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CURRENT TRENDS IN PUBLIC EMPLOYEE LABOR LAW IN ILLINOIS: ALICE-IN- WONDERLAND REVISITED?¹

*Elliott H. Goldstein**

Professor Goldstein points out that Illinois finds itself one of the rapidly diminishing number of states that have not enacted comprehensive legislation to structure and control collective bargaining in public employment. In an attempt to correct our inadequate laws, Governor Walker issued Executive Order No. 6 (1973) entitled "Public Employee Collective Bargaining." Professor Goldstein analyzes the Executive Order, considers how bargaining impasses are to be resolved, and concludes that the absolute silence of the Order constitutes de facto recognition of public employees' right to strike.

INTRODUCTION

IT has become a virtual cliché to begin any discussion of the area of public employee bargaining rights with some amazed reference to the phenomenal growth of both militancy and trade unionism among public employees since 1950. Indeed, one cannot over-emphasize the crucial importance of the growth in numbers and strength of public employee unionism at a time when union strength in the private sector has, at best, stagnated.² In re-

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1. In 1969, the current chairman of the National Labor Relations Board, Edward B. Miller, then a prominent Chicago practitioner, characterized public sector labor relations in Illinois as "a strange and wonderful world indeed, and as Alice said, it gets curiouser and curiouser." Miller, *The Alice-in-Wonderland World of Public Employee Bargaining*, 50 CHICAGO BAR RECORD 223, 226 (1969). Miller's article reviewed the obvious discrepancies which existed in 1969 between the textbook conception of reality in public sector law in this state, which Miller called the "dreamworld of the law," and what Miller called the "real world of the facts." *Id.* at 223-224. Governor Walker's EXECUTIVE ORDER NO. 6 (1973), discussed *infra*, seems to require a new review of collective bargaining among state public employees in Illinois. To this writer, the intervening four years have not changed the picture appreciably. Public employee bargaining in Illinois is still truly "an Alice-in-Wonderland World."

2. See D. Wollett & D. Sears, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT, pp. IX-XII (1971). See generally Edwards, *The Emerging Duty to Bargain*

sponse, at least thirty states have enacted statutes granting collective bargaining rights to various categories of public employees.³

However the Illinois General Assembly, despite numerous attempts to enact such legislation, has been able to pass only extremely limited and specialized legislation for specific categories of public employees.⁴ In 1966, a governor's advisory commission, known as the Kerner Commission, was established to consider all aspects of employer-employee relations for state and local governmental agencies. The Kerner Commission in a report issued in 1967 concluded that passage of a public employee labor relations law was "imperative."⁵ Nevertheless the attempt to enact legisla-

in Public Sector, 71 MICH. L. REV. 885 (1973); Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931 (1969); Pollelle, *Collective Bargaining and the Public Employee: A Coherence or Chaos?*, 48 N. DAK. L. REV. 41 (1971); Project, *Collective Bargaining and Politics in Public Employment—Part I: Historical Summary*, 19 U.C.L.A. L. REV. 893 (1972); Shaw & Clark, *The Practical Differences Between Public and Private Sector Collective Bargaining*, 19 U.C.L.A. L. REV. 867 (1972); *Trends and Changes in Union Membership*, 89 MONTHLY LAB. REV. 510-13 (1966); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969); Fritchey, *Public Employees Turn Militant*, The Chicago Tribune, Sept. 25, 1973, at 18 col. 3.

3. Different approaches are incorporated in HAWAII REV. STAT. tit. 7, §§ 89-1 to 89-20 (Supp. 1972) (public employees); MICH. STAT. ANN. tit. 17, §§ 17.455(1) *et seq.* (Supp. 1973) (public employees); Taylor Act, N.Y. CIVIL SERVICE LAW, §§ 200-214 (McKinney 1973) (public employees); PA. STAT. ANN. tit. 43, §§ 1101.101-1101.2301 (Supp. 1973) (public employees); WIS. STAT. ANN. tit. 13, §§ 111.50-111.64 (1957), *as amended*, (Supp. 1973) (public utilities employees); tit. 13, §§ 111.70-111.77 (Supp. 1973) (municipal employees); tit. 13, §§ 111.80-111.97 (Supp. 1973) (state employees). *See also* D. WOLLETT, *supra* note 2, at 98-100.

4. In 1945, the state legislature authorized the Chicago Transit Authority to continue the collective bargaining procedures used when the transit system was held in private ownership, including voluntarily binding arbitration of a dispute over the terms of any contract. ILL. REV. STAT. 1112/3, § 328a (1966). A statute was passed authorizing the university civil service system to enter into negotiations on wages and other conditions of employment with employee organizations representing nonacademic employees. ILL. REV. STAT. ch. 241/2, §§ 3861-38M (1965). Legislation dealing with limited bargaining rights for municipal fire fighters was also enacted in 1951. ILL. REV. STAT. ch. 24, §§ 10-3-1 to 10-3-11 (1967). The STATE PERSONNEL CODE authorizes the State Director of Personnel "to conduct negotiations affecting pay, hours of work, or other working conditions of employees" subject to the Code. ILL. REV. STAT. ch. 127, § 63b109(7) (1967). Legislation passed in 1961 and 1963 permits state or local employees (where there is an enabling ordinance or resolution) to check off union dues for its employees. ILL. REV. STAT. ch. 127, § 354 (1967) (state employees); ILL. REV. STAT. ch. 85, § 472 (1966) (local employees). In 1945, the legislature had in fact passed a bill granting public employees the right to negotiate collectively. The Governor, however, successfully vetoed this Bill. S.B. 427, 64th Ill. Gen. Assembly (1945).

