court held "that with the exception of the right to strike, public employees have the same rights of collective bargaining as are granted private employees by Section 6."⁶² Chief Justice Ervin summarily

of the two), filed an action in the Circuit Court of Dade County, requesting, *inter alia*, an injunction prohibiting the Board of Instruction from recognizing the Dade County Classroom Teachers' Association as the exclusive bargaining agent of the teachers employed by the Board. The petitioner also sought to block the Board from entering into a collective bargaining agreement with the Education Association. In support of its petition the Education Association alleged that the Board had, in contravention of its own published policy, secretly recognized and bargained with the Teachers' Association and, after revoking the representation status of the Education Association, intended to execute a master agreement recognizing the Teachers' Association as exclusive bargaining representative of the teachers employed by the Board.

The Board took a somewhat neutral position in its answer, claiming that it was entitled to bargain with the Teachers' Association under FLA. STAT. § 230.22 (1971), but that its policy of exclusive recognition would not be implemented until the conclusion of the present litigation.

The Teachers' Association, however, was granted its motion for leave to intervene as a party defendant and took a more aggressive stance, attacking the standing of the plaintiffs and the jurisdiction of the court, as well as offering statutory justification for the policy of the Board that created the Teachers' Association's status as exclusive representative.

60. 225 So. 2d at 904-05.

61. For example, the circuit court found that the action of the school board in recognizing a majority organization as the exclusive representative of the employees "violates the Florida and United States constitutions." *Id.* at 905. It also found that allowing the majority organization to run the grievance procedure violated both constitutions. *Id.* The supreme court disallowed both practices, but did not base its decision on constitutional grounds. *Id.* at 907.

62. *Id.* at 905.

disposed of *Miami Water Works and Dade County v. Amalgamated Ass'n of St. Employees*, stating: "The holdings in the two cited cases only went so far as to construe the law then existing and did not pass upon later modifications in the law relating to collective bargaining rights of public employees."⁶³ Thus, the misconstrued "rule" of *Miami Water Works* had no bearing on the construction of article I, section 6.

In interpreting the constitutional provision, the court purported to follow the intent of the legislature.⁶⁴ The legislative history of article

63. *Id.* at 905-06.

64. The legislative background of art. I, § 6, of the 1968 Revised Constitution, set out below, is based on a document prepared by William A. O'Neill, a member of the Constitution Revision Commission. The document is entitled "Statement—Chronology—History." This invaluable aid to the legislative history of art. I, § 6, is on file in the Florida Supreme Court Library. During the last special session of the legislature in which the proposed constitution was adopted for submission to the electorate, Mr. O'Neill notes that he "was employed by both the Florida Senate and the House of Representatives as a liaison attorney advising members of both houses and participating in advice [*sic*] to the various committees and to the conferees on the part of both houses." *Id.* at 3. Mr. O'Neill indicates that he was "requested to present his background and his experience as it relates to the Florida Constitution of 1969 [*sic*]; and to prepare a chronology and history of Section 6, Article I . . ." *Id.* at 1. He does not indicate by whom he was requested to prepare the document, nor for what purpose. All the versions of the Constitution of 1968, from the initial draft of the Constitution Revision Commission down through the several House and Senate point resolutions, are also on file in the Florida Supreme Court Library.

Mr. O'Neill's document is especially helpful in evaluating Chief Justice Ervin's reliance on the legislative history of art. I, § 6, in support of his interpretation of the section. The journal references given in the footnote supporting Chief Justice Ervin's interpretation of the legislative history of art. I, § 6, contain merely the text of the section, as it was eventually approved by the people, in the form of a joint resolution agreed to by the House-Senate Conference Committee and approved by the respective houses of the legislature. 225 So. 2d at 905 n.1. The Chief Justice states that the final resolution, in comparison with earlier versions of the section, indicates that the legislature intended the word "employees" to include both public and private employees. *Id.* In order to comment on that conclusion, a more complete statement of the legislative history of art. I, § 6, is necessary.

The new constitution had its origins in the 1965 session of the Florida Legislature, which established the Florida Constitution Revision Commission. *See* Fla. Laws 1965, ch. 65-561. The Commission held public meetings throughout the state, and convened in convention at Tallahassee, Florida, in 1966 to consider and formulate a proposed constitution for the Florida Legislature.

The Commission submitted its report and recommendation to the legislature in January 1967. The legislature evaluated the Commission's report during the regular and special sessions in 1967 and 1968. At the conclusion of a special session of the legislature in 1968, both houses of the legislature passed a joint resolution which contained a proposed constitution. This was submitted to and adopted by the electorate on November 5, 1968. The constitution became effective on January 7, 1969.

The language changes and structural revisions which translated § 12 of the declaration of rights of the 1885 Constitution into art. I, § 6, of the 1968 Revised Constitution, began with the proposed revised constitution released on November 10, 1966, by the Florida Constitution Revision Commission. Section 12 of this proposal provided:

The right of persons to work shall not be denied or abridged on account of

membership nor non-membership in any labor union or association. The right of employees, public or private, by and through a labor union or association to bargain collectively shall not be denied nor abridged. Public employees shall not have the right to strike.

This initial draft was amended by the Commission in convention between November 28, 1966, and December 16, 1966. The former § 12 then appeared in the report of the Commission as art. I, § 6. Only technical changes were made in the language of the former § 12.

This version of art. I, § 6, was introduced in the original drafts submitted to both houses on January 9, 1967. See Fla. S.J. Res. 1-X (67); Fla. H.R.J. Res. 4-X (67). The same version of art. I, § 6, appeared in Fla. S.J. Res. 1-XXX (67) and Fla. S.J. Res. 2-XXX (67). The section remained unchanged during subsequent legislative debate on the proposed constitution. See Fla. S.J. Res. 2-4XX (67).

Fla. H.R.J. Res. 3-XXX (67) contained the identical version of art. I, § 6. On September 11, 1967, the Chairman of the Constitutional Revision Committee of the House of Representatives forwarded by letter the engrossed Fla. H.R.J. Res. 3-XXX (67) to each House member. The language of the proposed art. I, § 6, had not changed.

Thereafter the Joint House and Senate Style and Drafting Committee, on September 29, 1967, considered this particular section. At page 3 of this Committee's report the following version of art. I, § 6, appears with an appended comment:

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, public or private, by and through a labor union or labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

NOTE: Many persons reading the original draft raised the question that "association" might not be restricted to labor organizations and for clarification and certainty the Drafting Committee made this change, in addition to the House committee receiving permission for editorial clarification in this area. This goes back to the 1885 wording. There was no intention to change the substance by the committee, but is purely editorial.

The Interim Constitution Revision Committee of the House and Senate recommended the language as it was contained in Fla. H.R.J. Res. 1-2X (68), and Fla. S.J. Res. 1-2X (68). These were introduced into the legislature on June 24, 1968. The language in both resolutions was as follows:

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, public or private, by and through a labor union or labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

Fla. S.J. Res. 2-2X (68) was adopted by the Senate as introduced. The House, however, during its deliberations on Fla. H.R.J. Res. 1-2X (68), adopted an amendment which changed the language of its version to the following:

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of private employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

Thus, the language of art. I, § 6, in the Senate joint resolution and in the House joint resolution was different, and a failure to concur on the part of either house caused the appropriate motions to be made for the appointment of a Conference Committee on the part of each house. See FLA. S. JOUR. 91 (Special Sess. June 24, 1968-July 3, 1968); FLA. H.R. JOUR. 45 (Special Sess. June 24, 1968-July 3, 1968).

According to Mr. O'Neill, a memorandum was prepared by the staff of the Conference Committee for comparison by the conferees before final adoption. Its title read: "Section

I, section 6, indicated to the justices that "the Legislature intended both private and public employees to be included in the word 'employees' in the second sentence of Section 6."⁶⁵ Even more important, however, was the text of section 839.221 of the Florida Statutes. Since article I, section 6, of the Revised Constitution was proposed by the legislature with full knowledge of the statutory policy contained in section 839.221(2), Chief Justice Ervin reasoned that the new constitutional provision "is in large part a constitutional restatement" of that statute, which, as the court had previously stated in the *Pinellas County Classroom Teachers Ass'n* case, guarantees to a public employee "the right to bargain as a member of a union or labor organization"⁶⁶ Seemingly, then, article I, section 6, merely

6—*Right to Work*, draft: New provisions *specifically giving public employees* the right to join labor unions, to bargain collectively, but prohibits them from striking." (Emphasis added.)

The Conference Committee of the House and Senate considering Fla. H.R.J. Res. 1-2X (68) and Fla. S.J. Res. 2-2X (68) voted to accept and recommend to the respective houses the Senate proposal with the words "public or private" stricken. This was the Fla. H.R.J. Res. 1-2X (68) version with the word "private" stricken; Fla. H.R.J. Res. 1-2X (68) was taken up and considered by both houses by the appropriate motions.

The Conference Committee recommended that Fla. H.R.J. Res. 1-2X (68) be passed and amended by the conferees. See FLA. H.R. JOUR. 89 (Special Sess. June 24, 1968-July 3, 1968); FLA. S. JOUR. 113 (Special Sess. June 24, 1968-July 3, 1968). This version was adopted by the legislature and was submitted to the electorate of the State of Florida on November 5, 1968, in the following form:

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

Although the intent of the staff members who advised the Conference Committee emerges clearly from this account of the creation of art. I, § 6, whether their intent was shared by the Conference Committee itself is problematic. The more important question is whether the legislature could have intended to work a change from § 12 of the declaration of rights by using almost precisely the same language—language, moreover, that had been commonly interpreted as prohibiting collective bargaining by public employers and employees. Even if the Conference Committee adopted the intent of the staff and the legislature that of the Committee, it does not follow that the people necessarily adopted the intent of the legislature. A more reasonable interpretation is simply that since no major language changes occurred in the transition from § 12 to art. I, § 6, the meaning of the section remained unchanged. Thus if § 12 had prohibited public employee bargaining, so should art. I, § 6. Chief Justice Ervin, however, reached a contrary conclusion: in his view § 12 had been interpreted as prohibiting public employee bargaining in *Miami Water Works Local 654 v. City of Miami*, 157 Fla. 445, 26 So. 2d 194 (1946), and *Dade County v. Amalgamated Ass'n of St. Employees*, 157 So. 2d 176 (Fla. 3d Dist. Ct. App. 1963); but he concluded that those cases had been legislatively overruled by the enactment of art. I, § 6, a virtually identical provision to § 12. See 225 So. 2d at 905-06. The legislative history does not necessarily support that interpretation.

65. 225 So. 2d at 905 n.1.

66. *Id.* at 906.

elevates to constitutional status a right which had been given to public employees by the legislature when it enacted section 839.221 in 1959.

In one paragraph of his opinion, Chief Justice Ervin gently urged the legislature to "enact appropriate legislation setting out standards and guidelines and otherwise regulate the subject within the limits of said Section 6."⁶⁷ In a perceptive observation on the nature of the task facing the legislature, the Chief Justice concluded his admonition by noting:⁶⁸

A delicate balance must be struck in order that there be no denial of the *guaranteed right* of public employees to bargain collectively with public employers without, however, in any way trenching upon the prohibition against public employees striking either directly or indirectly or using coercive or intimidating tactics in the collective bargaining process.

The *Ryan* case raised as many questions as it answered, if not more. First, the court stated that public employees "have the same rights of collective bargaining as are granted private employees by Section 6."⁶⁹ The court, however, failed to indicate what bargaining rights are granted to private and thus to public employees by section 6. Presumably the second sentence of section 6, which used a construction and syntax parallel to the first sentence, and which was certainly directed against private discrimination, must have been intended to reach denials by private conduct as well as denials by governmental action. But no completely successful attempt has been made by private parties, either under the 1885 or 1968 Constitutions, to enforce a constitutional right to collective bargaining.⁷⁰ Nor has the legislature enacted legislation which acknowledges or provides for

67. *Id.*

68. *Id.* (emphasis added).

69. *Id.* at 905.

70. In *Miami Laundry Co. v. Laundry Local 935*, 41 So. 2d 305, 307 (Fla. 1949), the supreme court held that "[t]hese rights and guarantees [of § 12] exist only in favor of the individual employee and do not inure to the benefit of the union in which he holds membership. They are purely personal to the employee and may be protected . . . only in an action brought by the employee." As a consequence of this decision, no union could bring an action under § 12 charging an employer with a violation for his refusal to engage in bargaining. An employee or group of employees might, however, be permitted to bring such an action. *Cf. Hotel & Restaurant Employees v. Boca Raton Club, Inc.*, 73 So. 2d 867, 872 (Fla. 1954), in which the court noted the possibility of permitting an employee class action seeking specific performance of a collective bargaining agreement. No specific reported cases have held, however, that a labor organization or a group of employees can compel bargaining by an employer by virtue of § 12.

such a right.⁷¹ What the court meant when it equated public employees' rights of collective bargaining with the rights of private employees remains unclear.

In an alternative formulation of its holding, the court found that the legislature had acknowledged bargaining rights for public employees in section 839.221.⁷² But section 839.221 speaks not of collective bargaining, a bilateral exchange between parties of equal status, but of the right of employees "to present proposals"⁷³ to their employer. The statute says nothing of the employer's obligation to respond to or even acknowledge the proposals. In the absence, therefore, of implementing legislation laying down more specific guidelines for collective bargaining than does section 839.221, the general right of public employees to engage in bargaining cannot be specifically enforced.

A major difficulty in the *Ryan* case lay with the nonadversary status of the three parties with respect to the central issue on appeal. Neither the teacher organizations nor the Board briefed the issue of whether article I, section 6, accorded to public employees the right to bargain collectively. All acknowledged the bargaining rights of at least one of the two employee organizations. If the meaning of article I, section 6, had been analyzed in an adversary context, perhaps the court would not have changed its crucial interpretation that the section applied to public employees. But in the face of a resisting employer, it would have had to measure the practical implications of its decision. How is a representative of employees selected? How can an employer "bargain" with four or five unions representing groups of the same class of employees? How does he deal with their conflicting demands? How are impasses resolved? How are unfair labor practices adjudicated?

71. FLA. STAT. § 447.03 (1971) states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." FLA. STAT. § 447.14 (1971) provides: "Any person or labor organization who shall violate any of the provisions of this chapter shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083." The statute suffers from the same defect as § 12 of the declaration of rights of the 1885 Constitution. No guidelines are furnished to indicate when an employee has the right to bargain through representatives, and no provisions are included to compel an employer to recognize the right. Consequently the section has never been used to compel an employer to bargain, nor do any reported cases indicate that the penalty provisions have been applied to an employer because of his refusal to bargain.

72. 225 So. 2d at 905.

73. FLA. STAT. § 839.221 (2) (1971).

But the court had neither the obligation nor perhaps the opportunity to stray beyond the parameters fixed by the circuit judge's order. The decision at least cleared up the misinterpretations of *Miami Water Works*⁷⁴ and established beyond challenge the right of a public employer to engage in collective bargaining with an employee organization. As a result of its failure to settle more than that one issue the decision has had little effect except to provoke more litigation attempting to clarify its meaning.⁷⁵ The right of collective bargaining *Ryan* established for public employees exists more in the pages of the opinion than in the bargaining room.

The Florida Supreme Court's decision in *Ryan*, therefore, completes the circle it unwittingly began to trace in the *Miami Water Works* decision. Despite several intervening judicial statements,⁷⁶ opinions of the Attorney General,⁷⁷ statutory enactments,⁷⁸ and a constitutional revision,⁷⁹ public employees stand precisely where they stood when the court held in 1946 that public employers had no obligation to engage in collective bargaining with the representatives of public employees.

Former Governor Claude Kirk, who was adamantly opposed to collective bargaining by public employees, dramatized the illusory nature of the right recognized by the Florida Supreme Court. On May 13, 1970, the Governor issued an executive order prohibiting any state agency or officer from negotiating or bargaining with any labor organization representing public employees.⁸⁰ The order, predicated upon the Governor's powers as chief budget officer,⁸¹ declared Governor Kirk's intention to veto any attempt by the legislature to delegate its negotiating and bargaining power to any state agency. In addition, the order required each state agency to report to the Governor any efforts to organize employees under its jurisdiction.

74. See note 45 and accompanying text *supra*. *Ryan* thus made it clear that, whatever their obligation, public employers have the right to bargain, and that, whatever their rights, public employees are not prohibited from bargaining.

75. See notes 88 & 91 and accompanying text *infra*.

76. See note 45 and accompanying text *supra*.

77. See note 44 and accompanying text *supra*.

78. See note 49 and accompanying text *supra*.

79. See note 55 and accompanying text *supra*.

80. Fla. Exec. Order (May 13, 1970) (on file in office of Secretary of State of Florida).

81. On the second page of the order, the Governor states:

WHEREAS, I as Chief Budget Officer have the responsibility for making budgetary recommendations to the Legislature, and

WHEREAS, negotiations or bargaining affect [sic] personnel administration, planning and budgeting

The executive order, although of questionable legality,⁸² was apparently effective.⁸³

Shortly after Governor Askew took office in 1971, he issued an executive order which, while considerably different in tone, had the effect of re-enacting Governor Kirk's ban on collective bargaining.⁸⁴ The Governor affirmed, in his order, the Florida Supreme Court's interpretation in *Ryan* of article I, section 6, but pointed out that the legislature had not implemented that right by approving procedures to be followed in the conduct of public employee bargaining. Consequently, he declined to permit collective bargaining by state agencies until collective bargaining legislation, which the Governor promised to propose, was enacted.⁸⁵ The position of both Governor

82. No doubt exists as to the legal power of the Governor to control the collective bargaining activities of state executive departments under his control; the heads of the departments serve at the pleasure of the Governor and are therefore subject to dismissal for violating his order. The Governor's authority to regulate collective bargaining by executive departments under the control of other members of the Cabinet is less clear. Certainly, his authority in his capacity as chief budget officer to regulate all matters concerning budgeting and personnel must have limits; otherwise he would be empowered to control all Cabinet affairs by executive order, since even the most minor decision can be tied to budgeting or personnel. His exercise of authority would have to be challenged by the other members of the Cabinet. Attempts by public employees or their organizations to invalidate the order of Governor Kirk would most likely be futile.

83. The Governor's office is unaware of any collective bargaining agreement between a state agency and a labor organization. Telephone conversation with Douglas Stowell, Governmental Assistant, in Tallahassee, Florida, Nov. 9, 1972.

84. Fla. Exec. Order No. 71-20 (Apr. 5, 1971) (on file in office of Secretary of State of Florida).

85. Governor Askew did not formally submit proposed legislation to the 1971 legislature. See note 118 *infra*. In Fla. Exec. Order No. 72-1, at 2 (Jan. 10, 1972) (on file in Office of Secretary of State of Florida), Governor Askew directed Lieutenant Governor Adams to develop "proposed legislation establishing guidelines for collective bargaining." Lieutenant Governor Adams prepared legislation for the 1972 session which was closely modeled on Fla. H.R. 3556 (1970) and Fla. H.R. 206 (1971). See note 118 *infra*. But the proposed legislation was not formally pre-filed. Governor Askew's Executive Order No. 72-1 reiterated in most respects his original order contained in Executive Order No. 71-20, *supra* note 84. In that order, however, he had, as had Governor Kirk before him, directed "[t]he head of each state agency . . . to immediately report to the Governor, through the Secretary of Administration, any efforts to organize employees under his jurisdiction." *Id.* at 2. He had also directed that "no state agency . . . shall negotiate . . . with any labor organization . . . on matters for which the Department of Administration has legal authority." *Id.* Although the exact wording of the order did not preclude collective bargaining between employee organizations and state agencies, the limitation on bargaining subjects coupled with the direction to agency heads to report any organizational activity did not positively support collective bargaining attempts. In Executive Order No. 72-1, however, the Governor directed all state agencies, "pending enactment or approval of legislation setting forth guidelines for collective bargaining . . . [to] assist the Lieutenant Governor . . . in the formulation of uniform procedures to guarantee the right of public employees to bargain collectively." Fla. Exec. Order No. 72-1, at 2-3 (Jan. 10, 1972). Whether Executive Order No. 72-1

Kirk and Governor Askew, that public employers presently have no legal obligation to bargain, has been implicitly supported by a recent interpretation of the *Ryan* decision by the Attorney General. In response to an inquiry as to the responsibilities of a municipality with regard to collective bargaining with public employees, the Attorney General stated that article I, section 6, of the Florida constitution and section 839.221 of the Florida Statutes, as construed by the court in the *Ryan* case, guarantee public employees the right to bargain collectively.⁸⁶ The opinion emphasized, however, that since the court had characterized implementation of these provisions as a legislative responsibility,⁸⁷

those of us in the Executive branch must be content with the law as it exists today, as any other action would be outside the scope of our constitutional power.

. . . [I]n light of the *Ryan* case and the fact [that] the Governor has vetoed all legislative attempts to enact guidelines dealing with this subject matter, it would be inappropriate for this office to attempt to set forth any specific procedural guidelines with respect to the conduct to be employed by any state, county or municipal employer in implementing the collective bargaining process.

In addition to the Governor and Attorney General, the supreme court has also been requested to act on the implications of its decision in *Ryan*. In 1971, a local of the International Association of Firefighters in Broward County petitioned the court for a writ of mandamus compelling the respondent Board of County Commissioners to engage in collective bargaining. In a per curiam disposition, the court noted the existence of "substantial and numerous issues of fact" and consequently transferred the case to the circuit court.⁸⁸

More recently, a local of the Fraternal Order of Police petitioned the supreme court for an alternative writ of mandamus against the City of Orlando to compel it to grant the local the right of collective bargaining.⁸⁹ The petition alleged that while the City Council agreed to allow the Fraternal Order to present certain demands to it, the

overruled Executive Order 71-20 is unclear. It is equally uncertain whether the Governor directed state agencies to recognize and bargain with labor organizations, at least on a limited basis, pending the enactment of legislation. If the Governor did so intend, his order was either not understood or was not executed by agency heads. See note 83 *supra*.

86. FLA. OPS. ATT'Y GEN. 070-101 (1970).

87. *Id.* at 3, 4.

88. See State *ex rel.* International Ass'n of Firefighters v. Board of County Comm'rs, 254 So. 2d 195 (Fla. 1971).

89. See State *ex rel.* Fraternal Order of Police v. City of Orlando, 269 So. 2d 402 (Fla. 1972).

Council specifically voted to deny the Order the right to enter into bilateral negotiations leading to a collective bargaining agreement. The supreme court again transferred, this time to the District Court of Appeal for the Fourth District.⁹⁰

On the same day that the Fraternal Order of Police filed its petition, the Dade County Classroom Teachers' Association filed an original petition for a "constitutional writ," requesting the Florida Supreme Court to order the legislature to show cause "why it has failed and refused to enact collective bargaining guidelines" ⁹¹ The petition prayed in addition that, in the event the legislature did not adequately explain its failure, the court "appoint a Commission to recommend collective bargaining guidelines to be subsequently adopted by this Court, thereby and for the first time effectuating the judgment of this Court . . . [in *Dade County Classroom Teachers' Ass'n v. Ryan*]." ⁹²

The apparent theory of the action was that, since the legislative and executive branches had defaulted in their obligations to enact legislation to implement the constitutional right to engage in collective bargaining guaranteed by article I, section 6, the obligation shifts to the court to provide guidelines to permit the exercise of employees' previously stated constitutional rights.⁹³

The initial questions raised by the suit revolved around the supreme court's competency to entertain the petition for a constitutional writ and to afford the relief sought.⁹⁴ The court, however,

90. See *id.* Cases are transferred to a circuit court when substantial questions of fact are involved. Otherwise they are transferred to a district court of appeal.

91. Brief for Petitioner, p. 4, *Dade County Classroom Teachers' Ass'n v. Legislature*, No. 42323, Fla. Sup. Ct., Nov. 8, 1972.

92. *Id.*

93. The Dade County Classroom Teachers' Association was the intervening party in the *Ryan* case. In one sense, the present litigation could be construed as an appeal to the continuing jurisdiction of a court of equity to oversee the effectuation of its previous decree recognizing a constitutional right to bargain. The normal device for invoking the power of a court of equity to implement an order resisted by respondent is to petition the court to hold the respondent in contempt for violating the court's order.

94. The petition was for a "constitutional writ" and was brought pursuant to FLA. APP. R. 4.5 (g). The writ appears designed more to preserve a legal issue for the court's determination on appeal rather than to provide an extraordinary route for invoking the original jurisdiction of the supreme court. Nor was the writ apparently designed, as the petition suggests, to provide a device whereby the court might "effectuate" a prior judgment. The effectuation of judgments and orders is the responsibility of the prevailing party, using the ordinary post-judgment devices. FLA. APP. R. 4.5 (g), however, was not intended as one of those post-judgment devices. If the obstacles to the use of rule 4.5 (g) could be surmounted, the court would still have to confront a constitutional objection to its assertion of jurisdiction based on the division of power among the three branches. The creation of collective bargaining guidelines has traditionally been a function of the legislative branch. No state or federal court has ever furnished "guidelines" for the conduct of bargaining. It is doubtful, therefore, that the supreme court has the competency, in a constitutional sense, to grant the relief requested.

treated this action as an original mandamus proceeding to "compel the Legislature of the State of Florida to enact standards or guidelines regulating the right of collective bargaining by public employees of this state, as guaranteed by Section 6, Article I, 1968 Constitution of Florida."⁹⁵ The petition was denied because of the "doctrine of separation of powers mandated by . . . [Florida's] Constitution."⁹⁶

In reaching its decision, the court reasserted the principle that the judiciary is the ultimate guardian of constitutional rights such as those involved in this case, citing *Marbury v. Madison*,⁹⁷ and other landmark cases.⁹⁸ The court also took judicial notice of the fact that although the legislature in 1972 had many problems with which to deal it nevertheless had managed to adopt standards and guidelines for collective bargaining for one group of public employees, the fire-fighters.⁹⁹

Finally, the court concluded that judicial intervention would be premature until the legislature had been allowed a reasonable time in which to act. But if the legislature failed to act within a reasonable time, the court felt that it would "have no choice but to fashion such guidelines by judicial decree"¹⁰⁰ The thrust of the opinion is clear: if the legislature does not enact a collective bargaining statute in the 1973 session, the Florida Supreme Court will "enact" collective bargaining guidelines by judicial decree. The court, however, did not specify in what manner these judicial guidelines would be fashioned.

The petitioner in *Dade County* suggested the appointment of a commission to establish the necessary collective bargaining guidelines which would be adopted, subject to approval by the court. This suggested approach is novel but not particularly farfetched. The commission could, through formal and informal devices, secure a representative sampling of opinion on the design of a workable collective bargaining system. Even though any bargaining bill would consist of a series of value judgments involving complex problems and requiring an adept political judgment for their proper resolution, the task would not be be-

95. *Dade County Classroom Teachers' Ass'n v. Legislature*, No. 42323, Fla. Sup. Ct., Nov. 8, 1972.

96. *Id.*

97. 5 U.S. (1 Cranch) 137 (1803).

