North Dakota Law Review

Volume 48 | Number 1 Article 3

1971

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COLLECTIVE BARGAINING AND THE PUBLIC EMPLOYEE: COHERENCE OR CHAOS?

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I. PUBLIC EMPLOYMENT GROWTH: A SPUR TOWARDS EMPLOYEE ORGANIZATION

Collective bargaining for public employees will become an increasingly important issue in that the largest and most rapidly growing business in the United States is that of government. In the early 1960's, more civilians worked for government than for the eight largest corporations combined, and they represented 12½ per cent of the working non-military labor force in the land.[1] By 1975, government employment is calculated to increase up to approximately fifteen million persons and to include one out of every five employees in the country.[2]

The growth of public employment at the state and local levels has proved to be particularly extensive. While federal civilian employment as of 1965 had only risen by 200,000 individuals, or 13 per cent from 1955, state and municipal employment increased at the same time by three million new employees for a 65 per cent increase.[3] By 1975, it is projected that non-federal government employment will increase by 50 per cent;[4] manpower requirements at the federal level will be only one-sixth of the work force at the state and local levels.[5]

Despite this massive growth in numbers of public personnel at the state and local levels, those same levels of government will find it increasingly difficult to recruit skilled and educated personnel with present policies. The tendency of municipal government is to attract

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1. Brinker, *Recent Trends of Labor Unions in Government*, 12 LAB. L.J. 13 (1961).

2. Stieber, *Collective Bargaining in the Public Sector*, in CHALLENGES TO COLLECTIVE BARGAINING 65-66 (L. Ulman ed. 1967).

3. U.S. BUREAU OF THE CENSUS, PUBLIC EMPLOYMENT IN 1966, at 1 (Series GE-No. 4, 1967). As of October, 1966, state and local governments in the United States accounted for 8.6 million employees, whereas federal government accounted for only about 2.9 million employees.

4. NATIONAL MANPOWER COUNCIL, GOVERNMENT AND MANPOWER 24-29 (1964).

5. *Supra* note 2, at 66.

moderately qualified personnel whose services are lost within a few years by rigid tenure laws which push mediocre talent upward largely on the basis of nonmerit considerations. The simple truth of the matter seems to be that government is no longer considered a model employer in regards to wages, hours, and working conditions.[6] The grim irony of this situation is that the country's biggest business has the biggest potential source of employee grievances. It is clear, therefore, that future personnel conflicts within state and local governments are virtually assured. The security of government employment, so valued in depression days, is a commodity equally available within the large corporate structures of today.[7]

The labor movement in the United States has not neglected the glowing prospects for recruitment in the troubled public service. Although experiencing sluggish growth in the private sector, unions have been growing at a brisk pace in the public sector.[8] In fact, the unionization of the public sector is responsible for most of the 159,000 increase from 1964 through 1966 in white-collar union membership. Government unions at all levels increased by about 264,000 during this period.[9] All in all, public employee unions now lead more than 1.5 million government workers.[10] The indications are that even teachers at the college level will begin to unionize and seek the alliance of organized labor.[11]

The surge of public employee unionism is no historical accident. It is fostered by many of the same catalysts that existed in private industry. Although the public employee bargains in theory for his individual employment contract, the realities of twentieth-century life have, in fact, produced standardized contracts and working conditions.[12] It is inevitable, therefore, that personnel treated as a standardized group should seek leaders to represent common grievances. This social phenomenon is no doubt part of the price paid for the enactment of statutes guaranteeing equal treatment and uniform

6. MUNICIPAL MANPOWER COMMISSION, GOVERNMENTAL MANPOWER FOR TOMORROW'S CITIES 26-27, 72, 164 (1962).

7. "Government is also the largest business in the world. We must therefore be competitive with other large businesses if we expect to attract to Government—and to keep in Government—its proper share of the Nation's employment Pool." 107 CONG. REC. 864 (1961) (remarks of Senator Johnston).