5. *See*, GOVERNOR'S ADVISORY COMM'N ON LABOR-MANAGEMENT POLICY FOR

tion based on this report foundered on the issue of the right of public employees to strike.⁶

In 1971, a second commission, the Ogilvie Commission, stated that "the passage of legislation is even more imperative now than it was four years ago."⁷ But the enactment of proposed legislation based on the recommendations of the Ogilvie Commission also met dismal failure, once again because of the inability of the state legislature to resolve the issue of whether public employees have a right to strike.⁸

In the face of this inability of the Illinois General Assembly to provide such legislation, what has developed is an ad hoc, piecemeal response by the various governmental units confronted with employees demanding collective bargaining rights and a union contract. Some units of government, such as the Chicago Board of Education, have "voluntarily" recognized employee unions and signed collective bargaining agreements with these unions.⁹ Other governmental employers have absolutely refused to recognize and bargain with unions of their employees. Recognition strikes have resulted with varying degrees of success.¹⁰ The achievement of

PUBLIC EMPLOYEES, REPORT AND RECOMMENDATIONS (March 1967) [hereinafter cited as the KERNER REPORT].

6. See Clark, *Public Employee Labor Legislation: A Study of the Unsuccessful Attempt to Enact a Public Employee Bargaining Statute in Illinois*, 20 LAB. L.J. 164 (1969); DERBER, LABOR-MANAGEMENT POLICY FOR PUBLIC EMPLOYEES IN ILLINOIS: THE EXPERIENCE OF THE GOVERNOR'S COMMISSION, 1966-1967, in COLLECTIVE BARGAINING IN GOVERNMENT 204 (1972).

7. COMMISSION ON LABOR LAWS, REPORT AND RECOMMENDATIONS, 19-20 (April 1971). [hereinafter cited as the OGILVIE REPORT].

8. See, e.g., S.B. 1000, 78th Ill. Gen. Assembly (1973); H.B. 448, 78th Ill. Gen. Assembly (1973); H.B. 3632, 77th Ill. Gen. Assembly (1971); H.B. 1, 77th Ill. Gen. Assembly (1971).

9. In *Chicago Div. of Ill. Educ. Ass'n v. Board of Educ.*, 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966), the Illinois Appellate Court for the First Division held that in the absence of legislation the Chicago Board of Education had the discretionary authority to recognize a bargaining representative selected by a majority of its teacher employees. Upon recognition, the court held, the Board of Education had the discretionary authority to bargain collectively with a union so chosen and to enter into a written collective bargaining agreement with it. Although an appeal was filed, the Illinois Supreme Court refused to grant it. 35 Ill. 2d 630 (1967). In *Edwards, supra*, note 2 at 890, Professor Harry T. Edwards states that this is the only American decision that has held that a public employer has the authority, "in a non-proprietary area and absent a statute, to engage in private-sector-type collective bargaining with an exclusive representative of the employees in an appropriate unit."

10. See, e.g., *Cook County Police Ass'n v. City of Harvey*, 8 Ill. App. 3d 147,

recognition and bargaining rights by public employees has thus been exclusively dependent on their extent of organization and their economic power, not on any rule of law.

On the state level, what has at last appeared is a granting of bargaining rights to state employees working directly under the authority of the Governor under the terms of the Illinois Personnel Code.¹¹ The device used to grant these bargaining rights is an executive order issued by the governor, as presented below.

EXECUTIVE ORDER NO. 6: SUBSTANCE AND
ADMINISTRATIVE FRAMEWORK

On September 4, 1973, Governor Daniel J. Walker issued Executive Order No. 6 (1973), entitled "Public Employee Collective Bargaining."¹² This order grants bargaining rights to all state employees working for departments, agencies, boards and commissions whose vouchers are subject to approval by the Department of Finance. Specifically excluded under the order are the supervisors, managerial employees, confidential, emergency and temporary employees of the covered agencies.¹³ Also excluded are all employees of the state police, and state college and university employees, since they are not covered by the Illinois Personnel Code.

The order provides that all covered employees "shall have the right, freely and without fear of threat or reprisal, to voluntarily form, join and assist an employee organization and the right to re-

289 N.E.2d 226 (1972) where the court held that in the absence of a statute, a city had no enforceable duty to recognize a representative of its employees or to bargain collectively with them about wages, hours or working conditions. Therefore, the appellate court reversed a lower court's issuance of a mandatory injunction ordering the city to recognize and bargain with an association representing its policemen. To the same effect, see *Chicago High School Assistant Principals Ass'n v. Board of Educ.*, 5 Ill. App. 3d 672, 284 N.E.2d 14 (1972). For an example of a recent successful recognitional strike, see *Chicago Tribune*, Oct. 29, 1973 § 1, at 22, col. 1.

11. EXECUTIVE ORDER No. 6 (1973) was issued pursuant to § 9(7) of the ILLINOIS PERSONNEL CODE, ILL. REV. STAT. ch. 127, § 63b109(7), which authorizes the Director of Personnel "[t]o conduct negotiations affecting pay, hours of work, or other working conditions of employees. . . ." See EXECUTIVE ORDER No. 6. 1 (1973).