98. *Chapman v. California*, 386 U.S. 18 (1967); *Baker v. Carr*, 369 U.S. 186 (1962); *Sobel v. Adams*, 208 F. Supp. 316 (S.D. Fla. 1962). In the last case the court stated that it would "fashion a remedy of reapportionment by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of equal protection" if the Florida Legislature failed to do so. 208 F. Supp. at 318.

99. See FLA. STAT. §§ 447.20-.35 (Supp. 1972).

100. *Dade County Classroom Teachers' Ass'n v. Legislature*, No. 42323, Fla. Sup. Ct., Nov. 8, 1972.

yond the capacity of a commission with well-chosen members. That kind of judicial resolution of the problem might, however, create more problems than it would solve.

First, it is not clear that the supreme court necessarily has the power in every case to enforce nonself-executing sections of the constitution. Cases might arise in which a judicial response, in the default of legislative responsibility, represents a possible, perhaps the only practical, solution to a problem of this type. But when, as here, the legislature has taken the problem up in debate and discussions,¹⁰¹ judicial pre-emption of an essentially legislative task is inappropriate. In the case of public employee bargaining guidelines, judicial decrees are not merely inappropriate, they are potentially dangerous. A poorly constructed collective bargaining system could create serious financial and political problems for state and municipal government. In addition, a collective bargaining apparatus which employers and employee representatives did not have a hand in constructing would have no claim on either of the parties. The task of enforcement would be made considerably more difficult if the affected parties have not been involved in, and consequently feel no responsibility for, the final solution to the collective bargaining problems. These problems could be mitigated by allowing the parties before the court to draw up potential guidelines for consideration by the court. Amicus briefs could be filed suggesting alternative guidelines. In this manner, employers and employee organizations could be involved in promulgating guidelines. This method is cumbersome and suggests that the matter is one obviously more suited to the legislation forum.

The supreme court might attempt to establish guidelines on a case-by-case basis by remanding with directions to the circuit courts to fashion tentative guidelines tailored to each specific situation.¹⁰² On the other hand a system of circuit-by-circuit solutions is not adequate

101. See note 118 and accompanying text *infra*.

102. For example, in *International Ass'n of Firefighters Local 2010 v. City of Homestead*, Civil No. 72-9285, Dade County Cir. Ct., Jan. 8, 1973, the court found that the City Council of Homestead, acting through its members, violated the Fire Fighters Bargaining Act, FLA. STAT. ch. 447.20-.35 (Supp. 1972), by refusing to bargain in good faith with the plaintiff labor organization. The court also found, however, that the activities of the City Council and one of its members constituted an independent violation of the constitutional rights of the employee-firefighters and that they were entitled to compensatory and punitive damages for the injuries they might have suffered. Although the court entered judgment against the individual councilman for only eighteen dollars compensatory and one dollar punitive damages, the principle that art. I, § 6, creates a right upon which an award of damages can be based is an extremely important one. The court ordered the defendants to bargain with the plaintiff labor organization on the basis of their obligation under the statute, but the order could presumably have been based on their obligation under art. I, § 6.

to a problem of state-wide dimensions. Conflicts between the circuits would be inevitable and confusing.¹⁰³ Although conflicts can theoretically be worked out through the appellate processes, considerable damage could be inflicted on the public before conflicting decisions reach and are decided by the supreme court.

Since the proponents of public employee bargaining have not compelled a satisfactory solution at the bench, they may well appeal to the executive branch for relief. Several theories and combinations of statutory provisions could be urged to support the Governor's intervention in the collective bargaining dispute.

The constitution provides that: "The supreme executive power shall be vested in a governor. . . . He shall take care that the laws be faithfully executed" ¹⁰⁴ An argument has been made with reference to similar provisions that these powers could provide general constitutional authority for gubernatorial administrative orders.¹⁰⁵ If that liberal reading were given to the Florida constitutional provision, the Governor might be justified in promulgating collective bargaining guidelines by executive order to ensure that the provisions of article I, section 6, are enforced. Since the Governor is chief executive officer of the entire state, responsible for the execution of all its laws, the executive order, according to this theory, could regulate the bargaining rights of state, county, and municipal employees.

A second theory justifying the enactment of bargaining guidelines through executive order relies on the administrative authority possessed by the Governor over executive departments. Aside from the state executive agencies under cabinet members, the constitution requires that other departments shall be placed under the Governor "or an officer or board appointed by and serving at the pleasure of the governor."¹⁰⁶ The Governor could issue bargaining guidelines, covering at least those agencies under his supervisory control, pursuant to his authority as "employer" of executive department employees.

A third theory, or rather a technique for implementing one or both of the two previously mentioned theories, derives from the Department of Administration's authority over the personnel policies

103. For example, a circuit court in Dade County might order a representation election among employees of a Sunland Hospital in Miami at the same time the circuit court in Leon County orders an election at the request of a different union petitioner among the employees of all Sunland Hospitals throughout the state. The other possible areas of conflict need not be enumerated at length; they are, however, certainly sufficient to make unattractive the prospect of *ad hoc* solutions at the judicial circuit level.

104. FLA. CONST. art. IV, § 1.

105. See Note, *Gubernatorial Executive Orders as Devices for Administrative Direction and Control*, 50 IOWA L. REV. 78 (1964).

106. FLA. CONST. art. IV, § 6.

of all executive departments and the Governor's constitutional authority over the head of that department.¹⁰⁷ Florida law confers upon the Department of Administration the power, *inter alia*, to develop "[s]uch other programs as are found to be necessary in the establishment and maintenance of a current and sound program of uniform personnel administration."¹⁰⁸ Pursuant to this power and under the provision of the Florida Administrative Procedure Act,¹⁰⁹ the Department of Administration could develop and promulgate rules regulating collective bargaining between executive departments and employee organizations with members subject to the control of the department.

Although the procedures would have to be authorized by the Secretary of Administration, he serves at the pleasure of the Governor. Presumably the Governor could issue what in effect would be a binding order to the Secretary to have the Department of Administration promulgate bargaining guidelines.

Strong arguments can be mounted in opposition to the issuance of collective bargaining guidelines based on any of the three approaches mentioned. With respect to their issuance pursuant to the "supreme executive authority" clause of the constitution, no precedent exists in Florida, and very little in other states, justifying the use of that clause to create rather than to execute laws. In theory, of course, the Governor is merely enforcing article I, section 6. In fact the enforcement of this nonself-executing section would require an elaborate panoply of regulations resembling the collective bargaining statutes passed by legislatures in other states.¹¹⁰ These can hardly be disguised as merely executive enforcement orders in Florida.

A derivative objection to this use of the executive order might be based on two apparently limiting provisions in the constitution. When the Governor is permitted to use the executive order, the constitution confers this power on him directly.¹¹¹ Secondly, the Governor's issuance of collective bargaining guidelines would impinge on areas now governed by civil service regulations. Since the constitution requires that the civil service system be created "by law,"¹¹² arguably any alteration or modification of that system should be accomplished only "by law"—not by executive order.

Similar objections could be raised to the Governor's issuing guide-

107. *Id.*

108. FLA. STAT. § 110.022 (1) (g) (1971).

109. FLA. STAT. ch. 120 (1971).

110. *See, e.g.*, 1 CCH STATE LEG., CALIF. ¶ 47.177 (1971).

111. *E.g.*, FLA. CONST. art. IV, § 7. The Governor is authorized to suspend by executive order any state officer not subject to impeachment.

112. FLA. CONST. art. III, § 14.

lines by virtue of his supervisory authority over the executive departments. No specific authority can be found for that exercise of authority in the constitution or statutes, whereas regulation of public employment relations is traditionally accomplished by legislation.

The third approach states the strongest basis for the issuance of bargaining guidelines by executive authority. Chapter 110 of the Florida Statutes permits the Department of Administration to develop new programs as the need arises through its rule-making power. Although the legislature perhaps did not envision the exercise of authority so delegated in this precise form, it did vest considerable discretion in the Department of Administration in its role as supervisor of state personnel.¹¹³ Also the rule-making requirements of the Administrative Procedure Act permit the involvement of interested parties;¹¹⁴ employer groups as well as those representing employee organizations would therefore have an opportunity to plead their cases and unique needs before the rules become law.

Whether the enactment of collective bargaining guidelines in this fashion would be prudent presents a more difficult question. The financing of the apparatus necessary to ensure proper administration of the guidelines would be problematic.¹¹⁵ If necessary financing is not available, that factor alone could abort the proposal.

If, on the other hand, a formal budget proposal were submitted to the legislature for the necessary funds, the legislature might be reluctant to appropriate funds for what many might consider a project more properly planned and executed by the legislature. The size and seriousness of these obstacles involve political judgments that do not lend themselves to academic analysis. Suffice it to note that these factors are relevant in the decision that might be made by the executive branch in deciding whether to regulate at least a part of state employment relations by executive order or administrative regulation.

113. Since the Secretary of Administration serves at the pleasure of the Governor, no doubt exists as to the Governor's authority to initiate the procedure for collective bargaining rules.

114. See FLA. STAT. § 120.041 (4) (1971).

115. Especially would this be so if the guidelines were promulgated before a budget request had been submitted to and approved by the legislature. The project would require highly skilled and experienced personnel for its successful administration; a poorly administered program would otherwise be the likely result. The ramifications of poor administration could easily be disproportionate to the error that provoked the problems; the fact that the error was made in good faith would provide little consolation. Whether the necessary talent could be formed and retained with present resources is uncertain.

C. Post-1968 Legislative Developments

Of the several bills that have been introduced in the Senate and House during the 1969-1972 legislative sessions, the one that has received the closest attention is H.R. 3314. The bill originated in the 1969 legislature as H.R. 117; it has subsequently undergone extensive alteration, but has remained remarkably true to the original outline of the collective bargaining system envisioned by H.R. 117.¹¹⁶

Numerous other bills have been introduced during the past four sessions; still other unofficial collective bargaining proposals have wandered from hand to hand through the capitol halls, and some have even been the subject of extensive debate in committee meetings. Despite these occasional and sometimes tempting diversions, the attention of the legislature has consistently turned back to H.R. 3314, the most thoroughly thought-out attempt to provide comprehensive collective bargaining procedures for all public employees in the State of Florida.

In 1971 H.R. 206, an amended version of H.R. 3556, was referred to the House Committee on Manpower and Development and the House Committee on Appropriations.¹¹⁷ During the regular session, most of which was devoted to Governor Askew's tax program, the bill was bottled up in committee, where it eventually died. A number of factors complicated committee debate on the bill and perhaps influenced its eventual death in committee.¹¹⁸

116. See note 15 and accompanying text *supra*.

117. See FLA. H.R. JOUR. 17 (1971).

118. First, Governor Askew issued an executive order on April 5, 1971, which continued former Governor Kirk's ban on collective bargaining over "matters for which the Department of Administration has legal authority"—presumably wages, hours and conditions of employment. See Fla. Exec. Order No. 71-20 (Apr. 5, 1971). Among the justifications recited by the Governor for the continuance of his ban were a statement of support for collective bargaining legislation implementing the constitutional right of collective bargaining by public employees and a promise to introduce a bill which would accomplish that objective. *Id.* at 2. A draft of the promised bill appeared during the middle of the session, but was not introduced and was not formally debated. The draft had, nonetheless, significant impact since legislators presumably felt debate on Fla. H.R. 3556 (1970) was pointless until the Governor's recommended legislation was routed to committee. The bill, however, never got to committee, but a good deal of time was consumed in waiting for it. When the draft of the bill was circulated, interested parties, including legislators, could not have failed to note an important difference in the language and approach of the bill in comparison to Fla. H.R. 3556 (1970). Whereas the latter stated forcefully the right of public employees to bargain through a certified representative, prohibited an employer from refusing to bargain in good faith with a certified representative, and conferred appropriate powers of enforcement on the Public Employee Relations Commission to enforce these rights and obligations, the Governor's proposal equivocated in detailing collective bargaining rights. The findings and purpose clause did claim that an object of the bill was to require "public employers and employee organizations to negotiate and bargain in good faith"

Prior to the 1972 session, H.R. 3556¹¹⁹ was introduced as H.R. 3314 by the Committee on Manpower and Development;¹²⁰ a companion bill, H.R. 2008,¹²¹ was introduced to implement the right-to-work section of the constitution.¹²² Both passed out of the Committee on Manpower and Development and received the approval of the Appropriations Committee, after vigorous debate resulted in some crucial amendments. Finally, again after several days of debate and several further key amendments, H.R. 3314 and H.R. 2008 were approved by the overwhelming majority of the House of Representatives.¹²³

Both bills were sent over in messages to the Senate where the cooperative truce that had managed to secure the passage of both bills in the House disintegrated. H.R. 2008 was quickly passed out of committee, approved by the Senate with a few minor amendments

and § 4(4) stated that public employees would have the right "to negotiate collectively through [an] . . . agent . . . concerning the terms and conditions of employment," but the draft bill failed to create a corresponding obligation on the part of the employer to negotiate or bargain in good faith. Subsequent sections did little to clarify the ambiguities surrounding the employer's bargaining obligations. The bill resembled "meet and confer" legislation more than the collective bargaining approach of Fla. H.R. 3556 (1970).

The filing of a strong right-to-work bill, Fla. H.R. 2008 (1971), further complicated the political context in which Fla. H.R. 3556 (1970) was debated. Fla. H.R. 2008 (1971) attempted to implement the "right" provided employees in art. I, § 6, to be protected against abridgement or denial of the right to work because of membership or nonmembership in a labor organization. Since the alleged right-to-work was created in the same paragraph as the alleged right of public employees to engage in collective bargaining, and since both required legislation to become effective, the bills were viewed by many as aspects of the same issue. Inevitably, the collective bargaining bill and the right-to-work bill became the counters in a political struggle between supporters and opponents of the concept of public employee bargaining. Each side professed a willingness to support some version of its opponents' bill in exchange for reciprocal support for its bill. At the end of the session, an attempt was made by House staff members to construct a single two-part bill out of Fla. H.R. 3556 (1970) and Fla. H.R. 2008 (1971), including both right-to-work and collective bargaining sections. In the process, many of the sections in Fla. H.R. 2008 (1971) deemed objectionable by opponents of right-to-work were excised or modified; at the same time important language changes were wrought in several key sections of Fla. H.R. 3556 (1970).

This bill, like the Governor's bill, was not yet formally introduced; nor did it survive into the 1972 session. Several ideas were incorporated into the bill, however, which did have important effects on subsequent versions of Fla. H.R. 3556 (1970) and Fla. H.R. 2008 (1971). The most important consequence was the symbolic union of public employee bargaining legislation with right-to-work legislation; that union proved indissoluble during the 1972 session. Also many of the changes made in the two bills found their way into the 1972 session version of Fla. H.R. 3556 (1970) and Fla. H.R. 2008 (1971).

119. This bill borrowed a few sections from the Governor's bill and some language from the staff bill.

120. FLA. H.R. JOUR. 235 (1972).

121. Substantial changes in the approach of Fla. H.R. 2008 (1971) had been made.

122. FLA. H.R. JOUR. 36 (1972).

123. FLA. H.R. JOUR. 312, 325 (1972).

and sent back to the House.¹²⁴ The House agreed to the amendments,¹²⁵ but then, in an ingenious parliamentary maneuver, amended H.R. 2008 by adding a new section, H.R. 3314.¹²⁶

The Senate refused to accede to the House amendment, and what had become a committee substitute for H.R. 2008 was referred to a conference committee.¹²⁷ The Senate and House members could not agree on a compromise version, and the House instructed its conference committee members not to accept a report that did not include both bills.¹²⁸ A last minute attempt by supporters of the right-to-work bill to extract it from the conference committee for a floor vote was defeated on the final day of the regular session.¹²⁹ Prior to the final defeat of the all-inclusive H.R. 3314, the House and Senate passed a bill giving firefighters the right to engage in collective bargaining.¹³⁰

124. FLA. S. JOUR. 320-21 (1972).

125. FLA. H.R. JOUR. 596 (1972).

126. See FLA. H.R. JOUR. 596 (1972). That parliamentary maneuver was in response to the difficulties faced by Fla. H.R. 3556 (1970) in the Senate, where it had received multiple committee references and an apparently low priority status at a time when the session was beginning to wind up. The amendment of Fla. H.R. 3556 (1970) on to Fla. H.R. 2008 (1971) was an attempt, therefore, to get the bill onto the Senate floor and at the same time preserve the political compromise in the House, which had implicitly agreed to accept both bills or neither.

127. See FLA. S. JOUR. 374 (1972).

128. See FLA. H.R. JOUR. 1065 (1972).

129. Fla. H.R. 3314 (1972) died in conference. In the meantime, during the conference committee sessions, House staff members drafted at least two other "ghost bills," essentially shortened versions of Fla. H.R. 3314 (1972), in an attempt to find a common ground on which Senate and House members could agree. Whether these bills, or the idea of a shortened version, will survive into the 1973 sessions will have to await the renewal of debate over collective bargaining.

130. FLA. STAT. §§ 447.20-35 (Supp. 1972), entitled the Fire Fighters Bargaining Act, effective January 1, 1973, not only recognizes the right of firefighters to organize and bargain collectively, but also imposes on their public employers an obligation to bargain. The obligation "shall include the duty to cause any final agreement resulting from negotiations to be reduced to a written contract . . ." *Id.* § 447.25. This contract cannot exceed two years.

Section 447.24 places a duty on the employer to recognize any employee organization selected by the majority of the firefighters of any municipality, county, metropolitan government, or fire district, but, no employee is prevented from refusing to join any organization or from presenting grievances personally or by counsel.

Section 447.27 provides for the submission of unresolved issues to a board of arbitration whose composition is defined by § 447.28. Section 447.29 sets out the factors to be considered by the arbitration board as follows:

- (1) Comparison of the annual income of employment of the employing authority in question with the annual income of employment maintained for the same or similar work of employees exhibiting like or similar skills under the same or similar working conditions in the local operating area involved.
- (2) Comparison of the annual income of employment of the employing authority in question with the annual income of employment of employing

Since a renewed effort to pass a version of H.R. 3314 seems likely during the 1973 session, this proposed legislation will be analyzed in close detail. The analysis is not merely an academic exercise. Points will be raised and options explored to aid interested legislators, public employers and employee organizations in drafting a more perfect bill. Although the criticisms leveled at the language and approach of some of the sections might appear extensive, if not serious, this meticulous probing does not imply a lack of confidence in the bill. On the contrary, H.R. 3314 is a well-conceived and structured vehicle for regulating public employment relations in Florida. With comparatively few changes, the bill would certainly be counted as one of the finer examples of state attempts to contain the phenomenon of public employee bargaining.

Because of the length and complexity of the bill, a brief overview will be presented to facilitate more detailed discussion of its component parts. The synopsis will follow a somewhat chronological sequence: (1) mechanisms for administration; (2) representation procedures; (3) collective bargaining procedures; (4) impasse resolutions; (5) unfair union practices; (6) local option; and (7) miscellaneous provisions.

III. ANALYSIS OF H.R. 3314

A. Summary of Bill

1. *Mechanisms for Administration. a. The Public Employee Relations Commission.*—The bill will be administered by a Public

authorities in municipalities, counties, or metropolitan governments, or fire districts of comparable size.

(3) Interest and welfare of the public.

(4) Comparison of peculiarities of employment in regard to other trades or professions, specifically:

- (a) Hazards of employment;
- (b) Physical qualifications;
- (c) Educational qualifications;
- (d) Mental qualifications;
- (e) Job training and skills;
- (f) Retirement plans;
- (g) Sick leave; and
- (h) Job security.

Procedural requirements for actions taken by the board of arbitration are set forth in § 447.30. The arbiters' decision is "advisory only and shall not be binding upon either the bargaining agent or the employing authority . . ." *Id.*

Under § 447.33 compensation of arbiters and other expenses are to be shared equally by the two parties. Under § 447.34 all bargaining discussions are subject to the provisions of FLA. STAT. § 286.011 (1971), relating to public meetings. Section 447.35 authorizes the extension of any time limit by mutual consent of the bargaining parties.

Employee Relations Commission within the Department of Administration, comprised of five members appointed by the Governor and confirmed by the Senate.¹³¹ The Chairman of the Commission will devote full time to his duties; the other four members will serve as needed. The Commission will have four principal functions:

(1) It is directed to "resolve questions and controversies concerning claims for recognition" by employee organizations.¹³²

(2) It is responsible for remedying unfair practices by employers and employee organizations.¹³³

(3) It is responsible for initiating procedures to stop public employee strikes and punish employees and employee organizations engaging in strike activity.¹³⁴

(4) It is responsible for appointing mediators and fact finders to aid public employers and employee organizations which encounter an impasse in their negotiations.¹³⁵

The Commission is authorized by the bill to adopt necessary rules and regulations pursuant to the Administrative Procedure Act.¹³⁶ It is also authorized to employ supporting personnel¹³⁷ and to create and maintain lists of qualified mediators and fact finders.¹³⁸

b. Regulation of Public Employee Organizations.—The bill requires public employee organizations to register with the Commission before they will be permitted to request recognition or a representation election.¹³⁹ The employee organization must also submit copies of the organization's constitution and bylaws.¹⁴⁰ Finally, it is required to keep accurate accounts of its income and expenses, which accounts must be opened to members of the Commission upon request.¹⁴¹

2. Representation Procedures.—The bill accords to public employees the right to be represented by an employee organization of their own choosing and to negotiate collectively through a certified bargaining agent with their public employer in the determination of

131. Fla. H.R. 3314, § 2-447.003 (1) (1972). The bill is divided into seven sections. Section 2 is subdivided into subsections, each numbered according to its intended location in the Florida Statutes, should the bill be enacted into law. Thus the designation, for example, "§ 2-447.003 (1)" means that this provision can be found in § 2 of Fla. H.R. 3314 and is intended upon enactment to appear as § 447.003 (1) of the Florida Statutes.

132. *Id.* § 2-447.004 (6).

133. *Id.* § 2-447.020.

134. *Id.* § 2-447.022 (2).

135. *Id.* §§ 2-447.004 (5), .014 (2)-(3).

136. *Id.* § 2-447.004 (1).

137. *Id.* § 2-447.003 (2).

138. *Id.* § 2-447.004 (5).

139. *Id.* § 2-447.008 (1).

140. *Id.* § 2-447.008 (5).

141. *Id.* § 2-447.008 (4).

the terms and conditions of their employment.¹⁴² Certification of a bargaining agent can be obtained in two ways. The organization can inform the public employer that it has been selected by a majority of the employees in a proposed unit as their bargaining representative and request recognition by that employer.¹⁴³ If the public employer has no doubt of the union's "majority" status, and if it agrees with the bargaining unit proposed by the employee organization, the employer can recognize the organization as the bargaining agent of the employees.¹⁴⁴ Upon recognition, the employee organization must petition the Commission for certification. If the Commission approves of the proposed unit, it will certify the bargaining agent. If it does not approve the proposed unit, it will deny the request for certification.¹⁴⁵

The second route to certification is by a secret ballot election. If the employer disputes the "majority" status of the organization or disagrees with the proposed bargaining unit, it can refuse to recognize the employee organization. The organization must then petition the Commission for a representation election.¹⁴⁶ The petition must contain a sworn statement that the organization has the support of at least thirty per cent of the employees in the unit.¹⁴⁷ After investigation and a hearing, the Commission will direct an election in a unit which it has determined is appropriate for bargaining.¹⁴⁸ The employees will have an opportunity to vote for or against representation. If an employee organization receives a majority of the votes cast, provided at least thirty per cent of the employees eligible to vote actually vote, the Commission will certify the organization as the exclusive representative of all employees in the unit.¹⁴⁹

In determining the appropriate unit the Commission is directed to take into account a variety of factors, but the Commission is specifically admonished to avoid a multiplicity of fractionalized units.¹⁵⁰

3. *Collective Bargaining Procedures.*—After a bargaining agent has been certified, it is authorized to engage in collective bargaining with the public employer concerning the terms and conditions of employment of all employees in the unit.¹⁵¹ The bill, however, exempts from bargaining any proposal pre-empted by provisions of federal, state or

142. *Id.* § 2-447.006 (2).

143. *Id.* § 2-447.009 (1).

144. *Id.*

145. *Id.*

146. *Id.* § 2-447.009 (2) (a).

147. *Id.*

148. *Id.* §§ 2-447.009 (3)–(4).

149. *Id.* § 2-447.009 (4) (c). See note 222 and accompanying text *infra*.

150. *Id.* §§ 2-447.009 (5) (a)–(b).

151. *Id.* § 2-447.011 (1).

local law; proposals which invade the area of management rights defined by the bill; or proposals which infringe on the authority of any career or civil service commission or personnel board.¹⁵²

If the provisions of the agreement conflict with any law over which the executive officer representing the employer has no amendatory power, he will request an amendment of the conflicting law. If the amendment is not adopted the conflicting provisions of the agreement will be void.¹⁵³

The chief executive officer will also request funds sufficient to implement the provisions of the negotiated agreement. If sufficient funds are not provided, then the executive officer will return and negotiate with the bargaining agent within the framework of the funds appropriated.¹⁵⁴

4. *Impasse Resolution.*—If the employer and the bargaining agent cannot resolve their disagreements through negotiations and an impasse occurs in the bargaining, either party can petition the Commission to initiate mediation.¹⁵⁵ The Commission will then supply the names of five mediators and within three days the parties shall elect one of them.¹⁵⁶ That mediator has fifteen days in which to bring the parties together.¹⁵⁷

If mediation fails, the Commission will next appoint a fact-finding board of three persons, one appointed by the employer, one by the bargaining agent and the third selected by both.¹⁵⁸ The board must be selected within fifteen days.¹⁵⁹ The board must begin its investigation within ten days of its appointment and finish it within thirty days of its appointment.¹⁶⁰

The board shall then transmit its findings of fact and recommend solutions to the parties.¹⁶¹ If the dispute is not settled within ten days, the board shall make its report public, and present it to the appropriate legislative body.¹⁶² The employer and the bargaining agent

152. *Id.* § 2-447.013.

153. *Id.* § 2-447.011 (3).

154. *Id.* § 2-447.011 (5). It is important to note that under this proposed statute the legislature would retain ultimate authority and control over both the economic and noneconomic items in a contract concerning state employees. No state agency or officer, including the Governor, can commit the legislature to a wage increase or to a change in any state law affecting state employees.

155. *Id.* § 2-447.014 (1).

156. *Id.* § 2-447.014 (2).

157. *Id.* § 2-447.014 (3).

158. *Id.* § 2-447.014 (3) (a)-(b).

159. *Id.* § 2-447.014 (3) (b).

160. *Id.* § 2-447.015 (1).