8. Moran, *Collective Bargaining in the Public Service—Massachusetts Style,* 52 MASS. L.Q. 153, 154 (1967).

9. Chicago Tribune, May 18, 1968, § 1, at 9.

10. Garnier, *Pay Negotiation with Public Employees,* in PRACTICAL GUIDELINES TO PAY ADMISTRATION 118 (K. Warner & J. Donovan ed. 1963). Starting with fifty state employees in 1932, the American Federation of State, County, and Municipal Employees (AFSCME) grew to 220,000 within about 30 years and is today the largest single union representing state and local employees. At the federal level the American Federation of Government Employees in 1966 had 270,000 members; the National Association of Letter Carriers had 170,000; and the United Federation of Postal Clerks had 140,000. At the state level AFSCME had 300,000 members in 1966. The International Association of Fire Fighters had 115,000; and the American Federation of Teachers had 113,000.

11. BUS. WEEK, Dec. 3, 1966, at 92; Day & Fisher, *The Professor and Collective Negotiations,* XCV SCHOOL AND SOCIETY 226-29 (1966).

12. S. SPERO, GOVERNMENT AS EMPLOYER 336 (1948).

classification in the public service. The leaders of these uneasy professional or quasi-professional public groups have come to identify themselves as a "new breed" composed substantially of young men who would rather fight the public service than quietly switch to the private sector.[13]

II. EMPLOYEE ORGANIZATION: A SPUR TOWARDS COLLECTIVE BARGAINING

The growth of the public service, its increased needs for skilled and professional personnel, and the expansion of unionism among growingly irritated public personnel have provided pressure for collective bargaining in the public service; the ultimate objective of which is a comprehensive code of public employee labor law in each of the states.[14] It is clear that sooner or later states with large working forces of state and local employees must face the reality of the powerful social and economic drive for the legitimization of public employee collective bargaining. The only real question is how these states will adapt to public employee collective bargaining and the organizational power behind that bargaining.

The issuance of Executive Order 10988 in 1962 initiated the impetus for public employee collective bargaining at the federal level.[15] The Executive Order provides for three forms of union recognition: (1) Exclusive; (2) Formal; and (3) Informal. Exclusive recognition requires a union to be chosen by a majority of the employees in a unit; should less than 50 per cent vote for one organization, a majority of those voting will suffice, provided that the number voting is considered "representative" which usually means that at least 60 per cent of employees in the unit must cast ballots. Formal recognition exists only in the absence of qualifications for exclusive recognition; representation must consist of not less than 10 per cent of the employees in a unit. An exclusively recognized union is entitled to negotiate an agreement, whereas a formally recognized union may only demand to be consulted from time to time and to present its views in writing at all times. Unions of less than 10 per cent representation receive only informal recognition. Informally recognized unions may only present their views; they need not be negotiated with or even consulted. Each agency determines: 1)

13. F. LUTZ & J. AZZARELLI, STRUGGLE FOR POWER IN EDUCATION 44 (1966); CCV NATION, Sept. 25, 1967, at 260.

14. Zander, *Trends in Labor Legislation for Public Employees*, 83 MONTHLY LAB. REV. 1293, 1296 (1960).

15. Exec. Order No. 10988, 27 Fed. Reg. 551 (1962). *See* 90 MONTHLY LAB. REV. I, III-IV (1967)—It is interesting to note that by 1966, there were some 911,000 federal workers covered by collective bargaining agreements; however, 290,000 of these employees were within the Post Office Department. Studies show that with the exception of the Post Office Department, only two out of ten federal white collar workers and one out of three blue collar workers are yet organized.

whether a unit is appropriate for exclusive recognition; and 2) whether a union seeking exclusive recognition has secured a majority within the unit. Upon request of either the agency or of a union qualified for formal recognition, advisory arbitration is used to determine the appropriate unit and the majority status of the union.[16]