12. EXECUTIVE ORDER No. 6 (1973) [hereinafter cited as the ORDER or EXECUTIVE ORDER No. 6].

13. *Id.*, at 2, para. 1.

frain from any such activity."¹⁴ This language virtually mirrors Section 7 of the Labor-Management Relations Act, the statute which accords and guarantees to employees in the private sector the right to engage in concerted activities for the purpose of collective bargaining. Like the Labor-Management Relations Act, the Order seeks to achieve, assure and protect the above rights by prohibiting any "interference, restraint, coercion or discrimination against employees in the exercise of their rights" to organize or refrain from joining unions.¹⁵

The Director of Personnel is made primarily responsible for implementing the provisions of the Order and the rights granted in it. To aid the Director of Personnel, the Order creates a six-member State Employee Labor Relations Council, "consisting of the State Labor Director as Chairman, the Director of Personnel, the Chairman of the Civil Service Commission and three public members with experience in labor relations to be appointed by the governor."¹⁶ The Council is a purely advisory body. Its function is to advise the Personnel Director with respect to all rules and regulations issued pursuant to the Order and to provide "such further assistance as the Director of Personnel may request."¹⁷

Under Executive Order No. 6 an independent Office of Collective Bargaining is also established.¹⁸ It is this agency which is responsible for the actual administration of the provisions of the Order and any administrative rules and regulations issued by the Director of Personnel "to carry out and promote the policies and purposes of this Order."¹⁹ In function, the Office of Collective Bargaining closely resembles that of the National Labor Relations Board, the private sector model. Like the National Labor Relations Board, one major responsibility of the Office is to determine whether a particular unit of employees is appropriate for collective bargaining.²⁰ In determining the appropriateness of such a unit, the Office

14. *Id.*, at 2, para. 2.

15. *Id.* The relevant sections of the Labor-Management Relations Act are §§ 7 and 8(a), 29 U.S.C. 157; 29 U.S.C. 158(a) (1970).

16. EXECUTIVE ORDER No. 6, 4, para. 8 (1973).

17. *Id.*

18. *Id.* at 2, para. 3.

19. *Id.* at 4, para. 9.

20. *Id.* at 2, para. 4.

is to "avoid artificial distinctions between groups of employees whose functions and community of interests are similar, without regard to the statutory jurisdiction of any agency."²¹ Another standard to be used in determining whether such an employee unit is appropriate is whether such unit would "promote the interest of the State in [employee] bargaining on a state-wide basis."²² Under the Order, state-wide units are presumptively appropriate for purposes of collective bargaining.²³

The above criteria emphasizing vocational groupings or agency-wide or state-wide employee organizations should result in the certification of relatively large collective bargaining units.

The Office of Collective Bargaining is also charged with the responsibility of determining whether a particular union seeking recognition in an appropriate unit is in fact the choice of the majority of the employees.²⁴ Those current employee organizations who have historically represented certain groups of state employees will continue under the terms of the Order to represent these groups unless a majority specifically rejects them. For all other employee units, the sole method whereby recognition and the certified representative status may be ascertained is in a secret ballot election.²⁵ All unions thus certified are to be accorded exclusive recognition by the employing agency.²⁶

21. *Id.*

22. *Id.* at 2-3, para. 4.

23. *Id.* The criteria enunciated in paragraph 4 of EXECUTIVE ORDER No. 6 reflects an awareness of the dangers of overly fragmented bargaining units in the public sector. See the KERNER REPORT, *supra*, note 5, at 19. See also Shaw and Clark, *Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems*, 51 ORE. L. REV. 151 (1971); and Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 MICH. L. REV. 1001 (1969). Under the terms of the order, professional employees may only be included in the same collective bargaining unit with non-professional employees when a majority of the professional employees specifically vote for inclusion in such a unit, and this combination "is not in conflict with the duties of each group." EXECUTIVE ORDER No. 6, 3, para. 4. This standard approximates Section 9(b) (1) of the Labor-Management Relations Act, 29 U.S.C. § 159(b)(1) (1964).

24. EXECUTIVE ORDER No. 6, 3, para. 5 (1973).

25. *Id.*, at 3, para. 5; at 5, para. 10.

26. *Id.*, at 3, para. 5. The principle of exclusive recognition has been a cornerstone of unionism in the private sector. See, e.g., *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). In the public sector, other devices such as proportional representation have been tried. The principle of exclusive recognition for the union, who has proved its majority status, is now accepted in the public as well as private sector.

The administrative framework created under the Order will obligate certified representatives of employees to sit down at the bargaining table with their management counterparts, the head of the affected agency and the Director of Personnel.²⁷ The mutual obligation is "to meet at reasonable times and negotiate in good faith with respect to wages, hours and other terms and conditions of employment. . . . [This duty to bargain in good faith] shall not compel either party to agree to a proposal or require the making of a concession"²⁸ by either side. These provisions virtually track the requirements of the pertinent section of the Labor-Management Relations Act, Section 8(d).²⁹

Yet the actual scope of negotiations to be allowed the parties under the Order is extremely narrow and limited. First, although bargaining for wages, hours and other terms and conditions of employment is allowed, this is so only "so far as may be appropriate and allowable under applicable laws. . . ."³⁰ Second, all bargaining is expressly made subject to the "laws regarding the appropriation and expenditures of State funds and the Rules of the Department of Personnel."³¹ Further, the obligation of the representatives of the State of Illinois to negotiate in good faith specifically does not extend to the "merit principle and the competitive examination system."³² In addition, the state reserves the right not to negotiate with respect to "the policies, programs and statutory functions of an agency."³³ The state does not have to negotiate con-

See the KERNER REPORT, *supra*, note 5 at 22; and the OGILVIE REPORT, *supra*, note 7 at 29-31, and Edwards, *supra*, note 2 at 901. Cf., the California Winton Act covering public education which provides for proportional representation of employee groups through "negotiating councils." Cal. Govt. Code §§ 3500-11 (West 1966), as amended, (West Supp. 1972).