161. *Id.*

162. *Id.* §§ 2-447.015 (2)-(3).

may also submit separate recommendations to the legislative body.¹⁶³ That body has authority to impose a final settlement.¹⁶⁴

5. *Unfair Labor Practices.*—Both employers and employee organizations are prohibited from interfering with employees because of participation in concerted activities or because of their nonparticipation in such activities.¹⁶⁵ It is an unfair labor practice to discriminate against employees who exercise rights guaranteed by the bill.¹⁶⁶ It is also an unfair labor practice for either side to refuse to bargain in good faith.¹⁶⁷

The Commission may, after a hearing, order the guilty party to cease and desist from such unfair practices.¹⁶⁸ The Commission's order is not self-executing and the party defendant may seek review of the order in the appropriate district court of appeal.¹⁶⁹ The Commission or the charging party may also petition for enforcement of the order in the district court of appeal.¹⁷⁰ If the order is not appealed within thirty days, however, it will, upon request of the Commission, be automatically enforced by the district court of appeal.¹⁷¹

6. *Strikes and Strike Penalties.*—It is an unfair labor practice for an employee organization to engage in a strike.¹⁷² A "strike" is defined very broadly to include concerted slow-downs, mass resignations, boycotts or picket lines.¹⁷³ It is also a violation of the bill for public employees to strike, with or without the sanction of the employee organization.¹⁷⁴ If a strike is threatened or actually occurs, either the Commission or the public employer affected may petition the appropriate circuit court for an injunction prohibiting the strike.¹⁷⁵ If the employee organization disobeys the injunctive order, the circuit court is empowered to fine the organization up to \$5,000 for contempt.¹⁷⁶ In addition, the court can fine striking employees between fifty and one hundred dollars per day for each day they remain on strike.¹⁷⁷

163. *Id.* § 2-447.015 (3).

164. *Id.* § 2-447.015 (4).

165. *Id.* § 2-447.019 (1)-(2).

166. *Id.* § 2-447.019 (1) (a).

167. *Id.* §§ 2-447.019 (1) (c), (2) (c).

168. *Id.* § 2-447.020 (3) (a).

169. *Id.* § 2-447.020 (4).

170. *Id.* § 2-447.020 (5) (a).

171. *Id.* § 2-447.020 (5) (e).

172. *Id.* § 2-447.019 (2) (e).

173. *Id.* § 2-447.002 (5).

174. *Id.* § 2-447.021.

175. *Id.* § 2-447.022 (2).

176. *Id.* § 2-447.022 (3).

177. *Id.*

The employee organization is prohibited from paying the fines for the employees.¹⁷⁸

The Commission is also authorized to penalize an employee organization and individual employees for engaging in strike activity. The Commission can, after a hearing, revoke any "check-off" (dues removal) privilege which may have been negotiated by the offending union;¹⁷⁹ revoke its certification for a period of one year;¹⁸⁰ fine the organization up to \$20,000 for each day of the strike;¹⁸¹ or fine the organization in excess of \$20,000 per day if the costs of the strike exceed that amount.¹⁸² With respect to the striking employees, the Commission may, after a hearing, place an employee on probation for a six-month period;¹⁸³ and the Commission must forbid an increase in remuneration for a period of one year.¹⁸⁴

7. *Miscellaneous.*—The bill permits a "local option." Any political subdivision of the state may adopt its own collective bargaining legislation provided that the legislation is "substantially equivalent" to the provisions and procedures of the state bill.¹⁸⁵

The inclusion of a "check-off" clause, stipulating that the employer will deduct organization dues and assessments from those employees who sign authorization cards, is a negotiable item. The employer does not have to agree to "check-off" or to pay for the expense involved, but must discuss the issue if the employee organization raises it.¹⁸⁶ All proceedings authorized or required by the bill are subject to the Government in the Sunshine Law.¹⁸⁷

B. *Matters of Representation*

1. *Procedure for Selecting a Bargaining Agent.*—The drafters chose a useful technique to determine the representative status of an employee organization seeking to represent a group of employees. The choice involves not only a selection among several possible technical approaches to the representation issue, but involves also several value judgments which might well be influential in determining the eventual success or failure of the proposed legislation. The bill authorizes an employee organization to raise a question or controversy concerning

178. *Id.* § 2-447.023 (2).

179. *Id.* § 2-447.022 (6) (a) (3).

180. *Id.* § 2-447.022 (6) (b).

181. *Id.* § 2-447.022 (6) (a) (4).

182. *Id.*

183. *Id.* § 2-447.022 (5) (a).

184. *Id.* § 2-447.022 (5) (c).

185. *Id.* § 2-447.025.

186. *Id.* § 2-447.007.

187. *Id.* § 6.

a claim for recognition in either of two ways:¹⁸⁸ first, the employee organization, if it believes that it has been "designated or selected by a majority of public employees . . . as their representative" may request recognition by the public employer.¹⁸⁹ The bill goes on to state that a public employer *shall* recognize an organization as the representative of his employees if he is satisfied that the employee organization has been selected by a majority of the employees and that the unit for which representation is requested is a unit appropriate for bargaining.¹⁹⁰

Up to that point the bill restates the law as it has evolved under the NLRA¹⁹¹ and also the law regulating representation procedures in most of the states that have adopted public employee bargaining legislation.¹⁹² The obvious explanation of why these laws allow a private settlement of the representation issue based on an informal assessment of employee sentiment rests with the relative ease, convenience and economy of a private resolution. In many representation cases, little doubt exists as to the feelings of the employees, and the expense and inconvenience of a representation election are unnecessary.¹⁹³

Many employers prefer the informal method in the clear case. Organizational campaigns provide myriad distractions to employees and can have an adverse impact on production, discipline and morale.¹⁹⁴ When the employees' choice is clear, some employers prefer to recognize the union quickly and to get on with the bargaining. The NLRB also prefers the informal settlement and for a long while

188. In language borrowed from NLRA § 9(c)(1), 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(1) (1970), the jurisdiction of the Commission over representation matters is created by giving it the power to "resolve questions and controversies concerning claims for recognition as the bargaining agent for a bargaining unit . . ." See Fla. H.R. 3314, § 2-447.004 (6) (1972).

189. Fla. H.R. 3314, § 2-447.009 (1) (1972).

190. *Id.*

191. For a discussion of the development of the law prior to recent developments discussed at note 199 *infra*, see Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 MICH. L. REV. 851 (1967). See also THE DEVELOPING LABOR LAW 246-67 (C. Morris ed. 1971).

192. See, e.g., CONN. GEN. STAT. ANN. § 7-468(b) (1972); N.Y. CIV. SERV. LAW § 201 (McKinney Supp. 1972); PA. STAT. ANN. tit. 43, § 1101.602 (Supp. 1972).

193. In the private sector, for example, when a group of ten employees gets together, forms its own union, selects its own officers and votes unanimously for strike action in a secret ballot election, could a legitimate doubt exist as to the union's majority status? Or in the public sector, when virtually every teacher in a school district has been a dues paying member of the Florida Education Association or American Federation of Teachers for ten years running, is there any legitimate doubt as to this organization's majority status when it requests recognition?

194. Cf. *Boeing Airplane Co. v. NLRB*, 217 F.2d 369 (9th Cir. 1954); *United Aircraft Corp.*, 134 N.L.R.B. 1632 (1961).

appeared to coerce employers to use that method in preference to the Board-conducted election.¹⁹⁵ The Board's preference is easily explainable. Many employers used the complex administration procedures that characterized representation hearings, elections and appeals to delay and, on occasion, to defeat the right of employees to choose a bargaining representative.¹⁹⁶ In addition private settlements conserved manpower and funds for the perennially underfunded and understaffed regional offices of the NLRB.¹⁹⁷ The United States Supreme Court recently decided, however, that the Board had overstepped the bounds of discretion in its efforts to force employer recognition without an election.¹⁹⁸ As a result, the employer in most cases now has the option of choosing between informal recognition and a secret ballot election.¹⁹⁹

Most states which have adopted comprehensive public employee bargaining legislation permit employer recognition to confer repre-

195. To trace the history of the Board's reliance on "card checks," *i.e.*, the use of authorization cards signed by employees as informal evidence of a union's majority status, see *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969); *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *modifying and enforcing* 85 N.L.R.B. 1263 (1949), *cert. denied*, 341 U.S. 914 (1951); *Bernel Foam Prods. Co.*, 146 N.L.R.B. 1277 (1964); *Snow & Sons*, 134 N.L.R.B. 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962); *Cudahy Packing Co.*, 13 N.L.R.B. 526 (1939). *See generally* THE DEVELOPING LABOR LAW 246-59 (C. Morris ed. 1971).

196. *Cf. Bernel Foam Prods. Co.*, 146 N.L.R.B. 1277, 1280 (1964). The NLRB has reduced the number of days consumed in processing representation petitions from a median of eighty-nine days in 1961 to a median of forty-three days in 1970. *See* 35 NLRB ANN. REP. 12 (1970). But the statistics do not indicate how long the Board took to process cases where each appeal possibility was utilized. *See* K. MCGUINNESS, HOW TO TAKE A CASE BEFORE THE NATIONAL LABOR RELATIONS BOARD 47-175 (3d ed. 1967), for an explanation of the myriad appeal possibilities in a representation proceeding. Nor do the Board's statistics indicate the length of time a litigant can consume in seeking review of the Board's order in a federal court of appeals.

197. *Cf. A. COX & D. BOK*, LABOR LAW 1163-68 (7th ed. 1969); *Miller, Our Rube Goldberg Labor Board*, *Nation's Bus.*, Feb. 1972, p. 30.

198. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

199. *See id.* at 591-92:

When confronted by a recognition demand based on possession of cards allegedly signed by a majority of his employees, an employer need not grant recognition immediately, but may, unless he has knowledge independently of the cards that the union has a majority, decline the union's request and insist on an election, either by requesting the union to file an election petition or by filing such a petition himself under § 9(c)(1)(B). If, however, the employer commits independent and substantial unfair labor practices disruptive of election conditions, the Board may withhold the election or set it aside, and issue instead a bargaining order as a remedy for the various violations. A bargaining order will not issue, of course, if the union obtained the cards through misrepresentation or coercion or if the employer's unfair labor practices are unrelated generally to the representation campaign.

See also THE DEVELOPING LABOR LAW 264-65 (C. Morris ed. 1971). *But see* Pogrebin, *NLRB Bargaining Orders Since Gissel: Wandering from a Landmark*, 46 ST. JOHN'S L. REV. 193 (1971).

sentative status on a bargaining agent.²⁰⁰ Unfortunately, possibilities for abuse inhere in unsupervised recognition. In the private sector informal recognition can be used by an employer to foist a corrupt or "co-operative" union on the employees before they can join or form a union of their choice.²⁰¹ In addition, an unscrupulous union can compel recognition from an economically weaker employer by picketing and boycotting tactics, despite the employees' wish to do without representation.²⁰² Sufficient remedies exist for these abuses both under the NLRA²⁰³ and H.R. 3314,²⁰⁴ but employees are too often unaware of them, or too intimidated to use them. It is unlikely, but not impossible, that similar abuses will creep into public employee bargaining under H.R. 3314. Public employers do not personally profit from low wages and benefits and inferior working conditions, nor do they necessarily suffer economically from increased wages and benefits. The only temptation for the public employer to circumvent the requirement of majority designation would proceed from a desire to work with what he believes is a "reasonable" or "understanding" union despite its lack of support among the employees. The risk of public employers violating the law in this way is probably not significant enough to justify the elimination of informal recognition, certainly a very useful and economical technique for settling representation issues.

One possible disadvantage does inhere in the use of this technique in the public sector that does not generally arise in the private sector. The private employer can refuse a demand for recognition either because the union has not proved to his satisfaction that it has been designated by a majority of the employees, or because the union has demanded the right to represent employees in a unit that the employer

200. See, e.g., N.Y. CIV. SERV. LAW § 204.1 (McKinney Supp. 1972); PA. STAT. ANN. tit. 43, § 1101.602 (Supp. 1972). But see WIS. STAT. ANN. § 111.83 (2) (Supp. 1972).

201. See 16 NLRB ANN. REP. 155-59 (1951), quoted in A. COX & D. BOK, *supra* note 197, at 215-20; Note, Section 8(a)(2): *Employer Assistance to Plant Unions and Committees*, 9 STAN. L. REV. 351 (1957).

202. See, e.g., C. S. Smith Metropolitan Mkt. Co. v. Lyons, 16 Cal. 2d 389, 106 P.2d 414 (1940). For an examination of one form of union pressure tactics, see Lauritzen, *The Organizational Picket Line—Coercion*, 3 STAN. L. REV. 413 (1951). But see Tobriner, *The Organizational Picket Line—Lawful Economic Pressure*, 3 STAN. L. REV. 423 (1951).

203. Section 8(a)(2), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(2) (1970), prohibits employer domination of or assistance to a labor organization; § 8(b)(7), 73 Stat. 544 (1959), 29 U.S.C. § 158(b)(7) (1970), prohibits most forms of organizational picketing.

204. Fla. H.R. 3314, § 2-447.019(1)(e) (1972), makes it an unfair labor practice for an employer to dominate, interfere with or assist in the formation, existence or administration of an employee organization; Fla. H.R. 3314, § 2-447.019(2)(e) (1972), forbids employee organizations from participating in strikes; Fla. H.R. 3314, § 2-447.001(5) (1972), defines strike to include picketing.

considers inappropriate.²⁰⁵ If the latter is his reason, the case will go to the NLRB for resolution. The employer will generally raise the appropriate unit issue when it is in his self-interest to do so. Unit determinations can cause him economic and managerial problems if they do not reflect his own internal management scheme. His failure to raise a timely objection will generally cause only himself discomfort.²⁰⁶

In the public sector, however, an inappropriate unit determination will not necessarily create immediate problems for the public employer, and consequently his self-interest might not dictate an objection to such units if they are requested by the employee organization. But inappropriate unit determinations, while they might not have an immediate adverse impact on the employer, can create havoc within a given governmental unit, ultimately costing the taxpaying public serious losses in funds and services.²⁰⁷ To guard against this possibility, the Florida bill provides that even when an employer on demand has recognized an employee organization, the employee unit for bargaining implied in the recognition must be expressly approved by the Commission before certification will issue.²⁰⁸ And despite informal recognition the employee organization cannot function under the bill until it has been certified by the Commission.²⁰⁹

The Commission, on the other hand, has the power to deny certification, but only on the ground that the unit is inappropriate for bargaining.²¹⁰ In making that determination, the Commission will measure the unit approved against the enumerated criteria used for de novo unit determinations by the Commission.²¹¹ Since the main purpose of the review process is to permit Commission intervention when the employer appears to be permitting fractionalization, the unit accepted by the employer should be approved by the Commission

205. Even prior to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the employer could decline to recognize a union if he had a good faith doubt as to the appropriateness of the unit requested by the union. See *NLRB v. Morris Novelty Co.*, 378 F.2d 1000 (8th Cir. 1967); *Clermont's, Inc.*, 154 N.L.R.B. 1397 (1965). But cf. *NLRB v. Ralph Printing & Lithographing Co.*, 379 F.2d 687 (8th Cir. 1967).

206. See generally N. CHAMBERLAIN & J. KUHN, *COLLECTIVE BARGAINING* 233-63 (2d ed. 1965).

207. Anderson, *The Structure of Public Sector Bargaining*, in *PUBLIC WORKERS AND PUBLIC UNIONS* 37, 39-42 (S. Zagoria ed. 1972).

208. Fla. H.R. 3314, § 2-447.009 (1) (1972).

209. Fla. H.R. 3314, § 2-447.006 (2) (1972), gives public employees the right "to negotiate collectively through a *certified* bargaining agent" (emphasis added); in addition, an employer is required to bargain only with a certified bargaining agent. *Id.* § 2-447.011 (1).

210. Fla. H.R. 3314, § 2-447.009 (1) (1972).

211. *Id.* See note 244 *infra*.

unless fractionalization would be the probable result²¹² or approval of the unit requested would involve a serious departure from the criteria set out in the bill.²¹³

If the employer refuses to recognize the employee organization either because he doubts the organization's majority status or cannot ascertain majority status because of uncertainty as to the appropriate unit to use in testing the union's claim, then the employer will refuse to recognize the organization; his next recourse is to petition the Commission for certification through a representation election.²¹⁴

The bill, borrowing what developed as an administrative rule with the NLRB, requires that the petition contain a sworn statement that thirty per cent or more of the public employees in the proposed bargaining unit desire to be represented for purposes of collective bargaining by the employee organization.²¹⁵ In an apparent attempt

212. In theory, the Commission could exercise very close scrutiny over the unit determinations made in the course of informal recognition by the employer; but since the parties themselves are in the best position to know what arrangement is the most workable for them, and since the number of factors for deciding on an appropriate unit permit a great deal of flexibility, it is highly unlikely that the Commission will disallow a unit determination unless it violates the specific mandate of the legislature to avoid fractionalized units.

213. The bill is silent on the options open to the Commission and to the union if the Commission refuses to certify the recognized employee organization on the ground that the unit is inappropriate. Presumably when the Commission deems it necessary to make a minor adjustment in the unit, the union will be permitted to amend its petition and the employer to amend his approval without the necessity of initiating a new procedure. If the Commission disagrees with the unit approved to the extent that the number of employees added or reduced is sufficient to affect the union's majority status, the employee organization should be allowed to withdraw its petition for certification or have it treated as a petition for a representation election.

214. Fla. H.R. 3314, § 2-447.009(2)(a) (1972). The section states in part: "Any employee organization may file a petition with the commission for certification as the bargaining agent for a proposed bargaining unit." The section should more accurately state: "Any employee organization may file a petition with the commission for a representation election."

In addition, the section might properly require the employee organization first to demand informal recognition by the employer under Fla. H.R. 3314, § 2-447.009(1) (1972), before filing a petition under subsection 2. Only if the public employer refused to recognize the employee organization would it be permitted to file the petition for an election. That procedure is required by the NLRA § 9(c)(1)(A), 61 Stat. 144 (1947), 29 U.S.C. § 159(c)(1)(A) (1970).

215. The Board "rule" is found neither in the statute nor in the NLRB Rules and Regulations, but has been included in the Board's Statements of Procedure, 29 C.F.R. § 101.18(a) (1972). It is an informal device used by the Board to administer economically its responsibility to investigate and determine representation petitions. To save the time and effort required in pursuing representation questions where employee interest is minimal or nonexistent, the Board usually requires a union to submit authorization cards indicating that at least thirty per cent of the employees in the unit desire the petitioning union to be their representative or wish to have an NLRB election to make such a determination, before the Board will proceed to a hearing on the petition. See K. McGUINNESS, *supra* note 196, at 60.

to use the NLRB system, however, the drafters misworded the section, requiring only a sworn statement that thirty per cent or more of the unit employees desire representation.²¹⁶ Presumably the Commission will still find it necessary to adopt a rule requiring the employee organization to submit evidence of the employees' desires in the form of authorization or membership cards.²¹⁷ The necessity for another rule and the inherent unreliability of privately furnished authorization cards could be eliminated by a simple amendment requiring that the petition be supported by statements signed by thirty per cent or more of the public employees in the proposed bargaining unit setting forth their desire to vote in a secret ballot election on the issue of representation for purposes of collective bargaining by the employee organization filing the petition. To avoid problems in the public sector similar to those generated by authorization cards in the private sector, the wording and form of the statement signed by the employees can be prescribed by the Commission pursuant to its rule-making powers.²¹⁸

Pursuant to its general power to determine the petition's sufficiency, the Commission, of course, may investigate the authenticity and voluntariness of the signatures if doubts exist that one or more signatures might have been forged or coerced.²¹⁹ The investigation can be accomplished through informal means or, as the NLRB does it, through nonadversary hearings with all interested parties invited to furnish the Commission agent with information relevant to the inquiry.²²⁰ At the conclusion of the hearing, if the Commission finds that a question concerning representation exists—that is, if the employer has not recognized the employee organization and more than thirty per cent have indicated a desire for representation—it is directed to order a secret ballot election.²²¹

A crucial section was inadvertently omitted from the bill during the 1971-1972 session when the bill was voted out of the House Committee on Manpower and Development.²²² As a result the bill says

216. The bill reads in part: "The petition shall contain a sworn statement that thirty percent (30%) or more of the public employees in the proposed bargaining unit desire to be represented for purposes of collective bargaining by the employee organization filing the petition." Fla. H.R. 3314, § 2-447.009 (2) (a) (1972).

217. See the discussion of the confusing "dual purpose authorization cards" often used in the private sector in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 601-10 (1969).

218. See Fla. H.R. 3314, § 2-447.004 (1) (1972).

219. *Id.* § 2-447.009 (3).

220. *Cf.* K. McGUINNESS, *supra* note 196, at 83-101. The NLRB representation hearing is nonadversary in a technical sense only. *Id.* at 94.

221. Fla. H.R. 3314, § 2-447.009 (4) (c) (1972).

222. The problem of certification dealt with in this missing section had caused interpretive difficulties in previous versions of Fla. H.R. 3314 (1972). Fla. H.R. 3065,

nothing about the Commission's duties subsequent to the election. The missing section provides that an employee organization which receives the votes of a majority of the employees *voting in the election* shall be certified.²²³ If the union obtains fifty per cent or less of the votes actually cast, the union will not be certified; and the Board will not schedule another representation election within that unit for one year.

Some of the cut-off percentages used in section 2-447.009 stirred controversy. The requirement of a showing of interest by thirty per cent of the employees was regarded with skepticism by some legislators who felt that at least fifty per cent of the employees should evidence a commitment to the employee organization before the Board ordered an election.²²⁴ The objection ignores the purpose of the "showing of interest" requirement, and also some of the realities of an organizing campaign. The purpose of a thirty per cent showing of interest is not to make it more difficult for employees to exercise their

§ 112.52 (1970), for example, spoke of "certified" employee organizations, but nowhere required the certification of an employee organization, or in any other way specified the duty of the Commission when an employee organization won a representation election. Fla. H.R. 3556, § 112.61 (1970), stated that the Commission should *not* certify an organization unless it received fifty per cent plus one of the votes, but never affirmatively required certification. Fla. H.R. 206, § 112.61 (1970), carried forward that anomaly.

The version of Fla. H.R. 3314, § 2-447.009 (d)-(e) (1972), which was debated by the Committee on Manpower and Development stated:

(d) Where an employee organization is selected by a majority of the employees voting in an election in which at least thirty percent (30%) of the eligible employees cast valid ballots, the public employer shall certify the employee organization as the exclusive representative of all employees in the unit for purposes of this act.

(e) In any election in which at least thirty percent (30%) of the eligible employees in the unit cast valid ballots and in which none of the choices on the ballot receives the vote of a majority of the employees voting, a runoff election shall be held according to rules promulgated by the commission.

The bill does not make sense without these subsections, which could only have been omitted through inadvertence; they should be included in any future versions. For the sake of convenience, references to subsections (d) and (e) will assume their inclusion in Fla. H.R. 3314 (1972).

223. See note 222 *supra*. The missing subsections were offered as amendments when the bill was debated in the Senate Committee on Civil Judiciary "B."

224. The following substitute for subsection (c) was offered by Senators Ware and Saylor during debate in the Senate Committee on Civil Judiciary "B":

The election ballot shall contain the name of the petitioning employee organization and the name or names of any other employee organization showing proof of at least 10% representation of the public employees within the defined bargaining unit. The ballot shall also contain a statement that may be marked by any public employee voting that he does not desire to be represented by any of the named employee organizations.

Hearings on Fla. H.R. 3314 Before the Fla. Senate Committee on Civil Judiciary B (1971) (on file in Florida Supreme Court Library).

right to select a bargaining representative, or to hinder the organizing efforts of employee organizations; rather the purpose is to permit the Commission to conserve its resources by ensuring that the employee organization has some chance of winning a representation election. The commitment of thirty per cent of the employees has apparently proved in the experience of the NLRB to be a reliable factor in making that judgment. Given the normal reluctance of employees to make themselves vulnerable to potential employer retaliation by declaring for representation, it is not unreasonable to assume that when thirty per cent "sign up," the employee organization's request for an election is based on substantial employee support.

Another percentage that occasioned misunderstanding and some controversy was the requirement that an employee organization must obtain a majority, that is, fifty per cent plus one, to earn certification as the bargaining representative.²²⁵ Some legislators quickly pointed out that an organization could be certified even though it received the votes of less than a majority of the employees in the unit. The experience in the private sector has been that between ninety per cent and one hundred per cent of the employees vote in representation elections.²²⁶

Despite the experience in the private sector and despite a contrary law in political elections, strong support existed for requiring a certain percentage of employees to cast votes before considering the elections to be valid.²²⁷ Since it is likely that most employees will vote in these elections in any event, little harm would be done by requiring that

225. In theory an organization could be certified with only one per cent of the employees voting for it, if less than two per cent voted, since the organization need only receive fifty per cent plus one of the votes cast.

226. See 28 NLRB ANN. REP. 177 (1963). The reasons are few and simple. The election generally takes place during or at the close of working hours on company property; no inconvenience results from the employees' exercise of their franchise. In addition employees are often intensively partisan and concerned in organizational campaigns, since the outcome of the election, unlike most political elections, will have a direct and immediate effect on their lives.

227. The following amendment was offered by Senators Ware and Sayler during debate in the Senate Committee on Civil Judiciary "B":

(d) Where an employee organization is selected by a majority of the employees voting in an election in which at least 50% of the eligible employees cast valid ballots, the public employer shall certify the employee organization as the exclusive representative of all employees in the unit for purposes of this act.

(e) In any election in which at least 50% of the eligible employees in the unit cast valid ballots and in which none of the choices on the ballot receives the vote of a majority of the employees voting, a runoff election shall be held according to rules promulgated by the commission.

Hearings on Fla. H.R. 3314 Before the Fla. Senate Committee on Civil Judiciary B (1971) (on file in Florida Supreme Court Library).

fifty to seventy-five per cent of the employees must vote before the election would be valid.

The runoff election procedures caused considerable consternation because, by providing that the employees would select between the two top choices in the first election, the section created the possibility that employees would not be given the opportunity to vote against union representation. For example, in a typical representation election, two unions might be vying for the votes of employees. A group of employees might be strongly opposed to any union representation. The employees will have three choices on the ballot: Union *A*, Union *B*, or No Union. If forty-eight per cent vote for Union *A*, forty-seven per cent for Union *B* and five per cent for No Union, then since no choice received a majority of the votes cast, a runoff election is necessary. The bill, since it provides that the two top choices will be placed on the runoff ballot, eliminates in this hypothetical the possibility of voting against union representation.

Some legislators insisted on amendments which would have included on every ballot, including runoff election ballots, the choice of No Union.²²⁸ The result of that procedure, however, would be a repeat of the first election rather than a runoff. It would be possible, of course, to include on the ballot only the union with the highest number of votes plus the No Union choice. But Union *B* could legitimately protest that that would be unfair to it; despite receiving forty-seven per cent of the vote, it would have been displaced on the ballot by the No Union choice which originally received only five per cent.

The argument for including the No Union choice points out that by failing to include the possibility of a No Union vote, the bill is forcing anti-union employees either to vote for a union or forfeit their vote. The argument is not without merit, but the alternative in this hypothetical is to allow five per cent of the employees to eliminate a choice of forty-seven per cent of the group.

Since one group's choice must be sacrificed if the runoff is going to be a runoff, the fairer solution is to eliminate the choice receiving the lowest number of votes.

