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Political Forces in Public Sector Collective Bargaining

Jay S. Siegel* and Burton Kainen**

Over the past few years, one of the most frequently discussed subjects in legal periodicals has been labor relations in the public sector. Unfortunately, much of this literature has been written from a theoretical vantage point. Thus, fact-finders and prospective fact-finders extol the virtues of fact-finding; arbitrators and prospective arbitrators extol the virtue of arbitration; and the President of the United States extols the virtues of "final offer arbitration." Since most of these authors are "neutrals" with little or no firsthand experience as negotiators, very little has been written about the practical realities of collective bargaining in the public sector. While their contributions to the field have been substantial, "neutrals," like judges, often have a circumscribed view of the relationship of the parties.

The present authors, on the other hand, do not pretend to be neutral. The reader should recognize that we represent various political subdivisions such as municipalities, school boards, and utility districts in collective bargaining. This may color our perspective. Certainly, our experience in the past few years from the public employer's side of the bargaining table has done so. This exposure will become evident as we take an inside look at labor relations in the public sector.

Collective Bargaining in the Public Sector

The Framework of the Bargaining

During the past decade, unionization of public employees has soared, and state

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legislatures have responded with the passage of public employee labor relations acts. Virtually all these acts have been modelled on the National Labor Relations Act (NLRA). This reliance is understandable. On balance, the NLRA has been a fairly stable piece of legislation in the private sector, with the only two major groups of amendments being passed in 1947 and 1959. Unfortunately, since the two spheres are substantially different in many respects, transposition of the NLRA to the public sector has not been successful.

One significant difference is the lack of a clear understanding of the adversary interest between public employees and the employer representatives. In private industry, management interests are clearly delineated; its negotiators come to the table fully aware of their competitive position. Prior to negotiations, they have determined the precise areas in which compromise is economically feasible. Generally speaking, the company's negotiators are sufficiently sophisticated and knowledgeable to be able to accomplish their objectives at minimum cost.

While the union's interests remain the same in both the public and private areas, the analogy is simply not applicable to managerial interests in public sector bargaining. The state, city, town, or other political subdivision is not competing in the marketplace with the services it renders; its negotiators are not armed with the objective consideration of competitive cost factors available to private negotiators. Their goal is merely to obtain a "good" contract with the costs being passed to the taxpayer.

Further, private employers are under no compulsion to remain in business and may, if confronted with unreasonable demands, close their plant and cease operations. The effect of a plant closure is, of course, disastrous to the union. Fully aware of this managerial prerogative, the union's bargaining team gears itself accordingly in its negotiations.

The public employer, on the other hand, is compelled by legislation to provide various services to the public. Public employees and their unions realize this and can use it to their advantage at the bargaining table. A manifestation of this is the tendency, at least with less militant labor organizations and employee associations, for negotiations to drag on for months, and sometimes for years, past the contract expiration date. With the typical state budgeting procedures and the practices that have developed, employees actively and often successfully press to receive full retroactive application of the wage-related portions of any eventual agreement.

Finally, collective bargaining in the public sector evolved from conditions substantially different from those existing in the private sector prior to NLRA's passage in 1935. Private management's attitude before that date can be characterized as unfriendly and even hostile to unionization. The relationship in the public sector is best described as benevolent and paternalistic. Further, public

employees have had a long history of legislative lobbying aimed at improving the terms and conditions of their employment. Nonetheless, a mechanism appropriate to private collective bargaining was superimposed upon the unique labor relations background of public employee negotiations.

The Identity of the Public Employer

A very basic difference between the public and private spheres is the serious problem of ascertaining just who is the public employer. Many labor organizations have been frustrated and bewildered by the maze of councils, boards, commissions, managers, and mayors which often characterize state and local government.

Identifying the employer, however, is only the first hurdle. It must also be determined who will bargain for the public employer. A labor organization cannot negotiate, in the traditional sense, with a legislative body. Most public employee relations acts recognize this and designate some executive officer (*e.g.*, the mayor or town manager) as the employer's representative. However, this only partially solves the problem since the legislative body still must appropriate the funds necessary for any agreement, and the executive officer may first have to negotiate with the legislature to determine the extent to which it will support him.

These various differences are magnified by the impact of politics on public collective bargaining. This factor has contributed significantly to the present turmoil in public employee bargaining.

The Pervasive Influence of Politics

At the beginning of the Paris peace talks, the participants spent weeks arguing about the shape of the negotiations table. Ostensibly, no side wanted the other to be in the head position. For an entirely different reason, similar discussions might be fruitful at the outset of contract negotiations in the public sector.