The scope of negotiation under Executive Order 10988 is limited. The representative of an exclusively recognized union has the right to "meet at reasonable times and confer with respect to personnel policy and practices and matters affecting working conditions, so far as may be appropriate subject to law and policy requirements."[17] The obligation of the federal employer, however, does not extend to "such areas of discretion and policy as the mission of an agency, its budget, its organization and the assignment of its personnel, or the technology of performing its work."[18] In addition, federal management officials reserve the right to direct, hire, promote, transfer, assign, suspend, demote, or take other disciplinary action against employees.[19] The federal agencies also retain the right to lay off employees due to lack of work or other legitimate reasons, maintain the efficiency of government operations, determine the methods, means, and personnel in the conduct of such operation, and take whatever emergency actions are required to fulfill the mission of the agency.[20] The usual subjects of negotiation include: discussion about grievance procedures; promotion and demotion practices; leave-taking policies; reduction-in-force practices; work environment; supervisor-employee relations; safety and health programs; and employee services.[21] Although budget matters cannot be negotiated, federal employees, whose salaries are determined by "prevailing wages," have negotiated agreements which grant union participation in local wage surveys.[22] Negotiated agreements may also provide for grievance arbitration; however, this restricted arbitration is advisory and extends only to the interpretation and application of the agreement or agency policy, but not to substantive changes.[23]

Whatever may have been its original motivation or support, Executive Order 10988 is undergoing increasing criticism. The major point of attack has been that the executive order provides no effective solution for a negotiation impasse.[24] The problem is not, so

16. Exec. Order No. 10988, 27 Fed. Reg. 551, §§ 3(a)-6(a), 11 (1962).
17. *Id.* at § 6(b).
18. *Id.*
19. *Id.* at § 7(2).
20. *Id.*
21. 90 MONTHLY LAB. REV. I, III-IV (1967).
22. U.S. DEPT. OF LABOR COLLECTIVE BARGAINING AGREEMENTS IN THE FEDERAL SERVICE, LATE SUMMER 1964, at 28 (1965).
23. Exec. Order No. 10988, 27 Fed. Reg. 551, § 8(b) (1962).
24. Hart, *The Impasse in Labor Relations in the Federal Civil Service*, 19 IND. & LAB. REL. REV. 175, 176 (1966); Wortman, *Labor Relations in Government Services—Collec-*

much, one of contract enforcement, as it is of merely obtaining any agreement from a recalcitrant agency. There is no procedure of effective power relationships to induce concessions from a federal agency. Not only is it a felony to strike against the federal government,[25] but Section 2(1) of Executive Order 10988 also denies the privileges under the order to any organization which asserts a right to strike against the federal government.[26] The Executive Order itself makes no provision for mediation, conciliation, fact finding, or even advisory arbitration of a negotiation impasse. Investigation indicates dissatisfaction with non-binding grievance arbitration and with the lack of centralized interpretation of Executive Order 10988.[27]

Consequently, it is no surprise that a growing swell of criticism has led to congressional soundings in this area. Representative Daniels (Dem. New Jersey) stated in Congress on January 17, 1967:

> The entire purpose of H.R. 10988 was to drag the management of the Federal Establishment into the 20th century, so far as its relationships with labor were concerned. In far too many cases, management has refused to be dragged. . .[28]

The trend of development at the federal level is to expand Executive Order 10988, especially in the area of enforcement and impasse procedures. States, which contemplate legislation, might well take heed of the defects in Executive Order 10988, which stem from a failure to deal with the deadlock of spirited negotiations.[29]

At the present time the newest developments in the area of public employee collective bargaining are taking place at the state level.[30] The significance of this trend lies in the industrialized nature of the governmental units which have legislated some type of collective bargaining for their public employees. States such as California,

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tive Bargaining Strategies and Tactics in the Federal Civil Service, 15 LAB. L.J. 482, 492 (1964).

25. 18 U.S.C.A. § 1918 (1970).

26. Federal Personnel Manual, ch. 711, §§ 1-2(c); Exec. Order No. 10988, 27 Fed. Reg. 551, § 2(1) (1962). Striking against the United States is a prohibited practice, which, if not stopped, could result in the suspension or termination of union recognition under Executive Order 10988, 28 Fed. Reg. 5127, §§ 3.2(b)(4), 3.4 (1963).

27. Wortman, *Federal Civil Service Bargaining,* 89 MONTHLY LAB. REV. 659, 660 (1964); Weisenfeld, *Public Employees—First or Second Class Citizens,* 16 LAB. L.J. 685, 692 (1965).

28. 113 CONG. REC. 704 (1967) (remarks of Rep. Daniels).