2. *Procedures for Unit Determination.*—The proper shaping of the unit appropriate for purposes of collective bargaining in the public sector requires both considerable insight into the nature of collective

228. A third amendment was offered by Senators Ware and Saylor, adding a subsection (f) to Fla. H.R. 3314, § 2-447.009 (1972). "Such runoff ballot election [sic] shall also contain a statement that may be marked by any public employee voting that he does not desire to be represented by any of the named employee organizations." *Hearings on Fla. H.R. 3314 Before the Fla. Senate Committee on Civil Judiciary B* (1971) (on file in Florida Supreme Court Library).

bargaining as it has evolved in twentieth-century America, and an added sensitivity to the unique features of public employee bargaining. The unit determination serves several distinct but related purposes.²²⁹ It creates "election districts," since its scope will determine voter eligibility in the representation election. Only those employees within the defined unit are permitted to vote for or against the collective bargaining representative. Secondly, the defined unit constitutes a governing unit. Since an employee organization that prevails in a representation election is certified as the exclusive representative of employees in the unit, the organization becomes "by force of law" the representative of both the consenting majority and the dissenting minority. Thirdly, the bargaining unit constitutes an economic unit "pairing union and management for purposes of collective bargaining."²³⁰ The collective agreement is generally co-extensive with the unit and establishes uniform rates of pay and a unified system of regulations binding on the employer and all members of the unit.

A unit determination also has more immediate consequences. The size and scope of a given unit will certainly affect and often determine the outcome of a one-union representation election.²³¹ Similarly, the unit designation might influence not only the results of an election choice between one union and no union: even when two employee organizations are competing, the unit selected will often control which has the better chance for employee approval.²³² As a consequence, the employee organization will often attempt to conform the size of a unit to the extent of its organizational efforts. The employer, on the other hand, if interested in defeating the organizational efforts, will attempt to expand the unit to dilute its opponent's strength.²³³

But there are potential disadvantages both to the organization and the employer in their attempts to mold the unit as an election district.

229. The following scheme of analysis was suggested by Professors Summers and Wellington. No attempt will be made to ascribe specific credit during the textual discussion. See C. SUMMERS & H. WELLINGTON, LABOR LAW 511-13 (1968). See also H. SHERMAN, JR., UNIONIZATION AND COLLECTIVE BARGAINING 54-78 (Labor Relations and Social Problems, Unit One, 1971). For an analysis of the economic impact on unions and employers of various kinds of bargaining unit structures, see N. CHAMBERLAIN & J. KUHN, COLLECTIVE BARGAINING 233-63 (2d ed. 1965).

230. C. SUMMERS & H. WELLINGTON, *supra* note 229, at 512.

231. For example, if the appropriate unit includes "all faculty and professional personnel" in the state university system, an organization which had focused organizational efforts on only two of the seven universities in Florida might find itself under a serious handicap at election time.

232. Using the model of the university system again, certain types of employee organizations would be favored if the unit included "all faculty and professional employees," and other types favored if the unit was limited to "all tenured faculty members."

233. See *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1965).

If the organization, for example, successfully limits the unit to those employees among whom it has significant support, the smaller unit might be weaker as an "economic grouping" than a larger unit. And while the employer might achieve a tactical advantage in enlarging the unit, it would risk having to bargain with a more powerful aggregate of employees if the employee representative wins an election in the larger unit.

In the private sector the union and the employer resolve the dilemma of the larger versus the smaller unit depending on their perception and assessment of the possible risks and advantages involved in each possibility. Each party then attempts to persuade the other to accept its unit definition in an informal settlement;²³⁴ or if no settlement is reached, each party may attempt to convince the NLRB that its suggested unit is the more appropriate for purposes of collective bargaining.²³⁵

In resolving appropriate unit controversies, the Board seeks to group together those employees who share a "community interest"; that is, those who have a substantial mutual interest in wages, hours and working conditions.²³⁶ The Board has emphasized that it is charged to select an appropriate unit, not the most appropriate or best unit.²³⁷ In discharging its responsibilities, the Board looks to a variety of relevant factors.²³⁸

Although Congress conferred upon the Board broad discretion in defining units appropriate for collective bargaining,²³⁹ the NLRA

234. N. CHAMBERLAIN & J. KUHN, *supra* note 229, at 256, observe that:

The scope of the bargaining unit will depend upon the pragmatic judgment of the parties as they balance their answers to three questions: (1) Who will gain or lose from changes in the unit? (2) How will relative bargaining power be affected by narrowing or widening the unit? (3) Will the internal authority of the organization support the agreement covering the unit? The balance may be precarious and may change over time; thus it is not surprising that units seemingly well established break up or expand. As the bargaining power of one party increases or decreases, the other party may find it worthwhile to try to change the scope of the unit to improve its position. Such changes may lead to a widening of the unit, but they may also tend to narrow it.

235. THE DEVELOPING LABOR LAW 200-02 (C. Morris ed. 1971).

236. Cf. 27 NLRB ANN. REP. 63 (1962).

237. Metropolitan Life Ins. Co., 156 N.L.R.B. 1408 (1966). For a critical analysis of the Board's performance in two specific classes of cases, see Note, *The Board and Section 9(c)(5): Multilocation and Single-Location Bargaining Units in the Insurance and Retail Industries*, 79 HARV. L. REV. 811 (1966).

238. These have been listed by Professor Morris as follows:

(1) extent and type of union organization of the employees; (2) bargaining history in the industry as well as with respect to the parties before the Board; (3) similarity of duties, skills, interests, and working conditions of the employees; (4) organizational structure of the company; and (5) the desires of the employees.

THE DEVELOPING LABOR LAW 201 (C. Morris ed. 1971).

239. See *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 134 (1944).

does limit that discretion in several important respects. Besides the classes of employees completely excluded from coverage under the NLRA²⁴⁰ and, therefore, from inclusion in a bargaining unit, the NLRA also specifies that a union may not be certified as the representative of security guards if it "admits to membership or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."²⁴¹ In addition, the NLRA also provides that a unit including both professional and nonprofessional employees is inappropriate "unless a majority of such professional employees vote for inclusion in such unit."²⁴²

H.R. 3314 closely tracks the structure and language of the NLRA. The bill provides that, if the Commission finds that a question concerning representation exists, it shall immediately "[d]efine the proposed bargaining unit and determine which public employees shall be qualified and entitled to vote at any election held by the commission."²⁴³ In defining the bargaining unit, the Commission is charged to consider nine factors,²⁴⁴ six of which have been borrowed from the NLRB's interpretations of the NLRA,²⁴⁵ and three of which—the principles of efficient administration, the organizational structure of the public employer, and the occupational classifications of the public em-

240. Section 2(2), 61 Stat. 137 (1947), 29 U.S.C. § 152(2) (1970). Excluded are employees of any federal, state or local government, employees of nonprofit hospitals, persons subject to the Railway Labor Act, employees of a labor organization (other than when acting as an employer) and agents of a labor organization. In addition, it excludes agricultural workers, domestics, members of the employer's family, independent contractors and supervisors. See NLRA § 2(3), 61 Stat. 137 (1947), 29 U.S.C. § 152(3) (1970).

241. Section 9(b)(3), 61 Stat. 143 (1947), 29 U.S.C. § 159(b)(3) (1970).

242. Section 9(b)(1), 61 Stat. 143 (1947), 29 U.S.C. § 159(b)(1) (1970) states: "[T]he Board shall not . . . decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit"

243. Fla. H.R. 3314, § 2-447.009(4)(a) (1972).

244. Fla. H.R. 3314, § 2-447.009(5)(a) (1972), lists the following factors:

1. The desires and recommendations of the public employer and public employees to be represented;
2. The duties, skills, and working conditions of the public employees to be represented;
3. The geographical location of the public employer or of the public employees to be represented, or both;
4. The occupational classifications of the public employees to be represented;
5. The extent of organization among the public employees to be represented;
6. The principles of efficient administration of government;
7. The community of interest among the employees to be included in the unit;
8. The organizational structure of the public employer;
9. The history of employee relations within the organization of the public employer.

245. See note 238 *supra*.

ployees to be represented—are unique to public sector bargaining relationships. The Commission also has the responsibility of “[i]dentify[ing] the public employer or employers for purposes of collective bargaining with the bargaining agent”²⁴⁶

C. Matters of Collective Bargaining

1. *Mechanics of Bargaining.*—After an employee organization has been certified as the collective bargaining representative of employees in a unit appropriate for bargaining, the bill requires the bargaining agent and the representative of the employer to “bargain collectively in the determination of the terms and conditions of employment of the public employees” in the unit.²⁴⁷ In carrying out this duty, “[t]he public employer . . . and the bargaining agent . . . shall meet at reasonable times and confer in good faith. Any . . . agreement reached by the negotiators shall be reduced to writing and . . . signed”²⁴⁸ The definition of collective bargaining adds the important caveat that in discharging their obligations “neither party shall be compelled to agree to a proposal or be required to make a concession”²⁴⁹

The language used to describe the mechanics for implementing the bargaining relationship is borrowed from the NLRA;²⁵⁰ an ex-

246. Fla. H.R. 3314, § 2-447.009 (4) (b) (1972).

247. *Id.* § 2-447.011 (1).

248. *Id.*

249. *Id.* § 2-447.002 (13). The entire subsection reads:

“Collective bargaining” means the performance of the mutual obligations of the public employer and the bargaining agent of the employee organization to meet at reasonable times, to confer and negotiate in good faith, and to execute a written contract with respect to agreements reached concerning the terms and conditions of employment, except that neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this part.

250. The bargaining requirements of the NLRA are set out in three sections. NLRA § 8 (a) (5), 61 Stat. 141 (1947), 29 U.S.C. § 158 (a) (5) (1970), makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a). NLRA § 8 (b) (3), 61 Stat. 141 (1947), 29 U.S.C. § 158 (b) (3) (1970), imposes a similar obligation on labor organizations. NLRA § 9 (a), 61 Stat. 143 (1947), 29 U.S.C. § 159 (a) (1970), states in part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment

NLRA § 8 (d), 61 Stat. 142 (1947), 29 U.S.C. § 158 (d) (1970), states in part:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and

tensive gloss has accumulated, therefore, to aid in the interpretation of the NLRA.²⁵¹ As a result the outlines of the collective bargaining system and the attendant obligations of the parties created by H.R. 3314 are clear in general terms, despite the occasional conundrum that has emerged in articulating the details of the bargaining relationship.²⁵² H.R. 3314, therefore, has reproduced a system of bargaining well used and understood in both the public and private sectors.

The Committee's selection of the collective bargaining model should be noted as a deliberate choice between competing modes that have been utilized to regulate public sector bargaining. Other states,²⁵³ as well as the federal government,²⁵⁴ have developed the "meet and con-

other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession

For an excellent discussion of the reasons which led Congress to enact § 8(d) in 1947, to define good faith bargaining as not requiring the making of a concession, see *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952).

251. The broad outlines of the system of bargaining that have evolved in the private sector, and that have been given a quasi-official status as a benchmark for measuring departures from the statutory bargaining duty, are well marked and need no elaborate explanation. See *Order of R.R. Tellers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944). The representatives of the parties meet for the first time, usually at the request of the employees' representative, to discuss a list of "demands" for improvements in wages and conditions, invariably well in excess of what the employees will accept in a final settlement. The employer responds with counterproposals, usually close to the status quo. The remaining meetings are devoted to the trade-offs, exchanges and haggling over words and sums that characterize the bargaining process. Occasionally, third party intervention is necessary, either at the request of the parties in the private sector, or because of statutory requirements in the public sector. Most contracts, however, are settled peacefully without outside aid both in the public and private sectors. In the rare instance, the employees will strike to enforce their demands. See generally A. GOLDMAN, PROCESSES FOR CONFLICT RESOLUTION: SELF-HELP, VOTING, NEGOTIATION AND ARBITRATION 62-80 (Labor Relations and Social Problems, Unit 7, 1972); D. WOLLETT & R. CHANIN, THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS 4:17-23, 6:60-65 (1970).

252. For an insightful study of the evolution of collective bargaining in the United States, see H. WELLINGTON, LABOR AND THE LEGAL PROCESS (1968).

253. Under some state laws, the employer clearly has no obligation to engage in the bilateral negotiations that characterize collective bargaining in the private sector. See, e.g., NEB. REV. STAT. § 48-836 (1968). Other state statutes use "meet and confer" language but apparently create an enforceable bargaining obligation. See, e.g., KAN. STAT. ANN. §§ 75-4328, -4333 (b) (7) (1971). A third group of state statutes use "collective bargaining" language but provide no administrative mechanisms for enforcing a bargaining obligation. See, e.g., MONT. REV. CODES ANN. §§ 75-6118, -6125 (1971). The larger group of state statutes require collective bargaining and provide mechanisms for the enforcement of the obligation. See, e.g., N.Y. CIV. SERV. LAW § 204.1 (McKinney Supp. 1972); PA. STAT. ANN. tit. 43, §§ 1101.701, .1201 (5) (Supp. 1972).

254. See Exec. Order No. 11491, 34 Fed. Reg. 17605 (1969), modified in Exec. Order No. 11616, 36 Fed. Reg. 17319 (1971). See generally K. HANSLOWE, THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT (1967). Several critical studies of Exec.

fer" approach, which permits employees to select an agent to represent them in conferences in which their views on working conditions are presented to the employer. The employer is under no obligation to implement employee suggestions or to bargain over his refusal to do so.

The "meet and confer" approach finds favor both with those who feel that the collective bargaining relationship is an inappropriate model of interaction for the public sector and with those who see it as a necessary first step before moving to the more mature, but also more complex, pattern of collective bargaining.²⁵⁵ Arguments can certainly be made in favor of both types of interaction. The majority of the states that have adopted comprehensive bargaining models have opted for the collective bargaining model.²⁵⁶

2. *The Structure and Subjects of Bargaining.*—The structure and scope of collective bargaining are interrelated concepts which touch upon many, if not most of the critical sections of H.R. 3314. The question of who bargains for what with whom involves a number of sensitive issues. What is the appropriate unit size for public employees? Who has the authority to bargain for the public employer concerning different bargaining subjects? What matters are appropriate for collective bargaining? What relationship does the collective bargaining agreement have with merit service systems and local ordinances or laws of state-wide application? And, finally, what subjects intrude on areas reserved for the employer and are, therefore, inappropriate for bargaining?

No single section confronts or attempts to resolve all of these issues. In fact, the several overlapping provisions in H.R. 3314 which deal with the structure and scope of bargaining leave several important questions unanswered and offer confused responses to still others. The defects, however, are not incurable.

a. *Structure of Bargaining.*—In making its unit determination, the primary task of the Commission will be to identify that group of employees with a sufficient community of interest to permit effective representation by a single bargaining agent. It was previously noted that a preferred approach to this very important responsibility of the

Order Nos. 10987 and 10988, 27 Fed. Reg. 550, 551 (1962), were completed and led to the reforms enacted in Exec. Order No. 11616, *supra*. See SECTION OF LABOR RELATIONS LAW, ABA, THE REPORT OF THE COMMITTEE ON THE LAW OF GOVERNMENT EMPLOYEE RELATIONS, PROCEEDINGS 79-85 (1968).

255. See generally ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT 105-06 (1969).

256. There are six states with "meet and confer" legislation: California, Maryland, Minnesota, Missouri, Nebraska and Oregon (teachers). See Goldberg, *Changing Policies in Public Employer Labor Relations*, Monthly Labor Rev., July 1970, p. 5.

Commission would be to create the largest employee units consonant with their right to be represented by an agent of their choice.²⁵⁷

An equally important function of the Commission in the course of its unit determination involves identifying the "employer."²⁵⁸ The identification of the public employer for a particular group of employees involves several problems unique to the public sector. First, the identification of the employer will often turn on a determination of the employee unit.²⁵⁹ The named employer must be an agency which has at least some authority over all employee members of the unit. Consequently, the more inclusive the unit of employees, the fewer the options left to the Commission in identifying the agency employer.

The size of the employee unit merely limits or expands the Commission's options. But unlike the private sector determination, the identification of an appropriate employee unit does not automatically identify the appropriate employer, since no agency in the public sector determines the wages, hours and working conditions of any particular group of state employees. Which agency has power or authority to bargain over the subjects of collective bargaining—wages, hours and working conditions—must still be determined. At that point the difficulty of creating viable bargaining relationships in the public sector becomes acute. Whereas in the private sector the appointed managers of the corporation would have ultimate control over all items of bargaining, the public sector is characterized by a diffusion of responsibility among various agencies, elected officials and elected bodies for most of the decisions and allocations that affect public employees.²⁶⁰

With respect to state employees, and some municipal employees, the difficulty of structuring a viable bargaining relationship is further complicated by the merit service system. The Division of Personnel

257. See note 212 and accompanying text *supra*.

258. For a general analysis of the problem, see Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805 (1970).

259. If secretaries in a state law school in Florida petition for union representation, it would be possible to name as their employer the college of law, the university, the Board of Regents, the Department of Education, the Cabinet or the State of Florida, depending on whether they organized by themselves or in conjunction with successively more inclusive groups of state employees. If the secretaries organize on the college level, and this unit is deemed appropriate, it would be possible to name the college, university, Regents, Department, Cabinet, or the State of Florida as their employer.

260. Again with reference to a state law school, entry wages and hours for various job classifications are set by the Department of Administration, but working conditions are determined primarily by the university and college. Annual wage increases are proposed by the Regents, included by the Governor in his budget message, approved by the legislature, but influenced by the Department of Administration. Promotion policies are set by the Department of Administration, administered by the university, but in the case of individual employees, are implemented by the college.

and Retirement in the Department of Administration has been authorized by the legislature to determine by administrative rule making the wages, hours and employment conditions of career service employees.²⁶¹ Most of the items that career service employees would wish to bargain for, therefore, are not controlled by their immediate employer. Nor, because of the legislation setting up and regulating the merit service system, are those items amenable to adjustment through the processes of traditional collective bargaining techniques.²⁶²

In some ways, however, the situation of municipal employers is even more complicated. Some municipal employees work under a locally adopted and administered merit service system;²⁶³ the same problems that occur in the case of career service state employees similarly complicate matters at the municipal level. In addition, municipal employees very often "work for" two separate employers: that is, two functionally distinct persons or bodies that control in some way their wages, hours or employment conditions. Deputy sheriffs, for example, are employed by the sheriff but their wages and hours are influenced, if not set, by the county commissioners.²⁶⁴ Teachers employed by a principal who is responsible to an elected school superintendent and an elected board of public instruction are in a similar situation.

Another vexing problem in the public sector arises from laws and ordinances which directly regulate pay, hours or working conditions. On the state level, such matters as the amount of reimbursement for official travel expenses are set by statute.²⁶⁵ On the municipal level, the working hours of firefighters are often regulated by ordinance.²⁶⁶

The problem of identifying the public employer—the "who" in the bargaining relationship—cannot be divorced from the even more important question involving the scope of bargaining—the "what" in the bargaining relationship. If, for example, a public employer is only authorized to bargain over wage increases, the public employer can be identified as that person or institution who decides on the wage increases of a specified group of employees. If, on the other hand, the endless items subsumed under the deceptively innocent phrase "wages, hours and terms or conditions of employment" are proper subjects for

261. FLA. STAT. ch. 110 (1971).

262. See note 340 and accompanying text *infra*.

263. See, e.g., JACKSONVILLE, FLA., CHARTER LAWS § 27.207 (1970).

264. See Anderson, *The Structure of Public Sector Bargaining*, in *PUBLIC WORKERS AND PUBLIC UNIONS* 37, 49-50 (S. Zagoria ed. 1972); cf. Siegal & Kainen, *Political Forces in Public Sector Collective Bargaining*, 21 CATHOLIC U.L. REV. 581 (1972).

265. FLA. STAT. § 112.061(6) (1971).

266. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 255, at 260-63.

bargaining, the task of identification becomes proportionately more difficult.²⁶⁷

The crucial phrase in the few sections directly concerned with identifying the public employer reads that he must have "sufficient legal distinctiveness to properly carry out the functions of a public employer."²⁶⁸ The phrase is ambiguous: what is "legal distinctiveness" and what are the "functions" of a public employer? The words can be more easily understood in terms of the purpose of the definition. The bill is not concerned with providing scientifically correct, abstract definitions of "public employer"; rather the point of defining "public employer" is to help the Commission identify the governmental unit or division which has the power to negotiate with the employees' bargaining agent. The phrase "sufficient legal distinctiveness to carry out the functions of a public employer" should therefore be interpreted as focusing on the question of whether a given employer unit has sufficient autonomy in regulating the wages, hours and terms and conditions of employment of the employees to negotiate these matters with the employees' collective bargaining representative. To name as the employer-negotiator one who does not have the authority to agree to proposals, or to execute agreements once they are reached, is destructive of the collective bargaining concept.²⁶⁹ On the other hand, it is also damaging to a healthy bargaining relationship to name as the employer an entity which has the authority to execute the agreement but not the responsibility for administering it.²⁷⁰

As has been previously noted, however, it will be the rare case in which a single public employer has both the authority to execute all the terms of a collective bargaining agreement as well as the responsibility for administering them. The Commission's responsibility in selecting the most appropriate unit or division within the hierarchy of governmental authority will be to search for the appropriate combination of practical authority and *de facto* responsibility. The problems will have to be worked out on a pragmatic, case-by-case basis.

The Commission should not experience too much difficulty in finding the appropriate structure in the case of school boards with appointed superintendents in the smaller municipalities. The school board will be the employer; negotiations will be carried out by the board or its representative. Any agreements reached will be binding on the board without the necessity of "legislative" approval. The

267. Forkosch lists eleven pages of bargainable subjects commonly discussed by management and labor. M. FORKOSCH, LABOR LAW § 557, at 856-66 (2d ed. 1965).

268. Fla. H.R. 3314, § 2-447.002 (2) (1972).

269. See N. CHAMBERLAIN & J. KUHN, *supra* note 229, at 251-55.

270. *Id.*

provisions of the agreement might have to be implemented through budgetary resolutions requiring approval by a majority of the school board, but the signing of the agreement would itself constitute the board's approval of it.²⁷¹ The negotiations might be carried out by the board or some of its members, by professional counsel, or by the appointed superintendent.²⁷² But all of these agents would be representatives of the board and their agreements would be binding on it.

The structure of bargaining might be different, however, with school boards that must deal with elected superintendents²⁷³ or with

271. Although the legal effects of the bargaining arrangement permitted by the "school board-appointive superintendent system" are simply stated, the practical difficulties of negotiating an agreement with a school board which has both executive and legislative functions should not be underestimated. See generally Livingston, *Collective Bargaining and the School Board*, in PUBLIC WORKERS AND PUBLIC UNIONS 63 (S. Zagoria ed. 1972). The school board usually will not appoint a professional negotiator to represent it. *Id.* at 74. But even if it does, the representative will have to check constantly with the board, which probably meets officially once a week, lest he exceed his authority in agreeing to certain proposals. The negotiator, therefore, does not have complete authority to agree to a proposal, and will often find himself negotiating with the school board as well as with the teachers' organization.

In addition, the school board may be unaware of its public constituency during the negotiating process; the financing for capital expansion, of course, depends on the electorate. Public approval of board actions may be required. The available budget for operating expenses may possibly be expanded or contracted according to the amount of state aid, often an unknown quantity at the time bargaining must be concluded. See Anderson, *supra* note 264, at 49-50. One possible response to these uncertainties would be to agree conditionally to wage and benefit scales depending on the ultimate revenue received from external sources.

272. An experienced labor relations practitioner observes that "[i]ncredibly, many school boards still try to negotiate themselves, or through their regular staff, without retaining competent and experienced professional labor relations advisors." Livingston, *supra* note 271, at 74. Even when school superintendents perform the function, they are usually little better than the school board members: "While they may be expert at setting educational policy and operating the school system, superintendents generally have no experience, background, or knowledge which enables them to cope with the difficult problem of negotiating with teacher unions." *Id.*

273. The legal status of the elected superintendent vis-à-vis the school board is unclear. FLA. STAT. §§ 230.32-33 (1971) set forth the general powers, duties, and responsibilities of the superintendent. These sections do not distinguish between elected and appointed superintendents. FLA. STAT. § 230.31 (1971) states that the superintendent shall be the "executive officer of the school board . . ." FLA. STAT. § 230.321 (1971) similarly provides that the appointed superintendent "shall be the executive officer of the school board . . ." But even if the elected superintendent is identified as performing ministerial functions much like his appointed counterpart, rather than executive functions, the problems generated by a system of dual responsibility are not completely averted:

[T]he superintendent . . . is not completely the school board's man. By statute in many states he is given a legal independence from the school board, and by tradition and ethics of his profession, he is expected to exercise that independence. . . .

Even though the superintendent is an employee of the school board and acts as its agent in the negotiations, experience has shown that some superintendents

municipalities that have separately elected mayors and city councilmen. In these cases, bargaining might take place between the "executive officer"—the superintendent or mayor—with the resultant agreement then dependent on approval and funding by the "legislative body"—the school board or city council. This bargaining structure would be especially appropriate when the "executive officer" has the responsibility for supervising the budget preparation of the various agencies performing governmental services and for submitting a recommended budget for approval by the legislative body. This structural description fits state government, of course, so that bargaining between state employees and agency employers would presumably take place under the general supervision of the Governor, with recommended settlements submitted in the form of agency budget requests to the Governor for transmittal to the legislature.²⁷⁴ The same arrangement might be appropriate for municipal governments, depending on the legal duties of the affected municipal officials flowing from the instrument creating the local government.²⁷⁵ It might well be that, although an official has the title of "executive officer," he acts in an administrative capacity with respect to the legislative body. Before determining the "employer," therefore, the local law establishing the powers, duties, and relationships of the elected and appointed officials of the municipality, and the customary interpretations given the law, must be examined.

The identification of the employer as the legislative body or executive officer has some important practical as well as legal consequences. If the legislative body is named as the employer, the resultant structure will eliminate a step in the bargaining process. Instead of bargaining with the executive who must then seek approval for and funding of the agreement from the legislature, the employee organization can rely on execution of the agreement as legislative approval and budgetary authorization for any increase involved. On the other hand, if the agreement is reached with the executive officer, but the legislative body fails to fund his settlement, the bill provides that the "collective bargaining agreement shall be returned to the chief execu-

do not hesitate to make recommendations that are markedly different from the bargaining position of their boards.

Livingston, *supra* note 271, at 73.

274. See FLA. STAT. ch. 216 (1971).

275. A complicated array of local governmental structures exist in Florida. For a penetrating study of local government in Florida, see STAFF OF FLA. HOUSE COMM. ON COMMUNITY AFFAIRS, THE HISTORY AND STATUS OF LOCAL GOVERNMENT POWERS IN FLORIDA (July 31, 1972).

tive officer and the bargaining agent for further negotiations within the framework of the amount of the funds so appropriated.”²⁷⁶

In addition, some agreements might necessitate amendment of statutory provisions or local ordinances to permit their implementation. The bill provides that where an agreement does contain provisions “in conflict with any law . . . over which the chief executive officer has no amendatory power, [he] shall submit to the appropriate governmental body having amendatory power a proposed amendment to such law . . . and until such amendment is enacted . . . the conflicting provision of the collective bargaining agreement shall not become effective.”²⁷⁷ When an agreement is reached directly with a legislative body, however, the agreement would imply that any conflicting law over which the body had amendatory power was impliedly repealed. If the legislative body agreed to a provision conflicting with local law and then refused to amend the local law, the Commission would probably find that the body had not bargained in good faith.²⁷⁸ To eliminate the possibility of such problems it might be wise to add a section such as is contained in the Connecticut bargaining legislation, which would cause an agreement reached or approved by a legislative body to override any existing local laws, rules or regulations that may be contrary to the bargained agreement.²⁷⁹

The division of authority between executive and legislative officials often differentiates patterns of bargaining familiar in the private sector from bargaining relationships required in the public sector.²⁸⁰ Very often the only commitment that can be made by the public employer amounts to a promise to recommend increases in wages and benefits. The named employer will usually be able to direct changes in the non-monetary employment conditions; but if he is an executive rather than a legislative entity, he will only be able to request or recommend monetary improvements to the legislative body responsible for appropriations.²⁸¹ Often those recommendations will be made in ignorance

276. Fla. H.R. 3314, § 2-447.011 (5) (1972).

277. *Id.* § 2-447.011 (3).