27. EXECUTIVE ORDER No. 6, 3, para. 6 (1973).

28. *Id.*

29. Section 8(d) of the Labor-Management Relations Act provides that "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 other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession" 29 U.S.C. § 158(d) (1970).

30. EXECUTIVE ORDER No. 6, 3, para. 6 (1973).

31. *Id.*

32. *Id.*

33. *Id.*

cerning such topics as "decisions concerning standards, scope and delivery of service and the utilization of technology" or the state retirement system and the state life and health insurance program.³⁴ Finally, Executive Order No. 6 provides a catch-all statement that the state retains the right not to negotiate concerning "anything required or prohibited by law."³⁵

This list of "non-negotiable" topics obviously excludes many subjects which have traditionally been included under the private sector duty to bargain.³⁶ However, the scope of bargaining allowed under Executive Order No. 6 is roughly equivalent to the limitation on the scope of bargaining imposed by Executive Order No. 10988, the Kennedy Order, issued in 1962; this Order initially granted public employees collective bargaining rights at the federal level.³⁷ While the current federal executive order, Executive Order 11491, is much less restrictive in the scope of bargaining allowed, section 12 thereof still sharply limits the permissible scope of collective bargaining negotiations.³⁸

Many of the state statutes dealing with labor relations in the public section contain similar or even more restrictive provisions.³⁹ In fact, several state statutes do not impose any mutual obligation on the parties to negotiate in good faith but merely require the public employer to "meet and confer" with union representatives before

34. *Id.* at 4, para. 6.

35. *Id.*

36. See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958); *NLRB v. American Natl. Ins. Co.*, 343 U.S. 395 (1952); *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953), *cert. denied*, 346 U.S. 887 (1953); and *NLRB v. General Electric Co.*, 418 F.2d 736 (2d Cir. 1969), *cert. denied*, 397 U.S. 965 (1970). See also Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 19 MICH. L. REV. 1065 (1941); Cox & Dunlop, *Regulation of Collective Bargaining by the NLRB*, 63 HARV. L. REV. 389 (1950); and Gross, Cullen & Hanslowe, *Good Faith in Labor Negotiations: Tests and Remedies*, 53 CORNELL L. REV. 1009 (1968).

37. EXECUTIVE ORDER NO. 10988, 3 C.F.R. 521 (Supp. 1964), 5 U.S.C. § 631 (1964).

38. See EXECUTIVE ORDER NO. 11491, 3 C.F.R. 262 (Supp. 1973), 5 U.S.C. § 7301 (1970).

39. See, e.g., HAWAII REV. STAT. tit. 7, § 89-9(d) (Supp. 1972); KAN. STAT. ANN. § 75-4326(d) (Supp. 1972); MINN. STAT. ANN. § 179.66(1) (Supp. 1973); N.H. REV. STAT. ANN. § 98-C:7 (Supp. 1972); NEV. REV. STAT. § 288.150(2)(e) (1971); S.D. COMP. LAWS ANN. § 3-18-2 (Supp. 1973); VT. STAT. ANN. tit. 3, § 905(b) (1972); and WIS. STAT. ANN. tit. 13, § 111.91(2)(a) (Supp. 1973).

unilaterally adopting agency policy.⁴⁰

Provisions creating large categories of "non-negotiable topics" where management officials of the affected agencies may properly refuse even to talk about whole areas of employment relations are thus the rule and not the exception in the public area. Such clauses, of course, in fact reflect a beginner's fear of participating in full-scale collective bargaining. As bargaining becomes more institutionalized, the allowable scope of bargaining may expand, as it has done in the federal sector.

Although admittedly limited in scope, the duty to bargain in good faith requirement of Executive Order No. 6 should result in genuine collective bargaining: a real give-and-take as to the issues properly placed on the bargaining table by the parties. Genuine bargaining, however, means real disputes. These disputes must ultimately result in an impasse in the bargaining process concerning some issues. In the private sector, such impasses in bargaining are resolved by threatening the use of the strike weapon by actual strikes or by employer lockouts. These effective mechanisms which are available in the private sector to unions and management largely define strategies used at the bargaining table and to a great extent determine the ultimate result. How bargaining impasses are to be resolved—what rights are accorded and what mechanisms and machinery are provided—are *the* significant questions in analyzing the likely impact of Executive Order No. 6 on the bargaining process for covered state employees. This topic will be dealt with next.