There appear to be only two sides represented at the bargaining table: the employees and the governmental employer. Yet, the dominant political party in the political subdivision, the "invisible" interest, necessarily casts a long shadow over the negotiations. For example, where a political group is dependent upon the labor unions for financial support, is it realistic to say that the governmental representatives can be oblivious to this factor? This influence may even manifest itself in the very designation of the governmental bargaining representatives. An effort may be made to pick a negotiating team that will be "responsive" to the needs of the employees. This, we suggest, is a perversion of what is essentially an adversary relationship. While this relationship is not, of necessity,

marked by discord and haggling, it must be recognized that there are differing and, at times, *conflicting* interests which will clash at the public sector bargaining table. To insure equitable treatment for all, the representatives of each side must be sufficiently free to negotiate with some flexibility.

Another feature of the invisible political interest arises when the governmental subdivision involved is split between different political groups. Thus, for example, a Republican governor, charged with negotiating a collective bargaining agreement, may have to receive funding approval from a Democratic state legislature. This potentially explosive element is unknown in the private sector. The union negotiators, aware that they have political "friends" in the ultimate forum, may press excessive demands on the state administration; they know full well that the governor's negotiators must stand firm against the outcry of legislators that the employees are being victimized by the executive branch. Conversely, a "friendly" executive branch may be inclined to negotiate an overly favorable contract and then face the legislature's onslaught that the administration is "giving the state away."

The possibilities for sabotaging the governmental employer's position are all too real. Thus, bargaining stances which evolve at the executive session of the employer's negotiating committee are passed on to "friends" of the union representatives. Similarly, obstructionist tactics by such political allies which force compromises also make the "bargaining" distorted. While this environment may make for dramatic episodes, it does little for the basic purpose of the bargaining—the arrival at a mutually satisfactory labor agreement that recognizes the interest of the employees while permitting the political subdivision to meet its responsibility. The danger, of course, is that the negotiations become a pawn in the political process, thus encouraging the use of "extra-negotiating" techniques by the employee representatives.

The "End Run" Around the Bargaining Table

"If at first you don't succeed, try, try again" may be a valid maxim when applied to one's personal endeavors. But when applied to public sector negotiations, it assumes an undesirable aspect, one promising destruction of the entire bargaining process. Arbitrator Arnold Zack has pinpointed the inherent danger:

Sophisticated employee organizations usually limit their efforts to improve their compensation to the negotiating tables, although they unquestionably have lobby muscle as well. Indiscriminate use of that muscle is bound to restrict effective collective bargaining in subsequent negotiations, for fear that the organization will take its "second bite at the apple." But the possibility of utilizing legislative

channels to attain benefits denied them in negotiations is bound to have its impact on the negotiating process.¹

The classic situations in which unions resort to these other channels are easily described. One occurs when employee representatives and the governmental employer negotiate in the traditional pattern of collective bargaining: the union sets forth its various demands, while the government attempts to reduce the amount and scope of those demands to an acceptable point.² When the union believes it will shortly obtain the maximum concessions possible at the bargaining table, it begins a campaign involving newspaper releases and personal contact of the appropriate elected public officials and legislators. This is all designed to create the impression that the government is abusing the employees by denying them the opportunity to enjoy a living wage and to work "with dignity." The ultimate aim, of course, is to bring pressure in the form of threatened reprisals at the polls, loss of political patronage, and outright harassment so that these officials will, in turn, pressure the governmental bargaining team into modifying its position—thus yielding further concessions to the union.

This entire drama necessarily places the administrative and the legislative officials in a strained position. The latter have personal interests in remaining in office. Faced with the labor union's political power, they are aware of the forces at play. In essence, what occurs is the bypassing of the governmental negotiators in the hope of a "back door deal" directly with city hall or the state house.

It becomes apparent that this fusion of economic and political bargaining strategies only confuses and distorts the pattern of public labor relations. Consider, for example, what the situation would be in the private sector if, after bargaining to an impasse, private union representatives met with the company's board of directors and tried to convince them of the merits of further concessions to the union's demands. The knowledge that the union could meet face-to-face with the directors would only serve to make the company's negotiators uneasy and ineffective. Further, if the employees could influence the election of the board of directors, negotiations would take on an added dimension.

There is another, more sophisticated situation in which the public employee's bargaining representatives resort to efforts beyond the negotiating table. It is equally destructive of meaningful public sector bargaining. This approach be-

1. 3 LABOR-MANAGEMENT RELATIONS SERVICE NEWSLETTER, no. 2, at 4 (Feb. 1972).

2. Many government negotiators have yet to comprehend the two-way street concept of such bargaining and prepare their own list of demands.

gins with the culmination of the employment contract proceedings. Turning to the legislature, the labor representatives try to secure statutory enactments that will add additional benefits to those already achieved through collective bargaining. These benefits may take the form of subtle changes in pension fund laws, wage and hour alterations, and so on. If labor has sufficient political strength, it can reconstruct an entire group of existing bargaining agreements.