278. It is an unfair labor practice for an employer to refuse to bargain in good faith. *Id.* § 2-447.019 (1) (c); see note 398 *infra*.

If the public employer agreed to a proposal in conflict with a law or ordinance over which the employer had amendatory power, the refusal then to conform the law to the provisions of the agreement would be persuasive evidence that the employer had not acted in good faith when it signed the agreement. But if the Commission did find that the employer violated the good faith requirement, its power effectively to remedy the violation is dubious. See note 399 *infra*.

279. CONN. GEN. STAT. ANN. § 7-474 (f) (1972).

280. See generally Anderson, *supra* note 264, at 42-46.

281. See, e.g., FLA. STAT. § 216.162 (1971).

of the total budget the employer will be working with, and with little or no idea of the other budgetary requests and revenue expectations being submitted to the legislative body.

Bargaining on these terms would seem at best a difficult experience and at worst a frustrating and unproductive exercise. Actual bargaining, however, probably does not respect the neat orderings and vertical relationships ordained by laws and ordinances. More likely, demands are made and commitments undertaken in reliance on both the past performance of the legislature and readings of its future allocations. Key legislators and staff members may even be involved in discussions between employee agents and executive officials.²⁸² In addition, the bargaining often does not stop with the executive's recommendation. If an impasse occurs, the board of fact finders, employer, and employee organization are permitted to make formal recommendations to the legislature with respect to a proposed contract settlement.²⁸³ Even if an impasse is avoided, nothing can prevent employee agents from attempting to improve on the recommended settlement by lobbying the legislature; and nothing can prevent an executive from lobbying against the implementation of the proposed settlement.²⁸⁴

b. Subjects of Bargaining.—Once the public employer is identified and the parties enter the bargaining room, what subjects can they bargain about? What items must the bargaining agent and the employer discuss to discharge their duty to bargain in good faith? What topics can the employer refuse to lay on the table for discussion?

The Florida bill is quite conservative both in the explicit and implicit limitations it places on the scope of bargaining. One explicit limitation forbidding provisions relating to federally or state-created rights²⁸⁵ would apparently forbid a clause, very common in collective bargaining agreements, extending recognition to the certified employee organization;²⁸⁶ or one containing a statement that neither the employer nor the employee organization would engage in racial or sexual dis-

282. "The Wisconsin State Legislature has fixed the employers' bargaining responsibility for state employees in the executive; but in practice the Joint Committee on Finance of the legislature has played a significant role in the bargaining process by maintaining very close liaison with the executive office bargainers and influencing the terms of the settlement." Anderson, *supra* note 264, at 43.

283. Fla. H.R. 3314, § 2-447.015 (3) (1972).

284. See Anderson, *supra* note 264, at 44. The author refers to the practice as "double-deck" or "end-run" bargaining.

285. Fla. H.R. 3314, § 447.013 (1972). This section did not appear in the earlier versions of Fla. H.R. 3314, such as Fla. H.R. 113 or Fla. H.R. 2556. See note 64 *supra*.

286. Since Fla. H.R. 3314, § 2-447.009 (1972), requires recognition of a certified employee organization, the recognition clause would "relate to" a state-created right.

crimination;²⁸⁷ or even a clause that guaranteed the parties' observance of Florida's right-to-work provision.²⁸⁸ All of these clauses "relate to" obligations created by state law. Similarly prohibited would be a guarantee by the employee organization to respect the employer's statutory rights.²⁸⁹

The apparent intent of the draftsmen was to ensure that constitutional and statutory rights of employees and employers are not nullified by private agreements in collective bargaining contracts. The language can be changed to capture that intent more accurately,²⁹⁰ but even with the change many aspects of the section remain troublesome. For example, the point of the proscription against contract interference with federal or state rights is unclear. Certainly, if the contractual provisions interfere with third parties' rights, they would be in violation of existing law, which would presumably include ample remedies for its violation. In addition, an insistence by one party on bargaining over illegal subjects would undoubtedly be characterized by the Commission as a violation of the duty to bargain in good faith.²⁹¹ The subsection therefore appears unnecessary, but is vague enough to cause substantial mischief. It should be deleted from the section.

The prohibition of contract interference with employer and employee rights is the logical expression of a premise implied in the sections creating the substantive rights: if the bill provides what are seen as needed protective rights for the parties to the collective bargaining relationship, these should not be treated as trade-off items in the bargaining room.²⁹² The major problems do not exist with the rights accorded employees, but with the extensive series of prerogatives

287. Racial and sexual discrimination in employment practices of any state agency, board, commission, department, or officer is prohibited by FLA. STAT. § 112.041 (1971).

288. FLA. CONST. art. I, § 6.

289. Fla. H.R. 3314, § 2-447.013 (iii) (1972), prohibits contractual provisions relating to "public employer rights defined in . . . this act . . ." A provision guaranteeing observance of those rights would "relate to" them and consequently be prohibited.

290. The critical clause of the section now reads: "[E]xcept, however, that the scope of a written agreement shall not include provisions relating to . . ." Fla. H.R. 3314, § 2-447.013 (1972). It should be amended to read: "Provided that no provision in a written agreement may be interpreted or implemented in such a way as to limit or infringe . . ."

291. The NLRB has characterized the insistence on bargaining over illegal subjects by either the employer or a labor organization as a violation of the duty to bargain in good faith. *See, e.g.,* National Maritime Union, 78 N.L.R.B. 971, 980-82 (1948), *enforced*, 175 F.2d 686 (2d Cir. 1949), *cert. denied*, 338 U.S. 954 (1950).

292. Where, for example, the legislature has expressed the judgment that employees should be permitted to join labor organizations of their own choosing, the employer and bargaining agent should not be permitted to nullify that right by an agreement which limits employees to joining only the employee organization certified as the bargaining representative.

awarded to public employers²⁹³ which are translated by the bill into limitations on the scope of bargainable subjects.²⁹⁴ The effect is to reproduce in the bill a most elastic version of the traditional "employer's prerogatives" clause²⁹⁵ which, in the private sector, the employer must secure by bargaining.²⁹⁶ Since the intent of this section is probably to protect the public from the diminution in public services that might result from a weak or ineffectual employer-bargainer, rather than to accord the employer disproportionate bargaining power, the subsection is defensible. But it has the unfortunate effect of determining for all public employers and all public employees those items appropriate for bargaining in their particular situation. The American system of collective bargaining, however, assumes that the parties themselves can best decide what is appropriate for discussion;²⁹⁷ since H.R. 3314 does not require the employer or bargaining agent to accede to a request or demand, what harm results from allowing a topic to be discussed? In fact, foreclosing certain issues from the cathartic effect of bargaining may well result in their eruption into crises, at which point they become least susceptible to a reasoned analysis. Especially in public sector bargaining, in which public employees are denied the use of strikes or other economic weapons, Florida should follow the example of other states that have enacted comprehensive bargaining legislation and allow the widest latitude in the scope of bargaining.²⁹⁸

293. Fla. H.R. 3314, § 2-447.005 (1972), states:

It is the right of the public employer to determine the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the right of the public employer to direct its employees, take disciplinary action for proper cause, relieve its employees from duty because of lack of work or for other legitimate reasons, and determine the methods, means, and personnel by which the employer's operations are to be conducted; provided, however, that the exercise of such rights does not preclude employees or their representatives from conferring or raising grievances about the practical consequences that decisions on these matters may have on terms and conditions of employment.

294. Fla. H.R. 3314, § 2-447.013 (1972), forbids a contractual provision relating to public employer rights defined in § 2-447.005 of the bill.

295. See M. FORKOSCH, *supra* note 267, at 866-67.

296. *Id.* at 854.

297. See H. WELLINGTON, *supra* note 252, at 49-90.

298. The suggested change in Fla. H.R. 3314 can be accomplished in one of four ways. First, Fla. H.R. 3314, §§ 2-447.005 and 2-447.013 (iii), could be struck in their entirety. Secondly, § 2-447.013 (iii) should be amended to protect agreements from invalidation where public employers elect to bargain over issues which are arguably within their unilateral control by virtue of § 2-447.005. Thirdly, a minimal effort to avoid some portion of the problems provoked by § 2-447.013 (iii) would involve tightening the very loose language used to describe an employer's prerogatives in § 2-447.005. Vague phrases which grant the exclusive right to an employer to "exercise control and discretion over its organization," "to direct its employees," and to "determine the

The bill also prohibits bargaining over provisions involving "the authority and power of any civil service commission . . . established by constitutional provision, statute or charter."²⁹⁹ This provision has the advantage of at least giving a definite answer to a difficult question. The question is whether collective bargaining agreements should take precedence over pre-existing civil service systems when both attempt to regulate the same detail of the employment relationship. H.R. 3314's response is clearly "no." Other states which have encountered the same problem have often resolved the inevitable conflict between collective bargaining and civil service by ignoring it.³⁰⁰ The resultant litigation ends up before judges who have little or no guidance from the legislature.³⁰¹ Their responses have, as a result, been varied and confused.³⁰²

The argument supporting an assigned priority to collective agreements over civil service regulations points out that the most important items in bargaining are controlled by civil service rules; the exemption of these items from the bargaining process would leave the parties with little of substance to negotiate.³⁰³ Consequently, the civil service regulations should be used only to regulate employees not covered by a bargaining agreement and to fill in the interstices in negotiated agreements.

The obvious rejoinder, which will be developed more fully in a

methods, means, and personnel by which the employer's operations are to be conducted," will produce more litigation than protection for the public.

A fourth possibility is to indicate that an employer should "consult with" or "meet and confer" with the employees' representative on any major decision affecting employees even though the decision is a prerogative of management. See PA. STAT. ANN. tit. 43, § 1101.702 (Supp. 1972), which states:

Public employers shall not be required to bargain over matters of inherent managerial policy Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employee representatives.

In addition see HAWAII REV. STAT. § 89-9(c) (Supp. 1971), which provides in part: "The employer shall make every reasonable effort to consult with the exclusive representatives prior to effecting changes in any major policy affecting employee relations."

For a strongly worded view opposing an expanded scope of bargaining in the public sector, see Wellington & Winter, *supra* note 258, at 852-70. For the view of an experienced practitioner in favor of expansion, see Wollett, "The Bargaining Process in the Public Sector: What Is Bargainable?", 51 ORE. L. REV. 177, 178 (1971).

299. Fla. H.R. 3314, § 2-447.013 (iv) (1972).

300. See Note, *The Civil Service-Collective Bargaining Conflict in the Public Sector: Attempts at Reconciliation*, 38 U. CHI. L. REV. 826-30 (1971).

301. *Id.* at 830.

302. *Id.* at 830-41.

303. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 255, at 76-78.

subsequent section,³⁰⁴ argues that the piecemeal and unregulated repeal of the civil service system will create confusion. The complete repeal of the civil service system is of course out of the question for a state such as Florida just commencing the bargaining model, and will not be a serious possibility until most employees traditionally covered by civil service are under collective bargaining contracts. More to the point perhaps, a civil service system seems to be required by the Florida constitution.³⁰⁵

Several pragmatic responses, which both respect the civil service system and at the same time seek to maximize the scope of bargaining, have been suggested by practices in other collective bargaining systems. The first is to name the Division of Personnel and Retirement as the "joint employer" along with the agency employer for all state employees covered by the career service system.³⁰⁶ That arrangement, possible under H.R. 3314,³⁰⁷ would allow the employee organization to negotiate changes in civil service regulations affecting employees it is representing; but the Division of Personnel would then be forced to negotiate with one group of employee organizations changes in regulations that might well affect all employees in the state.

One variation on that approach would require that negotiations with the Division of Personnel only take place with an employee organization which represented a majority of those employees covered by the civil service regulation.³⁰⁸ A second variation would permit coalition bargaining between the regulators of career service and all the employee organizations representing employees in the career service system.

These developments must await the sharper focus that results from the maturation of a collective bargaining system. It would be precipitate for Florida to tamper with a generally satisfactory civil service system before it gains some experience with the collective bargaining model.

3. *Procedures of Impasse Resolution.*—The sections outlining the procedures to be used in the event of a bargaining impasse between a public employer and employee organization attempt to resolve what many critics have diagnosed as the fatal flaw in public sector bargaining legislation: employee organizations have no right to strike, and without the right to strike, meaningful collective bargaining cannot take

304. See p. 104 *infra*.

305. See FLA. CONST. art. III, § 14.

306. See Anderson, *supra* note 264, at 42-46.

307. Fla. H.R. 3314, § 2-447.009 (4) (b) (1972), empowers the Commission to "[i]dentify the public employer or employers for purposes of collective bargaining"

308. See Anderson, *supra* note 264, at 42.

place.³⁰⁹ In substitution for the right to strike, completely prohibited by the bill,³¹⁰ the drafters have prescribed two types of third-party intervention—mediation³¹¹ and fact finding³¹²—at least to make it more likely that differences will be resolved equitably despite the employees' lack of economic weapons.

The system of third-party intervention proposed by the bill has serious technical deficiencies. The first of these involves the time frame envisioned by the bill. The drawbacks can best be illustrated in terms of the budgeting procedure used by state agencies. The fiscal year in Florida begins July 1 and ends the following June 30.³¹³ The law requires each state agency to submit an annual budget to the Governor no later than November 1 each year.³¹⁴ The budget must contain an itemized list of proposed expenditures, categorized by prescribed appropriations categories.³¹⁵ The Governor is empowered to hold hearings on the budget requests of the various agencies;³¹⁶ the budgets, at the same time, go through a rigorous analysis by the Department of Administration.³¹⁷ Thirty days before the commencement of the regular legislative session, the Governor is required to submit a copy of the recommended budget of each state agency "based on his own conclusions and judgment."³¹⁸ The entire budget is formally submitted to the legislature in the Governor's budget message. At that point the political process takes control and the legislature grinds out the ultimate appropriations act by a process of analysis, debate, and compromise.

For purposes of analyzing H.R. 3314, it is important to note that departments must have their budget requests completed by November 1 of the year preceding their operations. According to the bill, bargain-

309. One union official, for example, has maintained that true collective bargaining does not take place where the law provides for unilateral determination in the event of an impasse. Gotbaum, *Finality in Collective Bargaining Disputes: The New York Experience*, 21 CATHOLIC U.L. REV. 589, 590-91 (1972). According to the definition, only a few state statutes would qualify as collective bargaining models. See note 419 *infra*.

310. Fla. H.R. 3314, § 2-447.021 (1972); see also § 2-447.001 (5), .019 (2) (e).

311. Fla. H.R. 3314, 2-447.014 (1)-(2) (1972). For an explanation of the mediation process, see A. GOLDMAN, PROCESSES FOR CONFLICT RESOLUTION: SELF-HELP, VOTING, NEGOTIATION, AND ARBITRATION 86-89 (Labor Relations and Social Problems, Unit Seven, 1972).

312. Fla. H.R. 3314, §§ 2-447.014 (3), .015-.018 (1972). For a description of the varieties of arbitration processes, see M. BERNSTEIN, PRIVATE DISPUTE SETTLEMENT 1-3 (1968).

313. FLA. STAT. § 216.011 (g) (1971).

314. *Id.* § 216.023.

315. *Id.* § 216.031.

316. *Id.* § 216.131.

317. *Id.* § 216.121.

318. *Id.* § 216.162 (1).

ing must begin at least sixty days before the budget submission date to allow time for the impasse resolution procedures,³¹⁹ but more realistically it should begin at least two months before the sixty-day period to allow ample time for bargaining and the inclusion of the agreed-upon provisions in the budget request. In other words, bargaining for an agreement which will take effect in July 1973 must begin by July 1, 1972—one year in advance.

Even if the parties were prepared to bargain one year in advance, that period of time might not be sufficient under the bill. Although only sixty days are allotted for the completion of the mediation process, it would be possible to stay within the time limitations allotted to each step of the procedure and consume from 103 to 110 days in the mediation and fact-finding process.³²⁰ If that amount of time is considered necessary, therefore, the parties should begin their bargaining for the 1973 fiscal year in May of 1972.

The implications are obvious. Too much time has been allotted for the impasse resolution procedures. Even if the present schedule of steps is retained, the time allocated to each step should be reduced, the procedures streamlined to avoid delay, and the parties forced to settle or withdraw from negotiations within a reasonable period.

Before reducing the time period for the two-phase system, the legislative draftsmen should seriously consider whether the two steps are necessary or even desirable. The system was adapted from similar systems in the Wisconsin, Pennsylvania, and New York collective bargaining statutes. The two-phase system was implemented in those states primarily because the statutes prohibit the employees from striking.³²¹ No economic sanctions are available to employees, therefore, to deal with employer obstinacy or unfairness. In substitution for the strike action, the legislature permitted, and under certain circumstances required, third-party interventions. The presence of an impartial third party would presumably contribute to, if not ensure, a fair compromise settlement.

Why did the statutes prescribe a two-step intervention? At least one theory of collective bargaining contends that a collective bargaining settlement which the parties manage to work out themselves is immeasurably preferable to a settlement imposed on them by a stranger.³²² Since the parties must live with the agreement and imple-

319. Fla. H.R. 3314, § 2-447.014 (1) (1972).

320. Fla. H.R. 3314, § 2-447.014 (1972). The figure includes reasonable allowances for mailed notices to the parties, mediators, and fact finders, and for their responses.

321. See generally ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT 106-07 (Sept. 1969).

322. See Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*,

ment its provisions, their feeling of responsibility for it is essential to its effective operation. If neither party feels a degree of responsibility for the final agreement, either or both could sabotage it by poor administration of key provisions. Consequently, the mediator is seen as a necessary party to attempt to bring the parties together in a voluntary settlement.

But if mediation fails, the next step requires the appointment of fact finders to gather the data needed by the legislative body to make the "fair" decision for which the legislature is responsible in the absence of a voluntary agreement. The fact finder in this sense merely performs a service that could as well be performed by a legislative committee. But the fact finder, as is evident from H.R. 3314, is also part of the mediation process. His findings of fact and recommendations should push the parties to a voluntary settlement.³²³

Although voluntary settlements are undoubtedly preferable to solutions imposed by strangers to the agreement, and while the mediator and fact finder play some role in facilitating compromise, several questions should be raised about the two-phase technique before it is adopted. First, if compromise by the immediate parties is essential to a workable agreement, then party solution should be the preferred mode of devising a technique for impasse resolution as well as for devising a workable contract. Under H.R. 3314, however, the parties *must* use the two-step procedure; yet they might be able to agree to what is for them a better method for resolving impasses. The bill should be concerned with outlining the general processes for settling disputes; but the exact details of the process can as well be left to the parties as to inflexible statutory provisions.³²⁴ If the parties are unable to reach agreement on how to settle their disputes, the state, in pursuance of its legitimate interest in avoiding the interruption of governmental services and the frequent crises that accompany public employee strikes, should, at the point the impasse occurs, impose state-administered techniques for resolving the disputes.³²⁵

39 MICH. L. REV. 1065, 1106-08 (1941); H. WELLINGTON, LABOR AND THE LEGAL PROCESS 54-55 (1968).

323. Thus, Fla. H.R. 3314, § 2-447.015 (1972), provides that a copy of the report of the board of fact finders is sent to the parties prior to its submission to the legislative body to permit further negotiation based on the report.

324. See, e.g., N.Y. CIV. SERV. LAW § 209(2) (McKinney Supp. 1972), which provides:

Public employers are hereby empowered to enter into written agreements with recognized or certified employee organizations setting forth procedures to be invoked in the event of disputes which reach an impasse in the course of collective negotiations. Such agreements may include the undertaking by each party to submit unresolved issues to impartial arbitration.

325. N.Y. CIV. SERV. LAW § 209(2) (McKinney Supp. 1972) continues: "In the absence or upon the failure of such procedures, public employers and employee organi-

For some occasions, therefore, a prescribed formula under the control of the Commission will be necessary. But whether the impasse resolution procedures are used only on the occasion of the parties' default in working out private arrangements, or whether the procedure is retained in its present form as the required technique for the resolution of all impasses, changes could be made to make the procedure less costly, cumbersome and time-consuming.

The most important change would involve the elimination of the state-appointed mediator.³²⁶ Mediation works best when the parties themselves decide that a neutral third party might contribute to the resolution of their dispute. A mediator can only function effectively when he has the trust of both parties.³²⁷ But a mediator who is uninvited, unknown, and perhaps unwanted by either party, would find it difficult to establish that rapport with the disputants which he must create to bring them together. Even if mediators were occasionally successful in working under these conditions, other potentially serious disadvantages inhere in coerced mediation.

First, the expense involved, especially when added to the other costs of municipal government, could work a severe strain on the budgets of smaller municipal governments.³²⁸

Secondly, some experienced observers of the bargaining process believe that the prospect of third-party interventions actually discourages effective bargaining.³²⁹ Instead of viewing the negotiations as the final step prior to the execution of an agreement, the parties are tempted to regard bargaining as the first in a long series of steps that usually culminate in a settlement mandated by a legislative body in an atmosphere of crisis.³³⁰ The risks are few: if one cannot persuade his opponent across the negotiating table to accept a low (or in the case of the bargaining agent, a high) offer, perhaps one can persuade

zations may request the board to render assistance as provided in this section, or the board may render such assistance on its own motion"

326. See Fla. H.R. 3314, § 2-447.014(1) (1972). This section provides for mediation when impasse is reached.

327. See Simkin, *The Third Seat at the Bargaining Table: A Government Point of View*, 14 LAB. L.J. 5, 7 (1963). Simkin states: "[N]o mediator will be successful in such [mediation] endeavors unless he has been able to obtain the confidence of both parties, has a broad over-all grasp of the facts and the needs of both parties and has the requisite ability to make suggestions that have merit."

328. For a breakdown of costs in various sections of the country, see R. FLEMING, *THE LABOR ARBITRATION PROCESS* 31-55 (1965).

329. See generally H. NORTHRUP, *COMPULSORY ARBITRATION AND GOVERNMENT INTERVENTION IN LABOR DISPUTES* 179-84 (1966).

330. See Zack, *Impasses, Strikes and Resolutions*, in *PUBLIC WORKERS AND PUBLIC UNIONS* 101, 112 (S. Zagoria ed. 1972). See also Raskin, *Politics Up-Ends the Bargaining Table*, *id.* at 122, for illustration of this tendency as it appeared in New York.

the mediator to intervene in the bargaining on his behalf. If the mediator does not succeed in helping, perhaps the fact finder will; even if one fails to convince the fact finder, one might be able to persuade the legislature of the legitimacy of the demands. The intransigent party is rarely penalized for refusing to compromise on a reasonable basis. He is as often rewarded and reinforced for the very behavior that sabotages meaningful bargaining.³³¹

The elimination of mediation as a required step, together with some adjustments in the fact-finding process, might at least remove an inducement to the parties to forego good faith bargaining or to use it as a mere prelude to the serious negotiations that take place during the mediation and fact-finding processes.

The rejection of mediation as a necessary step in impasse resolution does not mean that mediation has no part to play in public sector bargaining. On the contrary, a skillful mediator can be of invaluable assistance in the bargaining process. But his assistance should be requested by the parties, he should be acceptable to, and preferably known by, both parties, and he should be part of the bargaining process, rather than an appendage to it.

Should mediation be deleted from the bill, logic would hardly dictate the same fate for fact finding. Fact finding should be retained. While it is true that fact finding has many of the disadvantages characteristic of mediation—both are costly and time-consuming, and both in varying degrees postpone serious bargaining—fact finding appears to be the best of the several options available to resolve an impasse in the public sector.³³²

Fact finding is not the perfect answer to the problem of the bargaining impasse, but it provides some check on the employer while at the same time avoiding a direct collision with the concept of private

331. *Id.*

332. The strike option is constitutionally prohibited and outside the realm of political possibility in Florida. Mediation, apart from its other faults, is inconclusive; if it does not work, there must be another, stronger step to a final resolution. Some innovative techniques have recently been suggested, including the nonstop strike and graduated work stoppage. *See, e.g.,* Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459 (1971). But both should be tried on a limited basis in a controlled situation before being used on a state-wide basis.

Consequently, if the legislature wants genuine bargaining between an employer and bargaining agent rather than mere meetings and conferences between an employer and some of his employees, then something has to be substituted for the strike. Otherwise nothing but his good will would prevent the employer from going through the motions of bargaining, then simply imposing his own contract on the employee organization at the conclusion of the bargaining process.

negotiations.³³³ But fact finding as envisioned by H.R. 3314³³⁴ is not without its problems.

The bill provides that the public employer and employee organization shall each appoint one member of the three-man board of fact finders, with the third to be agreed upon by the *public employer* and *bargaining agent*.³³⁵ The bill goes on to state, somewhat inconsistently, that "the third fact finder shall be selected by the *previously appointed members* in accordance with the rules of the . . . Commission."³³⁶ The first task, therefore, is to decide whether to have the parties or their representatives on the board select the third fact finder. For obvious reasons the selection should be by the parties under the rules of the Commission.³³⁷

A more basic objection involves the use of a tripartite board. There is little purpose in allowing the parties to appoint two members of the board. Their votes will be predetermined, their positions dictated by their principals, and their role that of an adversary representative, not an impartial fact finder. Either the bill should provide for a board of three genuinely impartial fact finders or require the parties to select one under the rules of the Commission. The adversaries can then present their cases to the fact finder when standing in front of him rather than while sitting beside him.

D. Administration of the Collective Bargaining Agreement

1. *Relationship of the Collective Bargaining Agreement to Civil Service Systems.*—One of the recurrent amendments during the committee and floor debates concerned the relationship between the merit service system and the proposed collective bargaining mode.³³⁸ The amendment took various forms but it essentially reflected a feeling that public employees should not have the benefit and security of a civil service system once they opt for a collective bargaining relationship. In effect, then, the amendment would have removed from the merit system either an entire unit of employees if a majority of the unit voted for representation, or at least those employees in the unit who chose to have their employment rights determined by a collective bargaining contract rather than by the rules and regulations of a personnel board.

333. See Zack, *supra* note 330, at 116.

334. See Fla. H.R. 3314, § 2-447.014 (3) (b) (1972).

335. *Id.*

336. *Id.* (emphasis added).

337. This will eliminate one step and an occasion for delay since the principals will determine their agents' choice in any event.