STRIKES AND IMPASSE RESOLUTION UNDER EXECUTIVE ORDER NO. 6

In the United States, public employee strikes have been declared illegal at every level of the government. This absolute prohibition is the most significant distinction between the public and private

40. ALA. CODE tit. 37, § 450(3) (Supp. 1971) (fire fighters); CAL. EDUC. CODE §§ 13080-90 (West 1969), *as amended*, (West Supp. 1973) (Winton Act—teachers); CAL. GOV'T CODE §§ 3500-10 (West 1966), *as amended*, (West Supp. 1972) (Meyers-Milias-Brown Act—other public employees); CAL. GOV'T CODE §§ 3525-3536 (West Supp. 1972) (state employees); IDAHO CODE §§ 44-1801 to 44-1811 (Supp. 1973) (fire fighters); KAN. STAT. ANN. § 75-4321 to 75-4335 (Supp. 1972) (public employees); MO. STAT. ANN. §§ 105-500-530 (Supp. 1973); MONT. REV. CODES ANN. §§ 75-6115 to 75-6128 (1971); ORE. REV. STAT. §§ 342.440-480, 342.710-780 (1971).

sectors in their respective handling of labor relations problems. The absolute proscription against strikes by public employees was the rule until the last half-decade in virtually all jurisdictions. In some jurisdictions, the rule was court-made; in others, the strike proscription was specifically enacted by the appropriate legislative body.⁴¹

The logic of the proscription against strikes by public employees was succinctly stated in the *United Federation of Postal Clerks v. Blount*.⁴² In *Blount*, a three-judge federal court held that there is no constitutional right for public employees to strike against their employer. In so holding, the court stated that:

At common law no employee, whether public or private, had a constitutional right to strike in concert with his fellow workers. Indeed, such collective action on the part of employees was often held to be a conspiracy. When the right of private employees to strike finally received full protection, it was by statute, Section 7 of the National Labor Relations Act. . . . It seems clear that public employees stand on no stronger footing in this regard than private employees and that in the absence of a statute, they too do not possess the right to strike. . . .

Given the fact that there is no constitutional right to strike, it is not irrational or arbitrary for the Government to condition employment on a promise not to withhold labor collectively, and to prohibit strikes by those in public employment, whether because of the prerogatives of the sovereign, some sense of higher obligation associated with public service, to assure the continuing functioning of the Government without interruption, to protect public health and safety or for other reasons.⁴³

Similar reasoning buttressed the controlling decision in *Illinois, Board of Educ. v. Redding*.⁴⁴ In *Redding*, the court stated that:

41. The literature discussing the no-strike prohibition in public employment is voluminous. See generally Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943 (1969); Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459 (1971); Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970); Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931 (1969); Shaw & Clark, *Public Sector Strikes: An Empirical Analysis*, 2 J. LAW & ED. 217 (1973); Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 908-17 (1969); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107, 1123 (1969). Discussions specifically dealing with the no-strike issue in Illinois are Miller, *supra*, note 1; Shaw & Clark, *The Need for Public Employee Labor Legislation in Illinois*, 59 ILL. BAR J. 628, 644-46 (1971); and Note, *Teacher Negotiations In Illinois: Current Status and Proposed Reforms*, 1973 ILL. L. FORUM 307, 330-36.

42. 325 F. Supp. 879 (D.D.C. 1971), *aff'd*, 404 U.S. 802 (1971).

43. *Id.* at 882-83.

44. 32 Ill. 2d 567, 207 N.E.2d 427 (1965).

The underlying basis for the policy against strikes by public employees is the sound and demanding notion that governmental functions may not be impeded or obstructed, as well as the concept that the profit motive, inherent in the principle of free enterprise, is absent in the governmental function.⁴⁵

Like the judiciary, most scholars have had a real aversion to the possibility of strikes in the public sector. Academic opposition to even a limited right to strike for public employees is based on three major concepts: the concept of the sovereignty of the public employer; the concept that strikes in the public sector deprive the body politic of essential government services necessary to the health and welfare of the community; and the belief "that strikes in non-essential governmental services should not be permitted because it is administratively infeasible to distinguish among the various government services on the basis of their essentiality."⁴⁶ Professors Harry H. Wellington and Ralph K. Winter, Jr., have developed an additional theme to support their opposition to strikes in public employment. Their argument, really a variant of the sovereignty concept, is that the application of economic force by employees to the employing agencies in the public employment sector constitutes a distortion of the American political decision-making process. Thus, Professors Wellington and Winter suggest that:

The trouble is that if unions are able to withhold labor—to strike—as well as to employ the usual methods of political pressure, they may possess a disproportionate share of effective power in the process of decision. Collective bargaining would then be so effective a pressure as to skew the results of the 'normal' American political process.

. . . .

The problem is that because market restraints are attenuated and because public employee strikes cause inconvenience to voters, such strikes too often succeed. Since other interest groups with conflicting claims on municipal government do not, as a general proposition, have anything approaching the effectiveness of this union technique—or at least cannot maintain this relative degree of power over the long run—they are put at a significant competitive disadvantage in the political process. Where this is the case, it must be said that the political process has been radically altered⁴⁷

The 1967 Kerner Report reflected in its recommendations

45. *Id.* at 571-72, 207 N.E.2d at 430.

46. Burton & Krider, *supra*, note 41, at 418.

47. Wellington & Winter, *supra* note 41, at 1123-24. See also H. WELLINGTON & R. WINTER, JR., *THE UNIONS AND THE CITIES* (1971).

the then-prevalent attitudes of both the judiciary and the scholarly community. The report conceded that "[t]he strike issue is central to a discussion of public employee-employer relations."⁴⁸ The report then observed that

the Commission also recognizes that significant differences exist between the services provided by public and by private employers and the standards used to determine how extensively and at what level of quality these services are to be performed. In private industry, decisions about these matters are generally influenced by market forces; in public agencies, these services are generally supplied 'free of price' and are determined by political processes in which legislative bodies decide how much revenue can be raised and how it is to be allocated among many competing demands. These factors make the determination of employment conditions in public agencies different from the process followed in private industry.⁴⁹

Based on the above reasoning, one of the five major principles upon which the Kerner Commission predicated its report is that a strike is not an appropriate instrument to be used in negotiation in the public sector and, therefore, "should be unequivocally prohibited."⁵⁰ The suggested alternative dispute-settling machinery set forth in the Kerner Report were the devices of mediation and fact-finding with recommendations.⁵¹

If one accepts the above-described basic premises, the logic of an unequivocal proscription against strikes in the public sector has a certain symmetry and weight. It is perhaps the curse of the pragmatist to believe that rules of law should comport to some degree not just with theory, but with reality—that a society's institutional structures, norms and standards should "work": at least in the limited sense that they provide mechanisms which allow people to solve their work-related problems with some degree of dispatch, certitude and even ideally with a certain degree of fairness. By this pragmatic standard, it is quite obvious that the unequivocal proscription of strikes in the public sector has completely failed. Anyone who reads a newspaper knows public employees do strike, strike often, and with impunity.