Further, the consequences of such legislative action may not even be apparent to the governmental representatives. A gross example of this situation came to light recently in Connecticut. At the 1971 session of the General Assembly, a bill extending the state minimum wage-hour law to public employees was enacted.³ Due to a highly publicized struggle between the governor and the assembly over fiscal legislation in the revenue and budgetary areas, the bill went unnoticed. On its face, the new law expanded, quite innocently, the definition of "employee" to include municipal employees. No reference to overtime was mentioned, but the net effect of the change was to raise a question as to whether firemen who work over 40 hours a week must be paid overtime. Since most paid firemen work under the traditional alternating-week pattern, the additional cost to the affected municipalities could be staggering.

Thus, with a single public act, 29 firemen's union contracts, negotiated at arm's length in the traditional labor relations manner, were amended to include overtime pay not provided in the original agreements.⁴ This outcome is not only inimical to the structure and function of the collective bargaining process, but also raises serious doubts as to the integrity of governmental employee labor unions which press for additional bargaining benefits before legislative bodies. If collective bargaining is to be the means by which wages, hours, and working conditions are to be established for government workers, then it must be the *exclusive* method. There is simply no other way to preserve the integrity of the negotiating process. As Connecticut's Governor Thomas J. Meskill aptly stated:

For collective bargaining to work in the public sector, there must be a willingness on the part of public employees to make an election . . . to seek all further benefits at the bargaining table and to refrain from lobbying activities with the legislative branch. If public management is to deal in good faith at the bargaining table, it must be assured that employee groups will not seek the best of both worlds.⁵

This point is well taken. If government negotiators are aware that union

3. CONN. GEN. STAT. ANN. § 31-58(f) (Supp. V, 1971).

4. The authors are personally aware that union demands at the table in many of these contract talks included requests for such overtime which were turned down.

5. Address by Governor Meskill, American Assembly Convention, Oct. 30, 1971.

representatives will bypass them whenever they firm up their bargaining position, this must necessarily play havoc with the course and direction of the talks and the positions they assert therein.

Conclusion

Having identified a problem, there always exists the temptation to expound an instant solution. Experience, however, has taught that the ideas which look best on paper many times simply will not stand the test of realistic application.

Political influence is a problem which has been present as long as man and government have existed. There can be no question, however, that the impact of politics on public collective bargaining is extremely undesirable. Considering this problem, the American Assembly Conference on Collective Bargaining in American Government asserted that it "deplores 'end runs' to any legislative body by either party to obtain terms more favorable than those already accepted at the bargaining table."⁶ The Report of the Advisory Commission on Intergovernmental Relations (ACIR) has also condemned these practices:

. . . the Commission opposes continuing any indiscriminate State mandating of the terms and conditions of local public employment. Such a policy does little or nothing by way of promoting the basic goals of a State labor-management relations policy. It encourages employee organizations to make "legislative end runs" when the parties are unable to reach agreement, and this violates the spirit, if not the letter, of the "in good faith" ethic.⁷

The ACIR formally recommends a policy of governmental restraint in this area.⁸ We would go even further. We believe that, as a first step in solving this problem, legislative bodies must be removed from the bargaining process. Accordingly, we would urge that present public employee relations acts be amended in the two following respects:

1. Require union representatives to bargain exclusively with the designated representatives of the public employer and stipulate that it is an unfair labor practice to do otherwise;⁹ and,
2. Provide that the collective bargaining agreement is controlling against conflicting statutes, ordinances, etc., and that, during its term, it is not subject

6. AMERICAN ASSEMBLY, COLLECTIVE BARGAINING IN AMERICAN GOVERNMENT (1971).

7. 342 GOV'T EMPLOYEES REL. REP. E-21 (Mar. 30, 1970).

8. *Id.* at E-20.

9. We do not urge this as a bilateral provision since virtually all existing statutory schemes already require the public employer to deal exclusively with the designated union representatives of the employees involved. We suggest that mutuality of obligation be accorded the public employer.

to change by legislative enactment concerning wages, hours, and working conditions of the employees covered thereby.

These two proposals are not a panacea. They will, however, represent a significant step toward achieving meaningful collective bargaining in the public sector and are in line with the call of Professors Love and Sulzner for a "reassessment aimed at discovery and recognition of the unique characteristics" of public sector bargaining and the development of guidelines appropriate to it.¹⁰

Public employee unions should not be entitled to the best of both worlds. The ability of collective bargaining to survive as a viable resolution device is predicated upon the negotiating parties' acknowledging the adversary interests involved. When one party seeks to undermine the independence of the other, it can only lead to a distortion of the entire process, for it alters and impairs the structure of the bargaining mechanism. That this has been the case in public sector bargaining is all too obvious. Those advocating equitable public labor relations can do no less than support these measures, minimizing the influence of political forces.

10. Love & Sulzner, *Political Implications of Public Employee Bargaining*, 2 INDUSTRIAL RELATIONS 117, 123 (1972).