338. This relationship is presently embodied in Fla. H.R. 3314, § 2-447.024 (1972).

The suggested amendment reflects very accurately what has long been an established attitude toward the benefits and burdens impliedly assumed by the public employee. In exchange for a mediocre but guaranteed wage, comparatively liberal fringe benefits (including medical insurance), at least two weeks of paid vacation time, the usual holidays, a pension at half pay after twenty years, and undemanding job performance requirements, the public employee was expected to give up his usual right to engage in partisan political activity, to demand wages on a parity with the private sector, and to join a union for the purpose of collective bargaining.³³⁹ To retain the merit service system in conjunction with a collective bargaining scheme would mean that the public employee union could rely on the benefits required by civil service rules and regulations as a secure base for further bargaining. Reductions in benefits could not be proposed by the employer because of the minima required by the rules. But across-the-board increases built on the floor set by merit service regulations could and obviously would be demanded by the collective bargaining representatives.

This attitude toward the *quid pro quo* of public employment is not without a foundation in reality. The salary of a public employee, while low, is assured;³⁴⁰ it does not depend on the vagaries of product performance, competitors' forays and market conditions. The fringe benefits are also usually on a par with or slightly better than those available for similar work in the private sector.³⁴¹ Most state employees and those municipal employees who are covered by a civil service system have very strong statutory protections against arbitrary dismissals.³⁴² In addition, the public employer's inability to reduce during negotiations previously accorded wages and benefits probably would provide a more secure base for further demands by the public employee unions.

Whatever the real or imagined justification for the traditional restrictions on public employees' bargaining rights, those restrictions are no longer regarded as functionally appropriate by large numbers of public employees.³⁴³ Since that attitude is also apparently prevalent among public employee groups in Florida, should the legislature con-

339. See Macy, *The Role of Bargaining in the Public Service*, in PUBLIC WORKERS AND PUBLIC UNIONS 5, 7-8 (S. Zagoria ed. 1972).

340. See FLA. STAT. § 110.022 (1) (b) (1971).

341. Cf. Macy, *supra* note 339, at 9.

342. See FLA. STAT. § 110.061 (1971), where procedures for suspensions, dismissals, reductions in pay, demotions, layoffs, and transfers are provided.

343. See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 321, at 78; Note, *The Civil Service-Collective Bargaining Conflict in the Public Sector: Attempts at Reconciliation*, 38 U. CHI. L. REV. 826-27 (1971).

sider removing merit service protections for those public employees who choose collective bargaining as a way of securing job benefits and security?

Aside from the practical difficulties involved in implementing the suggestion, the proposed amendment reflects a partial but serious misunderstanding of the function of a merit service system. It reflects also a refusal to acknowledge current economic realities. Merit service systems do indeed provide protections for public employees, but these protections are merely means of achieving certain important social and political goals. To ensure that public employment positions are not regarded as the spoils of a victorious political campaign, hiring is based on competitive examinations and demonstrated ability. Similarly, termination must be for provable cause, not only to provide job security for individuals but to ensure the survival of a competent work force during the changeover of elected officials.³⁴⁴

The elimination of groups of employees from the civil service system, and the consequent elimination of fixed wages and benefits, might place the state employer in a more advantageous bargaining position with the bargaining agent. As in the private sector, the state could respond to employee demands by proposing reductions in current wages and benefits. The state as employer would not have to follow a formal procedure to accomplish reductions in wages and benefits when state revenue had fallen short of expectations. Like their counterparts in the private sector, public employees would be faced with the prospect of losing as well as gaining at the bargaining table. But in exchange for a tactical advantage at the bargaining table, the public employer would surrender features of the civil service system—such as merit hiring and promotion by examination—that have long been thought essential for an efficient bureaucracy.³⁴⁵ If the private sector experience provides a reliable guide, it would not be surprising to find that the demise of the civil service system resulted in the unions' eventually assuming considerable control of hiring and promotion functions.³⁴⁶

But the suggested solution to the civil service-collective bargaining entanglement remains faulty and perhaps unworkable for a number of related reasons. The proposed elimination of civil service status would be difficult to implement and administer. Which employees would lose their civil service status, and at what point in time and for what purposes? Since the employees in a predetermined election unit

344. See K. HANSLOWE, *THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT* 7 (1967).

345. Macy, *supra* note 339, at 9.

346. G. BLOOM & H. NORTHRUP, *ECONOMICS OF LABOR RELATIONS* 227-43 (5th ed. 1965).

might reject representation, these employees certainly could not be removed from the civil service system prior to their voting in the representation election. Would the removal occur after a vote by a majority approving representation? If so, would *all* employees in the unit be excluded or only those who voted for the union? If all the employees were excluded, then forty-nine per cent of the employees could lose what they might regard as valuable rights and protections because of the vote of the majority. If only those employees who voted for the union were excluded, how could they be identified? A representation election is a secret ballot election. Even if they could be identified, would it be at all feasible to have some employees in an office working under civil service rules and regulations and some under the provisions of the collective bargaining agreement?

Another possible approach might allow the employees to opt for the collective agreement after the contract is negotiated so that a comparison could be made between its advantages and the existing civil service system benefits. But that is obviously unworkable. Besides not giving the employer the position he seeks at the bargaining table, it means the employee organization would *never* settle for a package of benefits unless it was superior to those available under civil service.

2. *Analysis of Grievance Procedure.*—During the life of any complex agreement, disagreements invariably arise with respect to the meaning of a given phrase or the applicability of a contract section to a specific situation. Collective bargaining agreements, among the most complex in content and function of all contracts, provoke their share of disputes. These can be handled in several ways: through economic warfare, which benefits neither party, and which has been largely rejected by modern labor organizations; through breach-of-contract actions in state or federal court, a time-consuming, expensive and inefficient method of settling what are often disputes of minor consequence except to the one or two employees involved; or through grievance and arbitration procedures negotiated and included in the collective bargaining agreement.

Most collective agreements in the private sector contain a four-or five-step grievance procedure, culminating in binding arbitration, to handle contract disputes.³⁴⁷ The inevitable companion of the em-

347. For the form and text of a commonly used grievance and arbitration clause, see R. KNEE & R. KNEE, JR., *COLLECTIVE BARGAINING CLAUSES* 61 (1969). See also D. WOLLETT & R. CHANIN, *THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS* 3:24 (1970). For a practical guide to the conduct of a grievance through the various steps to binding arbitration, see F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 79-172 (1960).

The literature of grievance arbitration is vast. See *THE DEVELOPING LABOR LAW* 440 n.2 (C. Morris ed. 1971), for a complete reference to bibliographic materials.

ployer's agreement to arbitrate disputes is the bargaining representative's agreement not to strike during the life of the agreement.³⁴⁸ Agreements to arbitrate are specifically enforceable under federal law³⁴⁹ and violations on the part of the employer³⁵⁰ or the union can be enjoined.³⁵¹ Money damages are also obtainable to remedy the breach of such agreements.

H.R. 3314 specifically empowers all public employers to establish a grievance procedure "to be used for the settlement of disputes between the employer and employee or group of employees."³⁵² The bill goes on to state, however, that when an employee organization is certified, the grievance procedures then in existence may be the subject of bargaining;³⁵³ any procedure negotiated during bargaining "shall supersede" the previous procedures.³⁵⁴

The employee is not restricted to the grievance procedure to voice his complaints. The bill allows him to present his own grievances to his employer, either in person or through legal counsel. This right is subject to the proviso, first, that the resolution of the grievance is not inconsistent with the collective agreement and, secondly, that the bargaining agent "has been given reasonable opportunity to be present at any meeting called for the resolution of such grievances."³⁵⁵ In addition, a career service employee has the option of utilizing the civil service appeal procedure.³⁵⁶

The bill is replete with ambiguities and interpretive problems, some of them avoidable, but most of them inherent features of any

348. Although a union is not required to agree to a "no-strike" clause in exchange for the arbitration agreement, management will usually insist on that exchange. In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957), the Court noted that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike."

349. *Id.*

350. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

351. *Boys Mkts. Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970).

352. Fla. H.R. 3314, § 2-447.012 (1972). The bill empowers all public employers, "including one whose employees are not represented by a . . . bargaining agent," to establish grievance procedures. The Department of Administration had already been authorized by the legislature to create grievance machinery for classified state employees. See FLA. STAT. § 110.061 (2) (a) (1971).

353. Fla. H.R. 3314, § 2-447.012 (1972).

354. *Id.*

355. *Id.* § 2-447.006 (3).

356. *Id.* § 2-447.012. This section, however, prohibits the use of both procedures, so the employee must choose one or the other. The grievance procedure authorized by FLA. STAT. § 110.022 (1) (e) (1971) is contained in Personnel Rules and Regulations of the Career Service System, Florida Department of Administration, Division of Personnel and Retirement, ch. 22A-10 (July 14, 1970).

grievance and arbitration system. The major problems revolve around four issues: (a) the rights, if any, of minority labor organizations; (b) the extent of the right accorded employees to process individual grievances; (c) the relationship of the grievance procedure to the traditional civil service system; and (d) the impact of binding arbitration on traditional employer prerogatives.

a. Minority Unions.—The directives of the bill providing for exclusive representation will hopefully foreclose the development of grievance representation by minority labor organizations.³⁵⁷ That problem has arisen in a few states³⁵⁸ where, because of the absence of provisions or because of ambiguous statutory language, labor organizations other than the certified representative have attempted to represent aggrieved employees.³⁵⁹ The desire of the minority union to handle employee members' grievances might well be altruistic. But the more likely explanation is that the minority union sees grievance representation as an opportunity for demonstrating its effectiveness to unit employees in preparation for an election challenge against the majority union. Grievance representation also provides an opportunity for performing the kinds of services the employee will expect in exchange for his dues.

The disadvantages of minority union representation are several. First, the grievance procedure itself could easily become the focus of union political disputes rather than the mechanism through which employer-employee disputes are peacefully and equitably resolved.³⁶⁰ An organization seeking to create a political image or to impress

357. A minority labor organization is one to which less than a majority of employees in a unit appropriate for bargaining belong. Fla. H.R. 3314, § 2-447.009(1) (1972), provides: "the commission shall immediately certify the employee organization as the exclusive representative of all employees in the unit."

358. For a list of those states, with statutory references, see Note, *The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004, 1017, n.70 (1970). New York's Taylor Law is an example of such a statute. N.Y. CIV. SERV. LAW § 200 (McKinney Supp. 1972). Subsection 1 (a) of § 208 states that a public employer shall extend to a certified or recognized employee organization the right "to represent the employees in negotiations . . . and in the settlement of grievances . . ." It does not confer on the recognized or certified organization a right to be the exclusive representative. For a criticism of this feature of the Taylor Law, see Kheel, *The Taylor Law: A Critical Examination of Its Virtues and Defects*, 20 SYRACUSE L. REV. 181, 182-83 (1968).

359. See, e.g., *New Haven Fed'n of Teachers v. New Haven Bd. of Educ.*, 27 Conn. Supp. 298, 237 A.2d 373 (Super. Ct. 1967). The issue in this case was the extent of an individual's right to process grievances independent of the bargaining agent. Presumably the right of a minority union to process and present grievances would be no greater than the right of an individual to do so.

360. See *Black-Clawson Co. v. International Ass'n of Machinists*, 313 F.2d 179, 186 (2d Cir. 1962); Note, *The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004, 1021 (1970). Professor Cox, borrowing

employees with its aggressiveness is often more concerned with seizing issues for those purposes rather than with fairly resolving employee complaints. Grievances, therefore, could easily be distorted or exaggerated at the ultimate expense of the grieving employee, of the employer, or both. Secondly, minority union representation can create divisions within the employee unit which make very difficult the employee organization's overriding task of fairly representing all employees. Since the majority employee organization will negotiate for all employees, the obligation must be observed; but to create a situation in which divided loyalties among employees are likely would inordinately complicate the discharge of the obligation.

It is not surprising, therefore, that the few states which have faced the issue have severely restricted minority union representation.³⁶¹ The same result should follow from a proper interpretation of the language of the Florida bill; a brief amendment explicitly prohibiting the practice would be useful added insurance.

b. Individuals.—Whether an individual grievant has a right to have his grievance processed through the usual steps to final arbitration has generated a considerable amount of controversy in the private sector³⁶² and is an unsettled issue in the public sector.³⁶³ An understanding of the problems that have arisen in reconciling individual and institutional rights in the context of the grievance procedure requires an understanding of the basic grievance mechanisms.³⁶⁴

The usual grievance mechanism negotiated by an employer and

from a War Labor Board decision, sums up the major objections to minority union representation in processing grievances:

To deny the majority representative power to control the presentation of grievances offers dissident groups, who may belong to rival unions, the opportunity to press aggressively all manner of grievances, regardless of their merit, in an effort to squeeze the last drop of competitive advantage out of each grievance and to use the settlement even of the most trivial grievances as a vehicle to build up their own prestige. . . . The settlement of grievances could become the source of friction and competition and a means for creating and perpetuating employee dissatisfaction instead of a method for eliminating it.

Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 626 (1956), quoting from Douglas Aircraft Co., 25 WAR LAB. REP. 57, 64-65 (1945). *But see* R. DOHERTY & W. OBERER, *TEACHERS, SCHOOL BOARDS AND COLLECTIVE BARGAINING: A CHANGING OF THE GUARD* 77 (1967).

361. *See Note, The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004, 1022-23 (1970).

362. *Compare Donnelly v. United Fruit Co.*, 40 N.J. 61, 190 A.2d 825 (1963), with *Black-Clawson Co. v. International Ass'n of Machinists*, 313 F.2d 179 (2d Cir. 1962). For a thorough collection of the literature on the subject, see *THE DEVELOPING LABOR LAW* 726 n.1 (C. Morris ed. 1971).

363. *See Note, The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004, 1021 (1970).

364. *See pp. 99-101 infra.*

bargaining representative contains a four- or five-step procedure: the grievant is first required to voice his complaint with his immediate supervisor; if he does not obtain satisfaction he must then seek redress from a higher supervisor; if he is still dissatisfied, he must go through one or two more levels of management before presenting his complaint to an impartial arbitrator or umpire who will make a binding decision on the merits. At some one of the steps after step one, the bargaining agent will become involved as the representative of the grievant. In some contracts, the bargaining agent's consent is necessary before the grievant can move beyond step one.³⁶⁵ In virtually all contracts, the bargaining agent must consent to binding arbitration.³⁶⁶

There are several reasons for the bargaining agent's superior authority in the grievance procedure: primarily, the bargaining representative is the signatory to the agreement and the possessor of the rights it creates. The contract will not usually create individual rights that can be enforced by employees independently of the collective bargaining representative.³⁶⁷ With respect to the grievance procedure, the representative has even greater authority in representing employees with grievances since traditional collective bargaining practice contemplates his weeding out frivolous employee complaints that might otherwise choke the grievance machinery.³⁶⁸ Finally, the bargaining representative must generally share the costs of final arbitration;³⁶⁹ he therefore has a strong financial interest in disallowing the unmeritorious grievance.

Nevertheless, the bargaining agent's control is not absolute. Like some other statutes,³⁷⁰ the Florida bill places some limitation on him by expressly protecting the rights of individual grievants to present their complaints to their employer "without the intervention of the bargaining agent," provided any resolution of the grievance "is not inconsistent with the terms of the collective bargaining agreement . . . and . . . the bargaining agent has been given reasonable opportunity to be present at any" adjustment of the grievance.³⁷¹ Despite one state

365. See R. KNEE & R. KNEE, JR., *supra* note 347, at 62.

366. *Id.* See also D. WOLLETT & R. CHANIN, *supra* note 347, at 3:25.

367. See Cox, *supra* note 360, at 616-17. The author states: "Wherever labor agreements are treated as binding contracts, the union is the proper party to enforce these obligations and an individual does not have standing to sue." (Footnotes omitted.) *But see* Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362 (1962). *But cf.* Serra v. Pepsi-Cola Gen. Bottlers, Inc., 248 F. Supp. 684 (N.D. Ill. 1965).

368. See D. WOLLETT & R. CHANIN, *supra* note 347, at 3:29; Cox, *supra* note 360, at 601.

369. See D. WOLLETT & R. CHANIN, *supra* note 347, at 3:25.

370. See, e.g., CONN. GEN. STAT. ANN. § 10-153b(d) (Supp. 1972); PA. STAT. ANN. tit. 43, § 1101.606 (Supp. 1972).

decision to the contrary,³⁷² the National Labor Relations Board,³⁷³ the federal courts,³⁷⁴ and the state courts interpreting similar provisions in private sector bargaining legislation,³⁷⁵ have all held that the right to present a grievance to an employer does not give an employee the right to take his grievance to binding arbitration.³⁷⁶ The Florida bill will almost certainly be interpreted to bar public employees from guaranteed access to binding arbitration.

c. Civil Service System.—The existence of parallel grievance mechanisms is unfortunate, but because of the existence of civil service systems, fairly common. "Forum shopping" of any sort involves an unseemly manipulation often productive of discontent. The tension that might well be generated by these two competing grievance mechanisms is, perhaps, unavoidable and symptomatic of the larger tensions produced by the transition from a civil service to a collective bargaining model in public employment.³⁷⁷ The reduction of the tension will take place over a period of time, and its eventual disappearance will, in large measure, turn on the competing effectiveness of the two modes of regulating the employment relationship. If collective bargaining proves a superior model, civil service systems will be phased out, or vice versa.

In the meantime, the continued coexistence of different procedures for resolving conflicts will on occasion produce inconsistent interpreta-

371. Fla. H.R. 3314, § 2-447.006 (1972). This provision is misplaced in that section. It should be included as a proviso in § 2-447.012, which deals generally with grievance procedures.

372. *Donnelly v. United Fruit Co.*, 40 N.J. 61, 190 A.2d 825 (1963).

373. *Hughes Tool Co.*, 56 N.L.R.B. 981 (1944), *enforced*, 147 F.2d 69 (5th Cir. 1945).

374. *See, e.g., Black-Clawson Co. v. International Ass'n of Machinists*, 313 F.2d 179 (2d Cir. 1962); *Ostrosky v. United Steelworkers*, 171 F. Supp. 782 (D. Md. 1959), *aff'd*, 273 F.2d 614 (4th Cir.), *cert. denied*, 363 U.S. 849 (1960).

375. *Parker v. Borock*, 5 N.Y.2d 156, 162, 182 N.Y.S.2d 577, 581, 156 N.E.2d 297, 300 (1959) (concurring opinion of Fuld, J.); *Falsetti v. Local 2026, UMW*, 400 Pa. 145, 161 A.2d 882 (1960).

376. The employee is not, however, completely unprotected. Under the Supreme Court's "fair representation" rule first announced in *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 207 (1944), unions have a duty to represent all members of the bargaining unit fairly. *See H. WELLINGTON, supra* note 322, at 155-84. An arbitrary refusal to process a meritorious grievance would thus subject the union to equitable orders and money damages for violations of this duty. Although the stiff evidentiary requirements for a successful action of this type have prevented all but a few employees from successfully challenging union grievance processing, the presence of the rule may deter unions from generally denying the use of the grievance machinery to dissenting or unpopular employees. Whether the Florida courts would find a similar duty implicit in the bill is problematic. It might be advisable to fix the duty of fair representation on the organizational representative, as does New Jersey. *See N.J. REV. STAT. § 34:13A-5.3 (Supp. 1972).*

377. *See ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, LABOR MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT 77 (Sept. 1969); Macy, supra* note 338, at 9.

tions of contract clauses, jurisdictional wrangles, cases where the decision reached in a grievance is urged as a binding precedent in a subsequent grievance, and a host of other problems yet unforeseen. But it is not worth jettisoning the civil service system to avoid them.

d. Bargaining.—The relationship of grievance procedures and arbitration decisions to the collective bargaining process is subtle, complex and symbiotic.³⁷⁸ The problems arising from that relationship are several.³⁷⁹ First, a collective bargaining contract, regardless of its detail, cannot anticipate and resolve the myriad points of conflict between employees and employer.³⁸⁰ As a result, grievances frequently invoke rights founded on custom, or as it is sometimes called, the common law of the shop.³⁸¹ Whether an arbitrator has the authority to search out and apply the customary law is a controversial point.³⁸² Assuming

378. For a thorough explanation of the history, development, and present uses of labor arbitration, see R. FLEMING, *THE LABOR ARBITRATION PROCESS* (1965). For a sensitive analysis of the effects that recent Supreme Court decisions on the arbitrability of grievances have had on the collective bargaining process, see H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 91–125 (1968). For a controversial reaction to the recent developments in labor arbitration, see P. HAYS, *LABOR ARBITRATION: A DISSENTING VIEW* (1966).

379. Suppose a certified teachers' organization proposes to the school board during collective bargaining a clause limiting a teacher's extracurricular duties to three hours a week. In the past no uniform policy had existed. Let us assume that no agreement can be reached on the number of hours that should be devoted to this task. A teacher is disciplined for refusing to spend five hours a week as had been the "custom" in the teacher's school. The teacher grieves and the issue goes to the arbitrator. What decision?

Or assume that inconclusive bargaining takes place and then, during the term of the agreement, the school board unilaterally adopts a policy requiring five hours of extracurricular duties. A teacher refuses to obey, is disciplined and goes to arbitration on the question of the school board's authority to issue such an order. What decision should the arbitrator make?

Assume, for purposes of a third illustration, that a collective bargaining contract provides that a teacher shall receive tenure after five years of continuous employment, that a teacher employed for four years shall receive one year's notice of non-renewal, and that the school board shall have the exclusive right to grant or deny tenure. In facts based on an actual case, envision a teacher who midway during his fourth year is advised that his contract will not be renewed. He grieves on the ground that the one-year notice of requirement was not observed. The arbitrator agrees and orders the school board to continue his employment for the fifth year. The effect of the decision, however, is to confer tenure on the teacher even though the contract reserves control over tenure to the school board. Was the arbitrator justified? What other options did he have?

380. See Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1004–05 (1955).

381. "The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578–79 (1960) (Douglas, J.) (footnote omitted). See also Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1498 (1959).

382. See Davey, *The Supreme Court and Arbitration: The Musings of an Arbi-*

the arbitrator is given or assumes the authority, of what relevance is the bargaining history of the disputants in the arbitrator's search for the common law?

Secondly, an arbitrator's decision might have the effect of varying the terms of the agreement;³⁸³ more seriously, in the public sector, the decision might well infringe a provision of the legislation regulating collective bargaining, perhaps by trenching on rights guaranteed employees or employers.

Arbitration can indeed add to, subtract from and even change the rights and responsibilities allocated to the parties in a collective bargaining agreement.³⁸⁴ Under the NLRA the impact of arbitration on contractual obligations has spawned a variety of interpretive problems and policy disputes that show no sign of abating.³⁸⁵ Unfortunately, in the public sector, the victim of the confusion resulting from the law's attempt to reconcile employer prerogatives, employee bargaining rights and the need for arbitrated settlement of disputes will be the public.

To avoid the problems that have arisen under the NLRA and to protect the public from inexperienced employer negotiators, the draftsmen might consider amending the bill to ensure that an arbitrator's authority is limited to interpreting provisions *in* the agreement; that the contract will be deemed to include the entire agreement; that matters not included in the agreement cannot be the subject of a grievance; and that only those issues which are specifically enumerated as subject to the grievance procedure can proceed to arbitration. Finally, the bill should specifically forbid any arbitral remedy which has the effect of trenching on rights or prerogatives reserved by the bill to public employers.³⁸⁶

trator, 36 NOTRE DAME L. REV. 138, 141-45 (1961); Meltzer, *The Supreme Court, Arbitrability and Collective Bargaining*, 28 U. CHI. L. REV. 464 (1961).

383. See *Torrington Co. v. Metal Prods. Workers Local 1645*, 362 F.2d 677 (2d Cir. 1966).

384. P. HAYS, *LABOR ARBITRATION: A DISSENTING VIEW* 100-18 (1966).

385. See generally M. BERNSTEIN, *PRIVATE DISPUTE SETTLEMENT* 273-419 (1968).

386. The suggested amendments would, in a sense, depart from a model of free collective bargaining to the extent that the statute overrides the terms of a collective agreement. The justification for close statutory regulation of this aspect of the collective bargaining relationship is nevertheless justifiable. As has been pointed out, considerable controversy exists in the public sector with respect to various aspects of the arbitration phenomenon. Through a series of questionable decisions, the Supreme Court, according to Professor Wellington, has

made it possible for arbitrators to exercise enormous discretion without regard to the desires of the parties. Indeed, the exercise of such discretion may be directly contrary to what the parties desire. Where arbitrators have such power, one can be sure that from time to time the power will be used. Thus, in this important class of cases, the Supreme Court has upset the reasonable expecta-

E. Unfair Labor Practices

1. *Employer Practices.*—The unfair labor practice sections reflect the strong influence of the NLRA, both in design and substance. As does section 8(a) (1) of the NLRA,³⁸⁷ the bill prohibits employers from interfering with, restraining, or coercing public employees in the exercise of rights guaranteed under the bill.³⁸⁸ Section 8(a) (1) has been interpreted to protect an employee engaged in activities related to his rights to form, join, and participate in, or refrain from forming, joining, or participating in, any employee organization of his own choosing.³⁸⁹ The Board frequently “balances” the business justification of the decision against the harmful effect on the employees.³⁹⁰ The balance, however, is not always struck consistently and even the careful

tions of parties who with words have tried to order the future in that fashion which they deemed . . . to be best for them.

H. WELLINGTON, *supra* note 378, at 112.

Consequently, statutory restrictions on the power of the arbitrator are necessary to avoid what might become a problem under the Florida legislation—not to restrict the power of the parties to contract privately, but to ensure that an arbitrator does not vary this private ordering.

387. 61 Stat. 140 (1947), 29 U.S.C. § 158 (a) (1) (1970). This section provides in part: “It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7” Section 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1970), provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

388. Fla. H.R. 3314, § 2-447.019 (1) (a) (1972), provides: “Public employees or their agents or representatives are prohibited from: (a) Interfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them under this act.”

389. For example, employers have been found in violation of § 8 (a) (1) for forbidding union buttons on the job, *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); for prohibiting the solicitation of union membership, *Stoddard-Quirk Mfg. Co.*, 138 N.L.R.B. 615 (1962), or the dissemination of written material during non-working hours on company property, *Republic Aviation Corp. v. NLRB*, *supra*; or for threatening or interrogating employees who join unions, *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962). Employers are also forbidden to make otherwise justifiable decisions which seriously impede the employees’ rights to engage in or not engage in union activities. *See NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). Employer acts which are intended to induce employees into foregoing statutory rights are, of course, violative of the NLRA. *See NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964). Moreover, § 8 (a) (1) also prohibits many employer decisions affecting employees regardless of the employer’s motivation. *Cf. NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967); *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). But not all employer decisions which interfere with an employee organization’s rights violate § 8 (a) (1). *See American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965).

390. *See American Ship Bldg. Co. v. NLRB and NLRB v. Brown*, *supra* note 389.

scholar finds it difficult to predict the Board's next decision in certain kinds of section 8(a) (1) cases.³⁹¹ The problem, however, probably lies more with the inherent difficulty of the issues involved than with the concept or language of section 8(a) (1); little would be gained, therefore, by tampering with the similar language in H.R. 3314. In general section 8(a) (1) has served its purpose, as have the section's counterparts in other public employee bargaining legislation.