Perhaps these pragmatic considerations influenced the Ogilvie Commission, in 1971, to disagree with its predecessor, the Kerner

48. The KERNER REPORT, *supra* note 5, at 25.

49. *Id.* at 1.

50. *Id.* at 2.

51. *Id.* at 26-32.

Commission, on the question of the right to strike for public employees. The Ogilvie Commission in its report stated that, "[W]e have concluded that a limited right to strike be allowed public employees whose continued service at the time is not held vital to public health, safety, or welfare, provided that impasse procedures have run their course."⁵² The impasse procedures recommended by the commission were mediation, with mediators to be supplied by the independent state agency created to administer the statute; a fact-finding panel appointed by the aforesaid state labor board, for if the compulsory mediation failed to resolve the impasse, the fact-finding panel would have power to conduct private hearings, take both oral and written testimony, and be able to subpoena, and to publicize its findings if necessary; and binding arbitration upon voluntary submission of the parties.⁵³ Upon the exhaustion of these prescribed dispute-resolving procedures, the affected public employees would have the right to strike, "unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public."⁵⁴ In such cases the public employer would be required to initiate legal action in the circuit court of the county where such strike occurred for all appropriate equitable relief including but not limited to an injunction.⁵⁵

How does Executive Order No. 6 purport to handle the crucial right-to-strike issue? *By silence.* There is absolutely no mention of the word strike in the entire Order, nor are there any alternative methods for the resolution of a bargaining impasse set forth. Given the crucial importance of the right-to-strike issue, the care with which the proposals for impasse-and dispute-resolving machinery had been structured in both the Kerner and Ogilvie reports, and the intensity of the lobbying by both the unions and by their management counterparts in the Illinois General Assembly since at least 1967,⁵⁶ it would be completely ridiculous to believe that the Executive Order No. 6's absolute silence was unconscious or a mere draftsman's error. The omission of any provision for im-

52. THE OGILVIE REPORT, *supra* note 7, at 19.

53. *Id.* at 37-40.

54. *Id.* at 40.

55. *Id.*

56. For an excellent discussion of the lobbying that occurred, see Clark, *supra* note 6 at 171-72.

passee resolution was obviously intentional. The intent must be to leave completely open, at least in theory, the question of whether state employees may strike to enforce their economic demands. Presumably, it would be argued by the drafters of Executive Order No. 6 that should any employee group in fact engage in a strike or other concerted activity against a public employer agency, it will be for the Illinois courts to decide the issue of whether the particular employees are engaged in a legal or an illegal strike.

It is to be remembered, however, that courts resolve only issues that interested parties, having standing to sue, choose to litigate. De facto recognition of the right to strike for employees covered by Executive Order No. 6 may result from the simple expedient of an executive decision not to institute legal action in a particular work stoppage. If the model of lower level governmental units who have "voluntarily" granted bargaining rights in Illinois is adhered to, institution of legal action by any of the interested parties who are involved in a strike would be an exception, not the rule.

Moreover, in *Allen v. Maurer*,⁵⁷ the Fourth District Appellate Court of Illinois decided that taxpayer-parents did not have standing to sue to enjoin a teachers' strike in order to secure performance of the constitutionally mandated duty of the state of Illinois to maintain a public school system. Rather, the courts specifically held that

in the circumstances present here, the authority to seek an injunction rests in the State and its official representative, the Board of Education, the members of which are elected by the people to implement the command of the constitution. Any other decision would have the effect of usurping the Board of Education's control of the local educational system. Control of that system, and the manner in which the constitutional mandate for a free and efficient system of public instruction is carried out must, of necessity, rest solely with the Board of Education.⁵⁸

In so holding, the court specifically rejected the argument that the parents were enforcing a "public trust."⁵⁹ The court decided that the concept of public trust is a theory that is premised upon an alleged misuse of public property or funds. Where an action is premised not on any misuse of public funds but on forcing the state to perform some constitutional duty, *Allen* holds that taxpayers

57. 6 Ill. App. 3d 633, 286 N.E.2d 135 (1972).

58. *Id.* at 640, 286 N.E.2d at 140.

59. *Id.* at 639, 286 N.E.2d at 139.

do not have a standing to sue. In light of that appellate court decision, only the union and the appropriate governmental agency charged with providing the struck governmental service would have sufficient interest to obtain relief in court.