29. Wortman, *Labor Relations in Government Services—Collective Bargaining Strategies and Tactics in the Federal Civil Service,* 15 LAB. L.J. 489, 490 (1964). Congress is currently considering a National Public Employee Relations Act, H.R. Doc. 17383, 91st Cong. 2d Sess. (1970).

30. Some 16 states have adopted specific legislation which, in one form or another, not only permits the organization of public employee unions, but also provides for some manner of mandatory collective bargaining specifically designed for some or all public employees. This does not include states which have a limited form of negotiations for employees of public utilities of state-operated mass transit systems. It also excludes those few states where public employees are merely confirmed by statute in their pre-existing right to present individual grievance. The public employee unions, however, are not satisfied with the minimal approach adopted by most of these statutes. Newscast with Jerry Wurt, President of AFSCME, AFL-CIO, Mutual Broadcasting System, Nov. 7, 1967.

Connecticut, Delaware, Massachusetts, Michigan, New Jersey, New York, Rhode Island, and Wisconsin have already found it necessary to adopt public employee bargaining laws. These statutes cover a wide area of negotiable subjects. They provide for the determination of bargaining units and for representative elections of bargaining agents. They also employ mediation and fact-finding as a means of dispute settlement. Wisconsin has placed supervision of its legislation under the aegis of a separate agency, the Wisconsin Employment Relations Commission, formerly known as the Wisconsin Employment Relations Board, which deals only with labor problems of the public sector.[31] The other states have placed supervision in already existing agencies, such as the state department of labor relations or the state mediation board.[32] Of the states adopting bargaining laws, it is not accidental that at least half of the states are urbanized, industrialized, and heavily populated.

Only four states have enacted general statutes in express opposition to a policy of organization and representation. Although Texas allows union membership among public employees, it is against the public policy of that state for an official to enter into a collective contract with a public employee union or even to recognize the union as a bargaining agent.[33] Any such collective contract is deemed null and void.[34] Virginia goes somewhat further by declaring it against public policy for an official to recognize or negotiate with a public employee union, although employees may join an organization unaffiliated with the labor movement and which does not claim the right to strike.[35] North Carolina probably takes the severest position of all by prohibiting public employees from joining any labor organization and by rendering null and void any contract with a labor union.[36] Finally, Alabama forfeits the benefits of its state employees under the state merit system if they should join a union.[37] Employees of cities, counties, and boards of education are exempted from the stringent penalty of forfeiture.[38]

The classical argument against collective bargaining in the public service has been that it would derogate from the sovereignty of the state. The sovereignty objection would have greater validity if government were coerced in some way, but it has been sufficiently observed that the sovereign may freely agree to be bound by a cer-

31. WIS. STAT. ANN. ch. 111 (Supp. 1971).
32. K. WARNER & M. HENNESSY, PUBLIC MANAGEMENT AT THE BARGAINING TABLE 91 (1967).
33. TEXAS STAT. ANN., art. 5154c (Vernon's 1971).
34. *Id.*
35. VA. SESS. LAWS, Joint Senate Resolution No. 12 (1946).
36. N.C. GEN. STAT. ch. 95, art. 12 (1965).
37. ALA. CODE tit. 55, § 317(2) (1960).
38. ALA. CODE tit. 55, § 317(3) (1960).

tain procedure in the exercise of its discretion.[39] Once having decided to accept the principle of collective bargaining, the state may legitimately decide to exercise its discretion in one way rather than another. If government can and does negotiate on an individual basis, it is difficult to distinguish collective negotiations on grounds other than convenience. State authorities have customarily contracted for the construction of public works, the purchase of land, engineering services, personal service contracts, surveys and numerous other matters. Often the contracts extend beyond the budget period of the municipality; yet it has never been suggested that such contracts infringe the sovereignty of the state.[40] Nor is it easy to find any undue delegation of sovereignty where any terms of agreement are arrived at jointly and freely and not at the unilateral dictation of a private group. This scarcely seems to delegate more authority than does the commonly accepted principle of a government unit which binds itself to pay a prevailing wage.