The bill also tracks the language of section 8(a) (3) of the NLRA³⁹² in forbidding an employer from "[e]ncouraging or discouraging membership in any employee organization by discrimination in regard to hiring, tenure, or other conditions of employment"³⁹³ The equivalent section under the NLRA has been used principally to remedy the termination of employees who engaged in union-related activity.³⁹⁴ But numerous interpretive problems have been generated by conflicting Supreme Court decisions involving the "intent" element in section 8(a) (3) cases.³⁹⁵ Although illegal intent is usually required to sustain a section 8(a) (3) complaint,³⁹⁶ similar interpretive problems could be avoided under the proposed bill by amending the appropriate section to require unlawful intent as a specific element of the offense.

Section 2-447.019(1)(c)³⁹⁷ may well prove to be one of the most

391. See Christensen & Svano, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269, 1331 (1968); Oberer, *The Scierer Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L.Q. 491, 516 (1967).

392. 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158 (a) (1970), provides: "It shall be an unfair labor practice for an employer— . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization"

393. Fla. H.R. 3314, § 2-447.019 (1)(b) (1972).

394. In *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-43 (1954), the Supreme Court summarized § 8(a) (3) in the following words:

The language of § 8(a) (3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.

395. Compare *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965), and *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), with *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

396. See Oberer, *supra* note 391, at 503-04.

397. Fla. H.R. 3314, § 2-447.019(1)(c) (1972), provides that public employers or their agents or representatives are prohibited from "refusing to bargain collectively or failing to bargain collectively in good faith, or refusing to sign an agreement orally agreed upon with the certified bargaining agent for the public employees in the bargaining unit."

difficult sections of the bill to interpret and administer. Both this section and section 8 (a) (5), its NLRA equivalent, articulate the obligation that constitutes the essence of collective bargaining legislation—the duty of the employer to bargain in good faith with the certified bargaining representative concerning wages, hours and conditions of employment. The NLRB and the courts have experienced an inordinate number of conceptual and practical problems in interpreting and administering section 8 (a) (5).³⁹⁸

The problems that have arisen with this section of the NLRA cluster around two interrelated points: the requirement can be circumvented by recalcitrant employers;³⁹⁹ and, because of the nature of free collective bargaining, violations are difficult to remedy.⁴⁰⁰ No solution to these problems has been suggested, however, which does not do violence to the basic value sought to be implemented in a system of free collective bargaining.⁴⁰¹

398. See *THE DEVELOPING LABOR LAW* 271 n.2 (C. Morris ed. 1971), for a thorough listing of law review articles on the duty to bargain in good faith. Professor Morris quotes one analyst's reaction to §8 (a) (5) as illustrative of the difficulties experienced by most commentators in interpreting that section and its agency and judicial gloss:

"If one were to select the single area of our national labor law which has posed the greatest difficulties for the National Labor Relations Board, that area would be encompassed within the phrase 'the duty to bargain in good faith.'" Cooper, *Boulwarism and The Duty to Bargain in Good Faith*, 20 *RUTGERS L. REV.* 653, 653 (1966).

Id.

399. See, e.g., *NLRB v. Cummer-Graham Co.*, 279 F.2d 757 (5th Cir. 1960); *White v. NLRB*, 255 F.2d 564 (5th Cir. 1958).

400. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

401. The well-advised employer can simply act out a charade of bargaining while concealing a firm intent not to yield to the bargaining agent on any point or proposal, however reasonable or undemanding the proposal might be. See *White v. NLRB*, 255 F.2d 564 (5th Cir. 1958). As long as the employer goes through the motions of bargaining—meeting at reasonable times, talking with the bargaining representative, and responding with counterproposals—the courts have been reluctant, because of the legislative history and clear language of § 8(d) of the NLRA, to find that he has failed to bargain in good faith by refusing to agree to reasonable union proposals. See *NLRB v. Insurance Agents' Union*, 361 U.S. 477 (1960).

The reluctance springs not only from the history and language of the NLRA but also from the absence of remedies effective to enforce the bargaining obligation. If an employer, for example, should refuse to incorporate a union-proposed "check-off" clause, not because he has any objection to the clause, but simply to make it difficult to reach a final agreement on any point, the Board has, in the past, done one of two things: it has issued cease and desist orders to stop bargaining in bad faith, or it has ordered the employer to include the "check-off" proposal in the agreement. The first remedy is too vague to be useful; the second allowed the Board to dictate the substance of the collective agreement in violation of the specific language of the NLRA and the essence of free collective bargaining; this was held to be beyond the Board's powers in *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

The dilemma created by the conflict between effective enforcement needs and the essentially private nature of the bargaining process cannot be resolved by changes in

Consequently, despite the problems that might arise under the bill because of the similarity of language and the ever-present possibility of employer resistance to the bargaining concept, little would be gained by manipulating language changes. Hopefully, the incidence of employer failure to bargain in the public sector will be less frequent than in the private sector; public officials should appreciate more than most managers the need for voluntary observance of legal obligations.

2. *Employee Organization Practices.*—The provisions dealing with employee organization unfair labor practices track the language of the employer sections.⁴⁰² The problems that were discussed in the context of employer unfair practices are, *mutatis mutandis*, present in the context of employee representative unfair practices. The only subsection that differs from the employer unfair practice sections concerns the prohibition on strike activities by employee organizations.⁴⁰³ The anti-strike provisions will be considered *in toto* at a later point.⁴⁰⁴

3. *Unfair Labor Practice Procedures.*—The unfair labor practice procedures permit an employer or employee organization to file a charge alleging that an employer or employee organization has committed an unfair labor practice.⁴⁰⁵ The procedures outlined in the bill create a sound framework for the processing of unfair labor practice charges.⁴⁰⁶ A few language changes and a substantial rearrange-

statutory language. No solution has been suggested which does not do violence to one of the values involved. The only acceptable response is to allow the occasional, intransigent employer to go unchecked in order to preserve for the overwhelming majority of sincere bargainers the system of private ordering that has evolved under the NLRA. See H. WELLINGTON, *supra* note 378, at 59.

402. See Fla. H.R. 3314, §§ 2-447.019 (2) (a)–(c) (1972).

403. *Id.* § 2-447.019 (2) (e).

404. See note 412 and accompanying text *infra*.

405. Fla. H.R. 3314, § 2-447.020 (1) (1972).

406. The Commission or its agent investigates the charge and if, after a preliminary investigation, it decides that there is not substantial evidence indicating a prima facie violation, the charge will be dismissed. *Id.* § 2-447.020 (1) (b). If, however, the Commission finds that there is substantial evidence indicating a prima facie violation, "the commission . . . shall issue . . . a copy of the charges and a notice of hearing before the commission . . ." *Id.* § 2-447.020 (1) (a). The Commission or its agent or a member may conduct the hearing. *Id.* The testimony presented "shall be reduced to writing and filed with the commission." *Id.* § 2-447.020 (3). In the hearing, the Commission is not bound by the judicial rules of evidence. *Id.* § 2-447.020 (1) (a).

If the Commission finds substantial evidence that an unfair labor practice has been committed, the bill directs that "it shall state its findings of fact and shall issue . . . an order requiring the respondent party to cease and desist from the unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this part." *Id.* § 2-447.020 (3) (a). If the Commission finds that the charged party did

ment of several subsections need to be made to achieve greater clarity and consistency,⁴⁰⁷ but these would not work any substantial changes in the procedures.

One major difference in the procedural scheme utilized by the bill and the methods and structure used to remedy similar practices under the NLRA is that under H.R. 3314 the Commission is the prosecutor, the judge and the jury in an unfair labor practice proceeding. Under the 1947 revisions to the NLRA, the investigative and prosecutorial functions previously performed by the Board were removed and allocated to an independent "General Counsel."⁴⁰⁸ The General Counsel decides whether to prosecute an unfair labor practice charge independently of the Board.⁴⁰⁹ Unfair labor practice complaints are then tried before another independent component within the system, the administrative law judge who issues a recommended order before the final decision is made by the independent NLRB.⁴¹⁰ That structure of related but independent components within a single agency was created precisely because of objections directed to the conflicts of interest the Board obviously faced in discharging its functions as investigator, prosecutor and judge.⁴¹¹ Perhaps the Commission will some day have to adopt a similar structure. Initially, however, the legislature is certainly justified in experimenting with the less cumbersome and less costly single-unit model.

F. Status of Strikes and Strike Penalties

The strike is labor's traditional weapon in the institutionalized warfare of collective bargaining.⁴¹² The various forms of the strike are used to compel recognition,⁴¹³ to coerce favorable economic settle-

not commit an unfair labor practice, it is directed to state its findings of fact and dismiss the charge. *Id.* § 2-447.020 (3) (b).

407. Fla. H.R. 3314, §§ 2-447.020 (1) (b)-(c) (1972), should be renumbered subsections (2) and (3), respectively, and should follow immediately after subsection (1) to clarify the sequence of the procedures. Subsection (c), which now reads "[a] charging party, so dismissed . . ." should be amended to read "[a] charging party, whose charge is thus dismissed . . ." For other changes, see note 428 and accompanying text *infra*.

408. Section 3 (d), 61 Stat. 139 (1947), as amended, 29 U.S.C. § 153 (d) (1970). See also the text of a memorandum describing the authority and assigned responsibilities of the General Counsel of the NLRB quoted in MCGUINNESS, HOW TO TAKE A CASE BEFORE THE NATIONAL LABOR RELATIONS BOARD 399-401 (1967).

409. See generally MCGUINNESS, *supra* note 408, at 29.

410. See THE DEVELOPING LABOR LAW 823 (C. Morris ed. 1971). The administrative law judges were formerly called "trial examiners."

411. *Id.* at 820.

412. N. CHAMBERLAIN & J. KUHN, COLLECTIVE BARGAINING 390-94 (1965); H. WELLINGTON, *supra* note 378, at 7-26.

413. Cf. International Hod Carriers Local 840, 135 N.L.R.B. 1153 (1962).

ments,⁴¹⁴ to protect unredressed grievances and occasionally to demonstrate labor's strength.⁴¹⁵ Although the incidence of strikes has varied considerably during different periods of economic growth and recession, the right to strike for better terms and benefits is a frequently exercised and aggressively defended right of organized workers in the private sector.⁴¹⁶ The legality of the primary strike weapon, in frequent doubt during the entire nineteenth and early twentieth century,⁴¹⁷ is no longer a debatable issue.⁴¹⁸

In the public sector, however, all forms of the strike have been, and continue to be prohibited in most jurisdictions.⁴¹⁹ H.R. 3314 not only prohibits strikes in every conceivable guise, but includes for violation of its no-strike provision some of the harshest penalties to be found in state legislation.⁴²⁰

414. *NLRB v. Katz*, 369 U.S. 736 (1962).

415. H. PELLING, *AMERICAN LABOR* 70-72 (1960).

416. Professors Chamberlain and Kuhn indicate that while the number of strikes has decreased since the turn of the century, the number of workers involved as a percentage of the total employed and the total man-hours lost have steadily increased since the passage of the Wagner Act in 1935. N. CHAMBERLAIN & J. KUHN, *supra* note 412, at 394-95.

417. H. WELLINGTON, *supra* note 378, at 7-26.

418. Although the primary strike is legal in a general sense, and protected by §§ 7 and 13 of the NLRA, "the Court has never clearly enunciated the degree of constitutional protection, if any, to which the strike is entitled." *THE DEVELOPING LABOR LAW* 518 (C. Morris ed. 1971). Compare *Thornhill v. Alabama*, 310 U.S. 88 (1940), with *Dorchy v. Kansas*, 272 U.S. 306 (1926). See generally *Cox, Strikes, Picketing and the Constitution*, 4 *VAND. L. REV.* 574 (1951).

419. See *GOV'T EMPLOYEE REL. REP. CURRENT REPS.* (July-Dec.) No. 459, at B-6 (July 3, 1972). A few states have recently passed legislation which permits certain categories of public employees to strike under limited circumstances. See *HAWAII REV. STAT.* ch. 89 (Supp. 1971); *PA. STAT. ANN.* tit. 43, § 215.1 (Supp. 1972).

420. Fla. H.R. 3314, § 2-447.021 (1972), forbids both public employees and employee organizations from instigating or participating in a strike against a public employer. If a strike is called, either the Commission or the public employer involved is authorized to petition the appropriate circuit court for an injunction. *Id.* § 2-447.022 (2). The bill requires a hearing after notice and mandates the issuance of a temporary injunction, pending final disposition, if the petitioner makes a prima facie showing that a strike is in progress or is imminent. *Id.*

If the injunction is disobeyed, the bill requires the circuit court to initiate contempt proceedings against violators. *Id.* § 2-447.022 (3). If an employee organization is found in contempt, the court is authorized to fix an appropriate fine, up to \$5,000, depending on "the extent of lost services and the particular nature and position of the employee group in violation." *Id.* The section also authorizes, but does not require, the court to levy a fine on officers and agents of public employee organizations, as well as on public employers, of not less than fifty dollars and not more than one hundred dollars for each calendar day the violation is in progress. *Id.*

Those penalties are taxed only for a contempt of the court order enjoining the strike. In addition the Commission is authorized to use an arsenal of sanctions against those employee organizations and public employees striking in defiance of the bill. With respect to employee organizations the Commission may: (1) issue cease and desist orders, *id.* § 2-447.022 (6) (a) (1); (2) suspend or revoke the organization's certification

As originally drafted, however, the penalty sections were even more rigorous.⁴²¹ It is not a matter of record why the change from mandatory to discretionary penalties was effected, but the substitution of "may" for "shall" in the various subsections dealing with strike penalties⁴²² contributed to the creation of a more workable bargaining system. The mandatory system has serious disadvantages. It assumes that a strike is entirely the fault of the employee organization or the employees involved. Yet an intransigent employer can as easily provoke a strike as a demagogic union officer. The scheme of required penalties not only did not permit a court or the Commission to apportion the penalties according to what might be shared responsibility for the strike, but did not even permit the mitigation of damages where, in all but the formal sense, the employer had caused the strike. Under the revised version damages can at least now be reduced to a minimal amount where justice requires it.⁴²³

as bargaining agent, *id.* § 2-447.022 (6) (a) (2); (3) revoke any "check-off" right that might have been granted to the organization, *id.* § 2-447.022 (6) (a) (3); and (4) fine the organization up to \$20,000 for each calendar day of a violation or determine the appropriate cost to the public due to each calendar day of the strike and fine the organization an amount equal to such cost, *id.* § 2-447.022 (6) (a) (4).

In addition, subsection (6) (b) categorically denies certification to an employee organization in violation of § 2-447.021 for a period of one year from the date of final payment of any fine levied against it.

The Commission is not limited to penalizing the employee organization for instigating or supporting a strike. If any public employee participates in a strike in violation of § 2-447.021, the Commission may order the termination of his employment. *Id.* § 2-447.022 (5). If the employee is then reappointed, it will be on the following conditions: (a) the employee will be on probation for six months following his reemployment, *id.* § 2-447.022 (5) (a); (b) his compensation may not exceed that received by him immediately prior to the time of the violation, *id.* § 2-447.022 (5) (b); and (c) the compensation of the employee may not be increased until after the expiration of one year from his reappointment, *id.* § 2-447.022 (5) (c).

Finally the bill provides in § 2-447.022 (4), a section without parallel in other state collective bargaining laws, that an employee organization in violation of § 2-447.021 "shall be liable for any damages which might be suffered by a public employer, or any other person, natural or corporate," as a result of the strike. The circuit court with jurisdiction over such actions is specifically empowered to enforce judgments against employee organizations "by attachment or garnishment of union initiation fees or dues which are to be deducted or checked off by public employers." *Id.*

421. For example, under Fla. H.R. 206, § 112.70 (3) (1970), the circuit court was required to fine an employee organization which violated its injunction, as well as the officers or agents of the organization. In addition, the Commission was required to fine the employee organization for violating the no-strike section. *Id.* § 112.70 (4). The Commission similarly had no discretion with respect to the other penalties applicable either to employee organizations or to public employees—revocation of certification for one year, suspension of "check-off" rights, termination of employment, and probation for six months upon reinstatement. *Id.* §§ 112.70 (5) (a), (6) (a) (2) - (3).

422. Fla. H.R. 3314, § 2-447.022 (1972).

423. For example, Fla. H.R. 3314, § 2-447.022 (3) (1972), states in part: "In de-

In addition the penalties were so arranged that, once a strike was called, the employee organization had little incentive to end it. Since the organization would face fines which on almost the first day of the strike would bankrupt its treasury, no advantage accrued in avoiding the further financial penalties resulting from a continuation of the strike. Similarly, since the organization would incur all the other penalties as of the first day of the stoppage, little would be gained by attempting to negotiate an immediate end to the strike. Yet the bill should not only be concerned with deterring strikes, but also with creating a scheme of laws which makes it possible to end strikes soon after they begin.

It should be noted that public employee strikes have occurred in virtually every state in the union, in those states which have comprehensive legislation and in those states which have none.⁴²⁴ Strikes will undoubtedly occur again in Florida, whether the penalties are harsh or nonexistent. Consequently, the bill should reflect the fact that the occasional strike will occur, and that, depending on the group of employees involved and the nature of the services interrupted, the public might generate irresistible pressure for an end to the strike.⁴²⁵ If the employees cannot be enticed to end what they perceive as a justifiable "job action" by agreements to recommend lenient fines, the alternative often is "arrangements" whereby public officials simply do not initiate any action against the organization or the employees in exchange for their agreement to return to work.⁴²⁶

Although changes have been made which cure many of the objectionable features of the penalty provisions, further improvements could be made. Specific directions should be given in the bill to circuit judges responsible for policing anti-strike injunctions to take into consideration possible employer misconduct. Similarly, the bill should direct the Commission to weigh possible employer misconduct

termining the appropriate fine, the court shall objectively consider the extent of lost services and the particular nature and position of the employee group in violation."

424. "The record of strike activity as reported by the Bureau of Labor Statistics shows almost as many strikes in states without bargaining laws as have occurred in heavily organized states with such laws." Anderson, *The Structure of Public Sector Bargaining*, in *PUBLIC WORKERS AND PUBLIC UNIONS* 38 (S. Zagoria ed. 1972).

425. See generally Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 *YALE L.J.* 1107 (1969). But see Burton & Krider, *The Role and Consequence of Strikes by Public Employees*, 79 *YALE L.J.* 418 (1970).

426. For an example of employer inaction in the face of a strike, see Gotbaum, *Finality in Collective Bargaining Disputes: The New York Experience*, 21 *CATHOLIC U.L. REV.* 589, 593 (1972), in which the author points to the failure of the Yonkers School Board to bring contempt proceedings against striking teachers and their representatives or to invoke the potent penalties of the Taylor Act for employee strikes, despite threats to do so.

in the balance before assessing damages and penalties against the employees and their representative.⁴²⁷ More specifically, the Commission should be directed to conclude any pending hearings alleging strike-connected unfair labor practices by the employer before reaching a final decision on the measures to be taken against the employee organization and the employees for participating in a strike.⁴²⁸

G. Procedure for Appeals

The procedures outlined for securing judicial review of orders of the Commission are based on the NLRA and are comparatively uncomplicated. Some of the language used in describing the appellate process is confusing,⁴²⁹ but the broad outline of the system is simple and straightforward. The procedures, however, fail to profit from the obvious faults in NLRA procedures, and even add, somewhat gratuitously, faults that have been avoided by that Act.

427. See, e.g., CONN. GEN. STAT. ANN. § 7-471 (4) (B) (iii) (1972), providing that, if the Board finds that either party has refused to bargain in good faith, it can order the guilty party to pay the full costs of the fact finding arising out of the refusal.

428. Several possible inconsistencies should also be resolved in the sections dealing with prohibited strikes. It should be made clear, for example, that the Commission will prosecute and adjudicate violations of Fla. H.R. 3314, § 2-447.021 (1972), according to the usual procedures used to dispose of unfair labor practice charges. In addition, there is confusion between § 2-447.022 (6) (a) (2), which empowers but does not require the Commission to “[s]uspend or revoke the certification of the employee organization,” and § 2-447.022 (6), which mandates that “[a]n organization determined to be in violation of section 447.021, Florida Statutes, shall not be certified until one (1) year from the date the final payment of any fine against it.” The amendment again should be in the direction of giving the Commission discretion in choosing the appropriate remedy. The Commission might, for example, choose to continue the certification of the guilty employee organization perhaps because of its cooperative role in getting employees back to work, perhaps because of its stabilizing influence on emotion-charged employees. To deprive angry people of their chosen leaders in a moment of crisis will as often exacerbate the crisis as resolve it. In a more practical vein, the suspension or revocation of the certification of an employee organization will invariably reduce the membership since the organization will not be able to act as the collective bargaining representative; the reduction of membership would cut into the primary source of revenue, members’ dues, and perhaps result in the organization’s paying only a small amount of the total fines levied against it. In any event, the suspended employee organization would have little trouble in dissolving the guilty organization and forming another under a different name.

429. The district courts of appeal are empowered, upon the filing of an appropriate petition, to review orders of the Commission. Fla. H.R. 3314, § 2-447.020 (4) (1972). Two kinds of petitions can be filed: the petition for enforcement of an order, which can be filed by the Commission or the charging party, *id.* § 2-447.020 (5) (a), or the petition for review seeking to have the order set aside or modified, which can be filed by any person aggrieved by a final order of the Commission, *id.* § 2-447.020 (6). A third kind of petition is also alluded to, involving a review of orders adverse to a “charging party”; its precise function is unclear. See *id.* § 2-447.020 (5) (e).

For example, a major obstacle to the efficient and economic functioning of the federal legislation arises from the absolute requirement of judicial intervention subsequent to a final order by the NLRB.⁴³⁰ To save the Commission needless expense, and to reduce an increased and unnecessary caseload in the district courts of appeal, the Commission's orders should be self-executing. The Commission's orders should, of course, be reviewable; but only at the petition of an aggrieved party and then only on very narrow grounds. It might even be well to make the review discretionary with the district court of appeal.

The legislative preoccupation with judicial review and multi-step appellate procedures has placed an intolerable strain on the institutional ordering of legal relationships in this country.⁴³¹ Delays of two or three years⁴³² (in some cases, nine years⁴³³) are not uncommon before an unfair labor practice charge filed with the Board is finally closed in the courts. Judicial review is useful to guard against the occasional abuse, but is not necessary and is certainly not desirable in every case. The traditional "justice delayed is justice denied" can no longer be viewed as a reliable aphorism for bar association talks; it must be accepted as imposing a direct responsibility on the legislature to avoid the time-consuming maze of appellate review in creating new statutes and reviewing established laws.

A variation on that larger theme is reflected in a section of the bill which permits either the Commission or the charging party to petition the district courts of appeal for enforcement of a Commission order.⁴³⁴ Assuming that the Commission will be forced to petition for enforcement of its orders, it should at least have the exclusive control over the enforcement mechanisms, as the NLRB does under the NLRA.⁴³⁵ A requirement that the Commission share control of

430. Miller, *Our Rube Goldberg Labor Board*, Nation's Bus., Feb. 30, 1972, p. 30. Mr. Miller, Chairman of the NLRB, ranked the nonself-executing orders of the Board as one of the principal reasons for the delay in processing Board cases.

Employers can, of course, voluntarily observe an order of the Board; but, the Board's orders are not self-executing, and to insure compliance the Board must petition a court of appeals for enforcement. Consequently, the Board routinely petitions for enforcement of all its orders, even where the employer indicates he will comply, to ensure that quick action can be taken to compel enforcement where the employer fails to carry out a promise of voluntary compliance.

431. See Address by Chief Justice Burger, ABA 95th Annual Meeting, Aug. 14, 1972, in 93 Sup. Ct. 3 (1972).

432. Miller, *supra* note 430, at 32.

433. For example, NLRB v. General Elec. Co., 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970).

434. Fla. H.R. 3314, § 2-447.020 (5) (a) (1972).

435. Section 10 (e), 61 Stat. 147 (1947), as amended, 29 U.S.C. § 160 (e) (1970); *accord*, Amalgamated Util. Workers v. Consolidated Edison Co., 309 U.S. 261 (1940).

the litigation with the charging party is not only inconsistent with the purposes of the bill and the responsibilities of the Commission, but also creates the likelihood of complexity and delay where none need exist.⁴³⁶

While no solution is perfect, the arrangement that has evolved under the NLRA, in which the NLRB retains control of the litigation and the charging party is allowed to intervene,⁴³⁷ seems preferable to the forced sharing of control seemingly permitted by the Florida bill.

Another problem which has come up under the NLRA, and which the present bill fails to solve, involves the reviewability of interlocutory orders of the Commission, particularly those involving unit determinations. Under the NLRA a decision by the Board in the course of a representation hearing is not a "final order" and is consequently not reviewable by the courts of appeals.⁴³⁸ Strong arguments can be made for permitting interlocutory appeals, but the better

436. The overriding purpose of the bill is to promote harmonious relationships between public employers and groups of employees. Fla. H.R. 3314, § 2-447.001 (1972). The Commission has the responsibility of enforcing the specific constraints imposed by the bill so that the obstructive tactics of a few will not thwart that purpose. The Commission is therefore required to provide remedies that will effectuate the policies and purposes of the bill. *Id.* § 2-447.020 (3) (a). In ensuring that the purpose of the bill is achieved, the Commission will generally protect the individual rights of employers and employees; but the vindication of private rights generated by the bill is a means to the larger end of promoting harmonious relations between public employers and employees. The larger public purpose and the specific private rights will usually coincide. But on occasion it may be necessary for the Commission to sacrifice or discount a private right in the interests of the public purpose. This conflict will arise most often in the Commission's decision to accept a compromise settlement of an alleged violation or in the selection of remedies it will pursue.

The resultant conflict in the values symbolized by the Commission and the charging party is not amenable to easy solutions. But giving the charging party enforcement powers under the bill is not likely to produce a workable solution to the conflict. If the bill is interpreted to mean that whichever party first files the petition thereby gains control of the appeal, it is indefensible; races to the courthouse are too often productive of conflict and confusion. If the bill is interpreted to require co-control of the appeal by the charging party and Commission, the aforementioned divergence in the objectives sought by the two parties will often produce conflicting views on the strategy to be pursued in arguing the appeal. The bill could mean that each should pursue its own case independently of the other, and while that is preferable to a sharing of control, it will result in a wasteful duplication of effort and expenditure of time.

437. See *Local 283, UAW v. Scofield*, 382 U.S. 205 (1965).

438. Only final orders are subject to review by the courts under NLRA §§ 10 (e), (f), 61 Stat. 147, 148 (1947), as amended, 29 U.S.C. §§ 160 (e), (f) (1970). Decisions made in the course of a representation proceeding are not final orders for purposes of §§ 10 (e) and (f). See *AFL v. NLRB*, 308 U.S. 401 (1940). Review of directions of elections in representation proceedings is obtained incidental to review of an order entered in an unfair labor practice proceeding. See NLRA § 9 (d), 61 Stat. 144 (1947), 29 U.S.C. § 159 (d) (1970).

approach is to avoid providing opportunities for the dilatory appeals that can paralyze the effective enforcement of labor relations legislation.