Even if legal action is actually instituted by the affected state agency, the relevant case law in Illinois may prohibit struck public agencies from effectively stopping strikes by their employees. The leading case on point, *Board of Education v. Redding*,⁶⁰ seems to hold just the opposite: that an injunction to prohibit strikes and any picketing in support of public employee strikes is proper. In *Redding*, a school board sought to enjoin its custodial employees from engaging in a strike against the board and from picketing its schools in support of such a strike. The trial court denied injunctive relief, and dismissed the board's complaint. The trial court found that the Board had failed to show irreparable injury and that the picketing was peaceful and a valid exercise of constitutional rights of free speech. Further, the lower court held "that there was no danger of interference with the operations of the schools."⁶¹ The Illinois Supreme Court overturned the lower court ruling, finding that the custodians' strike was clearly illegal and that irreparable injury had, in fact, occurred. The court then ordered that an injunction be issued to stop the strike and picketing. In so holding the court stated:

[T]he universal view [is] that there is no inherent right in municipal employees to strike against their governmental employer, whether Federal, State, or a political subdivision thereof, and that a strike of municipal employees for any purpose is illegal.⁶²

The court reasoned further that those who implement the constitution and supporting statutes "become the agents to fulfill the will of the people in such respect and are themselves charged with a duty to refrain from conduct which will render our schools less efficient and thorough."⁶³ The duty arises from the Illinois constitution itself, which has imposed a specific and particular duty on the General Assembly to "provide a thorough and efficient system of free schools."⁶⁴

60. 32 Ill. 2d 567, 207 N.E.2d 427 (1965).

61. *Id.* at 570-71, 207 N.E.2d at 429.

62. *Id.* at 571, 207 N.E.2d at 430.

63. *Id.* at 572, 207 N.E.2d at 430.

64. *Id.*

The court rejected the striking custodian's argument that there was a difference "between striking teachers and striking custodial employees measured in terms of the constitutional mandate that our schools be thorough and efficient."⁶⁵ Further, the court rejected the striking employee's offer to perform essential sanitary services so as not to injure the board or interfere with the education of the school children. To the court, "to be thorough and efficient, school operations cannot depend upon the choice or whim of its employees, or their union . . . but must necessarily be controlled only by duly constituted and qualified school officials."⁶⁶

As noted above, when first issued, this decision was generally interpreted as holding that all strikes by public employees are illegal in Illinois, and that an injunction to prohibit such strikes and any picketing in support thereof was perfectly proper.

Four years after *Redding*, however, the Illinois Supreme Court in *Peters v. South Chicago Community Hospital*,⁶⁷ ruled that the Illinois Anti-Injunction Act,⁶⁸ which prevents the issuance of any restraining order or injunction by any court in Illinois in any case growing out of a dispute concerning terms or conditions of employment, applied to private, non-profit hospitals so as to prevent the lower court's enjoining a strike or picketing. In so holding, the court specifically rejected the hospital's argument that the anti-injunction statute should not apply when the purpose of a strike clearly violates the general public policy of providing for a community's health and well-being.⁶⁹ The court reasoned that there must

65. *Id.* at 572-73, 207 N.E.2d at 430-31.

66. *Id.* at 573, 207 N.E.2d at 431.

67. 44 Ill. 2d 22, 253 N.E.2d 375 (1969).

68. ILL. REV. STAT. ch. 48, § 2(a) (1971).

69. The First District Appellate Court had adopted this point of view in reversing a trial court's order that an election be held by certain of the hospital employees to determine whether they wanted a union. That court held that the judiciary "may not formulate labor rules or policies when the legislature has failed to do so." 92 Ill. App. 2d 37, 45, 235 N.E.2d 842, 846 (1968). The court then remanded. On a second appeal the appellate court held that striking and picketing of a hospital by hospital employees was against public policy and enjoined. The court said:

The question for determination is whether a peaceful strike and picketing directed against a not-for-profit hospital is illegal as being contrary to public policy. The answer lies in balancing two conflicting principles of public policy. On one hand is the right of employees to organize and picket or strike with a view toward obtaining higher wages and better working conditions. On the other hand, not-for-profit hospitals provide a vital service to the community by ministering to the needs of the sick and

be a much more specific expression of public policy, either by the state constitution itself or by legislation, to overcome the Illinois Anti-Injunction Act's prohibition against issuing injunctions in all labor disputes.

One year later, in *County of Peoria v. Benedict*,⁷⁰ the court was faced with the issue of whether Illinois' anti-injunction law was applicable to striking public employees of a *county-owned* nursing home, clearly a public employer but like *Peters*, also supplying the health care needs of sick patients. The apparently unequivocal prohibition against strikes by all categories of public employees set forth in *Redding* would seem to make the Illinois anti-injunction statute inapplicable to public employees, therefore allowing the trial court to enjoin the striking employees' activities. The court held, however, that the Anti-Injunction Act applied, despite the public nature of the labor dispute before the court. Thus, in *County of Peoria*, the Illinois Supreme Court ruled that the lower court could not issue any injunction against the striking employees of the county-owned nursing home. The court, therefore, dismissed the temporary injunction which had, in fact, been issued against the strike by the lower court. The court did not buttress its position with any extensive explication of its reasoning. It merely stated "[i]n *Peters v. South Chicago Community Hospital* . . . we held the Illinois anti-injunction law applicable to employees of a non-profit hospital. For the same reasons stated therein, we find the anti-injunction act . . .

injured, which needs are immediate and should not be interrupted or delayed. The employees involved range from X-ray technicians and physical therapists to janitors and kitchen help, that is, practically all hospital employees except registered nurses and doctors. We have found no Illinois decision which has considered the issue as it relates to hospitals. However, the Supreme Court of our State has held that the proper and efficient education of children is an overriding public interest of such importance as to transcend the right of custodial workers to strike or picket a public school. *Board of Education of Community Unit School Dist. No. 2 v. Redding*, 32 Ill. 2d 567, 207 N.E.2d 427. South health and life are also important to a community.