H.R. 3314 is confusing on the question of the appealability of Commission orders. The bill speaks in one section of power in the district courts of appeal to review "orders" of the Commission;⁴³⁹ in a second section it refers to the Commission's "final decision;"⁴⁴⁰ in a third section to the courts' power to review a "final order."⁴⁴¹ The sections should be amended to refer uniformly to "final order." The powers of the district courts of appeal will then be clearly limited to review of final orders. If interlocutory reviews of unit determination decisions are thought desirable, a specific section should be added clearly setting forth the precise scope of that review.

A final problem connected with the scope of judicial review of Commission orders involves the reviewability of orders dismissing unfair labor practice charges.⁴⁴² Two sections address the question: one is confusing and one is ambivalent. Under the confusing section, the only action that can be taken by the Commission with respect to the charging party is a dismissal of his charge.⁴⁴³ It is difficult to envision, therefore, how the charging party would "comply" with that order or why the Commission would attempt to enforce it. If, however, the drafters meant to refer to "charged party," the section would make sense as an obvious attempt to strike a compromise between the desirability of allowing the Commission to issue self-executing orders and the felt need for judicial scrutiny of such orders. In that likely event the section would have no bearing on the question of judicial review of orders dismissing a charge.

Another section of the bill, however, might be interpreted as providing the right to such an appeal.⁴⁴⁴ A similar provision in the NLRA does not permit judicial review of orders dismissing unfair labor

439. Fla. H.R. 3314, § 2-447.020 (4) (1972).

440. *Id.* § 2-447.020 (5) (e).

441. *Id.* § 2-447.020 (6).

442. Fla. H.R. 3314, § 2-447.020 (1) (b) (1972), directs that if the Commission or its agent decides there is not substantial evidence substantiating an unfair labor practice charge, the charge shall be dismissed. Subsection (c) provides, however, for an appeal of that decision to the Chairman and one other member of the Commission who have the power to reinstate a meritorious charge. After full consideration, if it finds that the charge has not been proved, the Commission is directed to issue an order dismissing the charge. At that point, it is open to question whether the order dismissing the charge is amenable to judicial review as a "final order."

443. Fla. H.R. 3314, § 2-447.020 (5) (e) (1972), states that if the Commission's final decision is adverse to the charging party and he fails to seek review in thirty calendar days, the order will be automatically enforced by the district court of appeal upon the petition of the Commission if the charging party fails to comply with the order.

444. Fla. H.R. 3314, § 2-447.020 (6) (1972), provides that any person "aggrieved

practices;⁴⁴⁵ those orders are issued by the General Counsel, who functions independently of the five-member NLRB; and the statute contains no provision for judicial review of orders of the General Counsel.⁴⁴⁶ The same language used in the differently structured Commission, however, accomplishes different and perhaps undesirable results. Since the Commission itself dismisses unmeritorious unfair labor practice charges, a provision permitting review of final orders might well include orders dismissing unfair practice charges.

That result would work an unfortunate departure from the federal practice which has succeeded in damming the potential flow of appeals at that one point without apparent damage to the rights of those persons offered protection by the NLRA. Again, in the interest of the efficient and effective enforcement and administration of the bill, section 2-447.020 (3) (b) should be amended to foreclose judicial review of orders dismissing unfair labor practices.

H. Analysis of Miscellaneous Provisions

1. Local Option.—A crucial question involved in drafting public employee legislation is which employers should be included in the statutory scheme. Should one statute, for example, encompass all public employers, including state, county, municipal and school board; or should separate schemes be utilized for each level of government; or should some or all of the public employers be allowed to opt out of a statutory scheme provided certain conditions are met? Various states have taken widely different positions in response to these questions;⁴⁴⁷ the Committee on Manpower and Development recommended

by a final order of the commission granting or denying in whole or in part the relief sought, may obtain a review of such order"

445. See §§ 10 (e), (f), 61 Stat. 147 (1947), as amended, 29 U.S.C. §§ 160 (e), (f) (1970).

446. See 29 C.F.R. § 102.19 (1972); THE DEVELOPING LABOR LAW 834 (C. Morris ed. 1971).

447. Connecticut, for example, has separate provisions for municipal employees and teachers but no provision for state employees. CONN. GEN. STAT. ANN. § 7-467 (1972); CONN. GEN. STAT. ANN. § 10-153a (1967). Delaware permits municipalities to stay outside the Public Employees Bargaining Law unless they elect by legislative act to come under the statute. 10 DEL. CODE ANN. tit. 19, § 1301 (a) (3) (Supp. 1970). Kansas law also allows local governments to vote themselves in or out. KAN. STAT. ANN. § 75-4335 (Supp. 1971). Pennsylvania has no local option, but has a separate statute for police and firemen. PA. STAT. ANN. tit. 43, § 217.1 (Supp. 1972). Wisconsin has separate provisions for municipal and state employees. WIS. STAT. ANN. §§ 111.70, .80 (Supp. 1972). New York makes certain parts of its comprehensive statute inapplicable to a local government which "has adopted by local law its own provisions and procedures which have been submitted to the [public employment relations] board by such government and as to which there is in effect a determination by the board that such provisions and procedures . . . are substantially equivalent to the provisions and procedures set forth in this article with respect to the state." N.Y. CIV. SERV. LAW § 212 (McKinney Supp. 1972).

that Florida adopt a local option provision that would have permitted local governments to opt out of the statutory scheme provided that the local government adopted "in lieu of the requirement[s]" of the bill "its own provisions and procedures . . . provided that such procedures are substantially equivalent to and in accordance with the intent, provision and procedures set forth" in the bill.⁴⁴⁸ According to this version the Commission would determine whether local laws were substantially equivalent and therefore valid.

That recommendation provoked a vigorous floor fight in the House of Representatives. Opponents of the Committee's version of the local option succeeded in substituting a much more permissive provision, entitling a local government to opt out of the bill's coverage if it adopted measures respecting rights guaranteed employees in the bill. Among these were the rights of employees to form, join, and assist a labor organization, and the right to engage in collective bargaining through representatives of their own choosing.⁴⁴⁹ The amended version did not specifically confer power upon the Commission or any court to determine in the event of a dispute whether a particular local ordinance complied with the requirements of the bill. By arguing forcefully that the concept of centralized administration—a constant theme in the Committee bill—runs counter to the philosophy of "home rule" and decentralized government implicit in the 1968 constitutional revision,⁴⁵⁰ the proponents of "true" home rule overcame the Committee's commitment to centralized administration.

Neither version was a genuine "local option" provision. The former clause would have bound local governments to the statutory mechanisms by forcing them to reproduce the same mechanisms before they would be released from observance of the bill. Local governments would therefore have been forced by the expense of replicating the statutory scheme to stay within it.

The substitute measure, on the other hand, did not provide an "option" so much as it did an "escape" for local governments resistant to public employee bargaining. To require public employers merely to protect the rights guaranteed in section 2-447.006 required nothing more than the constitution already required.⁴⁵¹ The significant step in the bill moved the law from an unenforceable enumeration of abstract rights to the affirmative statement of procedures and remedies.

448. This provision was contained in the version of Fla. H.R. 3314 that was reported out of the Appropriations Committee in § 2-447.024.

449. This version of the local option appeared in Fla. H.R. 3314, § 2-447.025 (1972), and was contained in the engrossed copy that was sent to the Senate after passage in the House.

450. See FLA. CONST. art. VIII.

451. See note 61 and accompanying text *supra*.

A local government could, under the substitute measure, have exercised its option by publishing a local ordinance guaranteeing the rights specified, without making provision for the procedures necessary to implement the rights.

Fortunately, the adversaries of the local option issue were forced, by chance or necessity, to compromise their conflicting views. In working out the compromise, they managed to accomplish a delicate balance in which the advantages of both versions were preserved and their objectionable features eliminated.⁴⁵²

Instead of the local government having to adopt "provisions and procedures . . . substantially equivalent to and in accordance with the intent, provisions and procedures set forth in this part," the compromise provision would deem it sufficient if the local ordinance "effectively secure[s] to public employees substantially equivalent rights and procedures . . ." ⁴⁵³ The change in emphasis is subtle but important. The local bargaining legislation need not slavishly track the substantive and procedural details of the bill; it is sufficient if, whatever the details, the local law effectively secures "equivalent rights and procedures" for public employees. In addition, the circuit court, rather than the Commission, will determine whether the local law satisfies the requirements of the section. This change improves the amended version, which did not provide either for judicial or administrative review of local legislation. The possibility of inconsistent interpretations of the section has been mitigated (if not eliminated) by providing for appeal to the district courts of appeal.

2. *Government in the Sunshine.*—Florida's Government in the Sunshine Law provides:⁴⁵⁴

(1) All meetings . . . [of any state or local government body] are declared to be public meetings open to the public at all times, and no resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting.

452. The new version reads in part:

Any . . . political subdivision (other than the state or a state public authority), may elect to adopt by ordinance . . . its own provisions and procedures in lieu of the requirement of this part, provided that such provisions and procedures effectively secure to public employees substantially equivalent rights and procedures as set forth in this part. Any interested party may apply to the [appropriate] circuit court . . . for a determination as to whether local provisions or procedures, or both, are substantially equivalent to the provisions and procedures set forth in this part. The determination of the circuit court may be appealed to the district court of appeal.

Fla. H.R. 3314, § 2-447.025 (1972).

453. Fla. H.R. 3314, § 2-447.025 (1972). The amendment was accomplished when Fla. H.R. 3314 was offered as an amendment to Fla. S. 2008.

454. FLA. STAT. § 286.011 (1971).

(2) The minutes . . . [of any such meetings] . . . shall be open to public inspection.

The scope of this law is defined in three leading cases. In *Times Publishing Co. v. Williams*,⁴⁵⁵ the court held that, with one exception relating to attorney-client relationships, the legislature intended the statute to apply to all assemblages of boards or commissions governed by the act. The statute is applicable whenever discussion, deliberation, decision or formal action takes place.⁴⁵⁶ When the statute was challenged for lack of due process, the supreme court held in *Board of Pub. Inst. v. Doran*⁴⁵⁷ that it was sufficiently definite and contained sufficiently adequate standards to afford due process. Finally, in *City of Miami Beach v. Berns*,⁴⁵⁸ the supreme court held that "[w]hen . . . officials . . . transact or agree to transact [in a secret meeting] business . . . they violate the government in the sunshine law, regardless of whether the meeting is formal or informal."⁴⁵⁹

Should collective bargaining be subject to this statute? Although Florida's Attorney General has refused to exempt collective bargaining,⁴⁶⁰ the court, in *Bassett v. Braddock*,⁴⁶¹ exempted such bargaining. The court relied on the earlier decision in *Times Publishing Co. v. Williams*,⁴⁶² in which it was held that "constitutional impediments" are the only exceptions to section 286.011. The court noted in *Bassett* that the constitutional right-to-work provision⁴⁶³ is such a constitutional impediment. The court stated that this provision guarantees the right of collective bargaining and that applying the sunshine law would abridge that right. Since "[t]he discussions and deliberations . . . in an executive process often take place beyond the veil of actual 'meetings' of the body involved" and since "[t]he 'other side' (teachers' negotiator) is being 'coached' and given advices privately . . . it is only common sense and fair play that 'our team' [government employer] have the same advantage in order to be effective in his efforts."⁴⁶⁴

H.R. 3314 provides that "[a]ll bargaining, negotiating, mediation proceedings and hearings of the fact-finding board . . . shall be subject to section 286.011, Florida Statutes."⁴⁶⁵ This section of H.R. 3314

455. 222 So. 2d 470 (Fla. 2d Dist. Ct. App. 1969).

456. *Id.*

457. 224 So. 2d 693 (Fla. 1969).

458. 245 So. 2d 38 (Fla. 1971).

459. *Id.* at 41.

460. See FLA. OPS. ATT'Y GEN. 071-32 (Mar. 3, 1971).

461. 262 So. 2d 425 (Fla. 1972).

462. 222 So. 2d 470, 474 (Fla. 2d Dist. Ct. App. 1969).

463. FLA. CONST. art. I, § 6.

464. 262 So. 2d 425, 427, 428 (Fla. 1972).

465. Fla. H.R. 3314, § 6 (1972).

should be amended to exempt collective bargaining by statute from the requirements of section 286.011, just as the supreme court has done by decision in *Bassett*. The Government in the Sunshine Law places a restriction on public employers that unduly strengthens the bargaining position of public employees. As noted in *Bassett*, this would abridge rather than further the right of collective bargaining.

3. "Check-Off."—The question of whether a certified employee organization should be allowed to negotiate a "check-off" clause with a public employer proved one of the more abrasive issues in the debate on H.R. 3314. A suspicion lurks that check-off has acquired a symbolic value in the debates between opponents and proponents of collective bargaining, with the unfortunate result that the immediate merits of the check-off proposal tend to be at worst forgotten or at best distorted.

Check-off is a process whereby an employer deducts from the employee's wages the dues and assessments owed by the employee to an employee organization and transmits the amounts collected to the employee organization. Under the NLRA, a check-off proposal is a mandatory subject of bargaining; but, of course, as with other mandatory subjects, the employer need not agree to the union's proposal for check-off.⁴⁶⁶ Assuming the employer agrees to a check-off proposal, the cost of implementing the agreement is as well a subject of bargaining; the employer is perfectly within his rights in insisting that the union absorb whatever administrative costs may be involved.⁴⁶⁷ Most employers in the private sector, however, negotiate check-off as a matter of routine; they rarely attempt to shift the book-keeping and clerical costs to the union.

Under the Taft-Hartley Act employee consent is a prerequisite to dues deduction. If the employee is a member of the union, and a check-off clause is negotiated, the employer can legally deduct dues only if he receives the employee's specific permission.⁴⁶⁸ The NLRA also permits (except where prohibited by state right-to-work legislation) an employer and a union to negotiate a union security clause, the most usual version of which requires each employee to become a member of the union on or after the thirtieth day of his employment.⁴⁶⁹ In the event that the employer and the union negotiate both

466. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), for a brief history of "check-off" as a bargainable item. See *THE DEVELOPING LABOR LAW* 716 n.106 (C. Morris ed. 1971).

467. A fortiori, if the practice itself is bargainable, its cost must be also. The point has not come up in a Board proceeding.

468. See Labor Management Relations Act § 302(c)(4), 61 Stat. 157 (1947), 29 U.S.C. § 186(c)(4) (1970).

469. See § 8(a)(3), 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (1971);

a check-off and a union security clause—a not unusual contract combination—the employee has dues deducted as a condition of continued employment. The employee is free to demand that the employer discontinue checking off dues, but if he neglects to pay the dues personally the union can insist that the employee be terminated.⁴⁷⁰

The provisions in H.R. 3314 regulating “membership dues deduction” resemble in some respects the companion provisions of the NLRA. Like the NLRA, the Florida bill states that the employees must present “cards authorizing the deduction of such dues”⁴⁷¹ But under Florida law, since no employee can be compelled to join a labor organization or contribute to its support,⁴⁷² the result is that only those employees who voluntarily join a labor organization and then voluntarily sign authorization cards can have their dues deducted. In addition any authorization furnished by an employee is revocable at will.⁴⁷³

The layers of protection furnished against abuse of the check-off are several—and thick. First, a dues deduction clause has to be negotiated by the employee organization with the employer. There is no obligation that the employer agree to its inclusion. Assuming his conditional acceptance of the check-off proposal, the employer can insist that the union pay for its costs. If the employer and the employee organization manage to agree on a check-off clause, the employee must still voluntarily join or continue his membership in the labor organization, then sign an authorization card and present it to the employer, before dues can be deducted from his wages.

To include a provision that forbids the negotiation of a dues deduction clause would be carrying a paternalistic concern for employees, or a dislike for employee organizations, to the point of interference with the essence of free collective bargaining. Under H.R. 3314 and other similar legislation, the parties themselves determine what is best for them in their unique situation. It is only when one party threatens the rights of the other participants in the bargaining process or the rights of neutral third parties that government intervenes. Given the ample protections available to the employer and the employees, government’s intervention via a prohibition of check-off is simply not justified.

Ironically, if no mention had been made of check-off in H.R. 3314, it would probably have been adjudged a subject of bargaining as a

Rosenthal, *The National Labor Relations Act and Compulsory Unionism*, 1954 Wis. L. Rev. 53, 55.

470. See *Producers Transport, Inc. v. NLRB*, 284 F.2d 438 (7th Cir. 1960).

471. Fla. H.R. 3314, § 2-447.007 (1972).

472. See FLA. CONST. art. I, § 6.

473. Fla. H.R. 3314, § 2-447.007 (1972).

“term or condition” of employment.⁴⁷⁴ In the alternative, it would have been a subject of bargaining under section 112.171 of the Florida Statutes, which has authorized the negotiation of check-off agreements since 1959.⁴⁷⁵ Perhaps the best solution to the present controversy is to eliminate section 2-447.007 from H.R. 3314 and allow present law to control the issue.

IV. SUMMARY AND CONCLUSIONS

Whether collective bargaining between public employers and employee organizations is ultimately regulated by executive order, judicial decree, or legislative enactment, the issues confronted in the course of this analysis of H.R. 3314 must be understood and resolved. The questions generated by this particular bill, involving representation matters, collective bargaining requirements, strikes and strike penalties, unfair practices and mechanisms for administration and judicial review, are not peculiar to legislative enactments regulating bargaining nor to this particular legislative effort. Whatever legislative, executive or judicial vehicle is used for containing public sector bargaining, the same value choices and technical problems that have been analyzed in terms of H.R. 3314 will be encountered. The discussion of H.R. 3314 should therefore be useful whatever device or bill is ultimately chosen to regulate bargaining.

But the question must be confronted whether a statutory instrument is the appropriate device for regulating collective bargaining; whether comprehensive legislation such as H.R. 3314 is preferable to a skeletal guideline such as some of the “meet and confer” statutes; and whether 1973 is the appropriate time for attempting that regulation. That these questions must be answered affirmatively is fairly obvious. With respect to the comparative virtues of legislative regulation, the statutory approach is certainly accompanied by fewer problems than executive or judicial regulation. An executive order would have to survive powerful constitutional challenges. Even if it succeeded, it would probably cover only state employees, leaving teachers and municipal employees unregulated. Judicial enforcement would be of more doubtful constitutionality than executive regulation and would be severely limited in its effectiveness because of the difficulties that would be faced in policing and administering the details of a bargaining system. The legislature, on the other hand, can involve all the affected parties in working out a viable and comprehensive response to the challenge of public employee bargaining demands.

474. See *id.* § 2-447.002 (13).

475. See FLA. STAT. § 112.171 (1971).

The appropriateness of the timing is a question that is difficult to answer because the growth of public employee organizations in Florida has been uneven. If the rate of growth in this state accelerates rapidly, however, the legislature might well find itself debating collective bargaining in an atmosphere of crisis. The response will then be dictated by raw political power rather than by rational assessment of options and careful selection of a collective bargaining system oriented to the public interest rather than to partisan demands.

The final and most difficult hurdle to clear in recommending the passage of collective bargaining legislation is the effect that a bargaining bill will have on the state and municipal fisc, as well as on the authority of government to deliver services and protection to its citizens. Much of the legislative opposition to a collective bargaining statute seems grounded on three basic fears: (a) that employee organization membership will increase due to the legitimization of collective bargaining; (b) that the employee organization will use superior bargaining strength to bankrupt state and municipal government with exorbitant bargaining demands; (c) and that the organizations will use bargaining techniques along with political power to wrest control of public institutions from elected and appointed public officials.

A. The Impact on Union Membership

No solid evidence exists to support the hypothesis that links the growth of employee organizations to collective bargaining legislation. It appears, of course, that the numbers of organized employees increase after the passage of collective bargaining legislation; but it could just as defensibly be assumed that the collective bargaining bill resulted from the political pressure generated by increased employee organization membership. The relationship between bargaining legislation and membership in employee organizations is undoubtedly a symbiotic one: increasing membership numbers will often force a collective bargaining bill which appears to accelerate union membership or at least the selection of an employee organization as the bargaining representative by public employees.

The more important question for opponents of collective bargaining, however, is not whether legislation affects employee organizational growth, but whether that growth can be delayed by the absence of legislation. Since unionization in the private sector seems to be as much the by-product of urbanization as legislation, the pace of public employee organizing in Florida will probably increase regardless of the action or inaction of the legislature. Eventually, of course, legislation will have to be enacted as it has had to be enacted in other

urban states. The issue, consequently, is not whether, but when and under what political circumstances public sector bargaining legislation will be enacted in Florida.

Another troublesome problem that must be faced by individual legislators is whether the legislature should foreclose the exercise of a right that the people have conferred on public employees. A response to public employee demands for bargaining that says, "You have a right to bargain but no means to enforce that right," can only inculcate disrespect for the rule of law and encourage a resort to self-help that does not comport with civilized processes of government.

B. *The Effect on the Fisc*

The suspicion that increased collective bargaining will result from the legitimization of bargaining and that bargaining will bankrupt the public treasury is deep-seated and passionately held. In fact the same "financial disaster" arguments that have been proffered to support a ban on public sector strikes could, with appropriate modification, be urged to support a prohibition on public sector bargaining. Just as no market checks exist in a public employee strike situation to limit exorbitant strike settlements, no natural political or financial checks exist to curb the feeding of exorbitant employee bargaining demands.

Little agreement can be found, however, on the question of the impact that collective bargaining has on wage rates.⁴⁷⁶ It would seem from casual observation that public sector wages have risen considerably in those areas that have experienced collective bargaining with public employee organizations.⁴⁷⁷ But reputable economists dispute the theory that collective bargaining has a significant impact on wage

476. Compare Kasper, *The Effects of Collective Bargaining on Public School Teachers' Salaries*, 24 IND. & LAB. REL. REV. 57 (1970), with Baird & Landon, *The Effects of Collective Bargaining on Public School Teachers' Salaries*, 25 IND. & LAB. REL. REV. 410 (1972). See generally *Effects of the Union: A Symposium*, 24 IND. & LAB. REL. REV. 159 (1971). In a recent study of the effect of collective bargaining on the salaries of teachers and class size in 118 elementary school districts in Cook County, Illinois, Professors W. Clayton Hall and Norman E. Carroll stated:

Our findings strongly indicate that teachers' organizations do indeed increase salaries. . . . Apparently, however, the magnitude of the increases are [*sic*] relatively small. Our estimates suggest that they average around \$165.00 per year. . . .

In addition, it appears that teachers' organizations are associated with a larger student-teacher ratio. This lends support to the common allegation that school boards are offering teachers higher salaries in exchange for larger classes and that these offers are being accepted.

Hall & Carroll, *The Effect of Teachers' Organizations on Salaries and Class Size*, 26 IND. & LAB. REL. REV. 834, 840-41 (1973).

477. See Hayes, *Collective Bargaining and the Budget Director*, in PUBLIC WORKERS AND PUBLIC UNIONS 89, 93 (S. Zagoria ed. 1972).

structure.⁴⁷⁸ Given the principle of legislative finality, any significant increases would have to occur as the result of legislative action or approval. These decisions then are made by elected officials who are responsible to, and can be removed by, the taxpaying public. A very significant check exists, therefore, on employee demands—the desire of elected officials to remain in office.

If bargaining power must be translated into political power before it can achieve significant improvements in public employee benefits, an argument might be made that the shift will merely change the locus for the exercise of organized employee power rather than provide a significant check on it.

C. *The Impact on Control of Public Institutions*

This objection touches on the third concern behind the opposition to public employee bargaining, the suspicion that collective bargaining legislation will result in the usurpation of employer and legislative control of public services. Although these concerns are often expressed interchangeably, they involve two separate phenomena: first, the possible exploitation of bargaining power by employee organizations to gain control of traditional management functions; secondly, the manipulation of political power through lobbying, services and bloc voting to achieve the objectives denied the employee organization at the bargaining table.

With respect to the first concern, a weak public employer can undoubtedly collapse during negotiations in the face of determined and knowledgeable bargaining by public employee bargaining agents, even to the extent of surrendering the power needed to discharge duties and obligations imposed by law. But the mere existence of a collective bargaining statute does not compel surrender to exorbitant employee demands; it does not necessitate high wage increases; nor does it require the employer to act contrary to the public interest. Only employers can make the decisions that will produce these effects.

Rather than compelling employer concessions, the bill attempts to provide every possible protection to the employer (and thus to the public) to ensure that he will not lose control of the public enterprise.⁴⁷⁹ The primary protection against the demanding employee

478. See N. CHAMBERLAIN & J. KUHN, *COLLECTIVE BARGAINING* 310-12 (1965).

479. One section states explicitly that collective bargaining only requires that the employer bargain—not that he reach an agreement acceptable to the union, Fla. H.R. 3314, § 2-447.011 (1) (1972). A second section indicates that bargaining in good faith does not require the making of a concession. *Id.* § 2-447.002 (13). Still other sections define an employer's "rights" very broadly to include the right to "determine the purpose . . . [of the organization], set standards of [service] . . . exercise control . . .

organization, however, is the prohibition on strikes. Employers in the public sector simply have no excuse for their failure to resist exorbitant demands; public employees, unlike those in the private sector, have no way to compel accession to those demands except by joining in a strike which could irreparably damage their organization and personal careers.

The balance of power at the bargaining table has been struck in the decided favor of the public employer. Refusals to exercise and retain that power can hardly be remedied by a statute without completely distorting the nature of free collective bargaining. The public is not without remedy, however, in the face of employer vacillation. School board personnel can be voted out of office, as can legislators. Contracts must be renegotiated every two years and objectionable features can be eliminated. The public has ample opportunity to voice its displeasure with the handling of employee relations.

Undoubtedly some abuses of the bargaining process will occur. But the experience of states with mature bargaining relationships indicates that these will be uncommon. Indeed it is possible that what some denote an "abuse"—close employee participation in the policy decision affecting delivery of services to the public—may actually improve the quality of those services.

The second aspect of the concern for employees' usurpation of control of public services and institutions, the fear of the achievement of political power by bargaining representatives, is certainly not far-fetched. The "end-run" bargaining technique has become fairly common in some states and municipalities. The bargaining agent obtains the maximum concessions possible at the bargaining table, then attempts to improve on them by using political leverage to force legislative intervention. Thus, after state employees negotiate a recommended across-the-board increase of five per cent of base pay with the state as employer, the same negotiators may then attempt to lobby legislators to approve a seven per cent increase.

Again it is not a collective bargaining statute that permits, requires or even legitimizes such political intervention. The same phenomenon could easily exist independent of the statute. Nor can legislative provisions foreclose political activity of this type. Public employees are citizens and have the same right of access to their representatives as other citizens. The protection against what some

over its . . . operations . . . direct its employees, take disciplinary action . . . relieve its employees from duty because of lack of work . . . and determine the methods, means, and personnel by which the employer's operations are to be conducted . . ." *Id.* § 2-447.005.

see as a misuse of the political process inheres in the sensitivity of the legislature to the dangers involved in its intervention in the bargaining process and in the pressure of other lobbyists representing public employers to counter the appeals of public employees and their representatives.