. . . .

The rights of those who labor must be respected, but the operation of a hospital involves a public interest of such urgency that labor's right to strike must yield to the greater importance of the uninterrupted and efficient operation of hospitals . . .

107 Ill. App. 2d 460 at 465-66, 246 N.E.2d 840 at 843.

70. 47 Ill. 2d 166, 265 N.E.2d 141 (1970).

applicable to the instant case."⁷¹

The Illinois Appellate Court, Fourth District, in *Allen v. Maurer*,⁷² reaffirmed the illegality of teacher strikes, holding that since there is a clear "constitutional duty to provide public schools," the implementation of this constitutional mandate is not subject to the provisions of the Illinois' Anti-Injunction Act.⁷³ Therefore, paradoxically, Illinois courts may apparently still issue an injunction for school board employees to stop their strikes or picket actions, but are apparently unable to enjoin strikes against all other public bodies.

Public strikes are still illegal, if one believes the language of recent Illinois decisions.⁷⁴ However, since the courts cannot enjoin strikes or picketing in their support, a public employer will be unable to obtain effective relief—to stop the strike—whenever large numbers of public employees act in concert against the governmental unit involved. In the event of a strike the employees cannot all be terminated and replaced simply because of the impracticality of replacing large numbers of skilled employees who perform vital services for the community. It is extremely doubtful that an employing agency will impose any sanctions whatsoever against striking employees, except in the most extreme cases. If the laws of economics do not prevent a public employer from firing and attempting to replace substantial numbers of striking state employees, political self-preservation in an industrial state where unionists comprise a high percentage of the electorate certainly will do so. Politicians who fire strikers or otherwise attempt to penalize them will not win friends or influence voters by these actions.⁷⁵

71. *Id.* at 169-70, 265 N.E.2d at 143.

72. 6 Ill. App. 3d 633, 286 N.E.2d 135 (1972).

73. *Id.* at 644, 286 N.E.2d at 143.

74. *See, e.g.,* Bd. of Educ. v. Fed. of Teachers, 46 Ill. 2d 439, 264 N.E.2d 18 (1970); Board of Education v. Falk, 8 Ill. App. 3d 696, 290 N.E.2d 667 (1st Dist. 1972); Cook County Police Ass'n v. City of Harvey, 8 Ill. App. 3d 147, 289 N.E. 226 (1972); and Fletcher v. Civil Service Comm'n., 6 Ill. App. 3d 593, 286 N.E.2d 130 (1972).

75. In cases where strikes begin to seriously affect the public health or welfare, the absolute silence of EXECUTIVE ORDER No. 6 as to the right-to-strike question may preserve the public employers' options. In these very extreme cases, firm action against strikers might be a political asset for the executive, rather than a liability. Therefore, the employing agency might attempt legal action. Under these circumstances, the state could argue that the injunction remedy should be available because

Under these circumstances, it is submitted that the absolute silence of executive Order No. 6 constitutes de facto recognition of the right-to-strike for state employees by the executive branch in Illinois.

CONCLUSION

One authority on public sector labor law in Illinois, R. Theodore Clark, Jr., as early as 1969 stated:

We are, in short, in a period of substantial transition, a period in which many traditional notions are being reconsidered in light of new circumstances. Whether public employees, or at least those engaged in non-essential services, will obtain the legal right to strike remains to be seen. I would suggest, however, that the best way to avoid legalization of strikes in the public sector is for public employers to devise and be receptive to imaginative ways of resolving the underlying collective bargaining disputes that are the cause of most public employee strikes.⁷⁶

Such imaginative devices for impasse resolution which would obviate the necessity for the granting of the strike weapon to public sector employees have obviously not been forthcoming in Illinois. The Illinois court decisions in this area offer no help; the legislative response to the problem has been nil. In this context, silence, absolute and total, as to any impasse or resolution devices and/or the right to strike may be the most intelligent response that the executive branch could have utilized in issuing Executive Order No. 6. Viewed from a purely pragmatic point of view this silence does preserve the public employer's options in the face of a strike.

Illinois finds itself one of a rapidly diminishing number of states that have not enacted comprehensive legislation to structure and control collective bargaining in public employment. The development of public sector collective bargaining in this state has been characterized by fragmentation, lack of coherence and ad hoc responses to particular problems. Executive Order No. 6 adds another institutional structure to already overly-proliferated structures. This, in turn, increases the likelihood of conflicting rulings and differing rights and procedures at the various levels of government. At best, then Executive Order No. 6 is a stop-gap bandage for a

of the specific requirement of the Illinois Constitution that the governor shall "have the supreme executive power, and shall be responsible for the faithful execution of the laws." ILL. CONST. Art. V, § 8.

76. Clark, *supra* note 6, at 173.

gaping wound in the body politic. A sensible response to the problem would be to adopt the sound recommendations embodied in the 1971 Ogilvie Commission Report, which in turn is modeled after Pennsylvania's recent public employment labor statute.⁷⁷ Such legislation should follow the newly-emerging pattern of granting a limited right to strike to all public sector employees except those whose work is vital to the public safety and health. It is time the General Assembly "bit the bullet" and did just that, *i.e.*, enacted such sound labor legislation for *all* employees in the public sector throughout the state.

77. PA. STAT. ANN. tit. 43, ch. 19, §§ 1101.101-1101.2301 (Supp. 1973).