A further argument has been made that the existence of legislation, such as school codes and civil service laws, prevents collective negotiations. It must be remembered, first of all, that not all municipal and local public employees are covered by school codes or complex civil service regulations. Secondly, the nature of the legislation needs to be examined. The real test is whether the legislation involved is so specific as to exclude negotiation or bargaining. It is true that most tenure, retirement, and pension laws are so detailed that they leave little room for negotiation. On the other hand, state legislation relative to salaries and working conditions of public employments has traditionally been sufficiently general so that fruitful negotiations can take place about specifics.[41]

III. COLLECTIVE BARGAINING: A SPUR TOWARDS THE STRIKE

The most advanced legal devices for collective bargaining in the public sector will prove a Pandora's box unless some attention is given to the power relationship behind collective bargaining. Authorities in the area are questioning the practicality of an elaborate collective bargaining structure which refuses to deal with the realities of bargaining power.[42] A National Institute on Collective Negotiations in Public Education concluded with a "growing acceptance" of the proposition that the right to strike is necessary to collective

39. W. VOSLOO, COLLECTIVE BARGAINING IN THE UNITED STATES FEDERAL CIVIL SERVICE 19-20 (1966).
40. Anderson, *Labor Relations in the Public Service*, 1961, WIS. L. REV. 601.
41. Seitz, *Rights of School Teachers to Engage in Labor Organizational Activities*, 44 MARQ. L. REV. 36 (1960).
42. F. LUTZ & J. AZZARELLI, STRUGGLE FOR POWER IN EDUCATION 8 (1966); W. VOSLOO, COLLECTIVE BARGAINING IN THE UNITED STATES FEDERAL CIVIL SERVICE 35 (1966).

negotiations in the public service.[43] Inevitably, one must explain why the right to strike, so prized in the early days of the labor movement in the private sector, is not equally to be expected in the early days of organization among public employees.

Unfortunately, there is no evidence that modern public employee laws for collective bargaining, even with sophisticated devices for arbitration, mediation, conciliation, and fact-finding, have caused the rash of strikes in the public sector to abate—to the contrary, there were only 15 work stoppages involving 1,720 public employees in 1958, while the United States experienced 414 public employee strikes involving some 160,000 workers in 1969. Federal employees, for the first time in history engaged in five work stoppages during 1968 and 1969.[44] Ronald W. Glass of the Department of Labor traces part of the increased teacher militancy to recent state legislation which guarantees public employees the right to organize and bargain.[45] One observer, having noted that Michigan has endured about twenty-four public employee strikes since 1965, concludes:

> Granting the right to engage in collective bargaining by public employees and then denying them the right to strike is like inviting a child to a candy parlor without allowing the child to taste the candy. The right to engage in collective bargaining assumes by tradition of even the least sophisticated the right to fight to support one's demands.[46]

Similar legislation in Wisconsin resulted in accelerated union demands of about 20 million dollars per year, or about ten times as much as the annual settlements in prior years, with a consequent backlog of impasse situations which overtaxed the fact-finding procedures of the state.[47] It seems clear that not even modernized bargaining laws have caused unions to forsake the ultimate weapon of the strike.

In the United States, public employee strikes have been declared illegal at every level of government.[48] Government in this country has never conceded the right of its employees to strike and has had

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43. Potts, *A Summer School Course in Teacher Negotiations*, 89 MONTHLY LAB. REV. 847 (1966).

44. U.S. DEPT. OF LABOR, WORK STOPPAGES IN GOVERNMENT: 1958-68, at 9 (1969); U.S. DEPT. OF LABOR, WORK STOPPAGES IN 1969, at 2 (1970).

45. Of the thrity-three teacher stoppages in 1966, twelve occurred in Michigan, shortly after passage of the Michigan Public Employment Relations Act in 1965. Chicago Daily News, Sept. 13, 1967, at 3; Glass, *Work Stoppages and Teachers: History and Prospect*, 90 MONTHLY LAB. REV. 43, 45 (1967).

46. Clary, *Pitfalls of Collective Bargaining in Public Employment*, 18 LAB. L.J. 406, 408 (1967).

47. Krause, *The Short, Troubled History of Wisconsin's New Labor Law*, 25 PUB. AD. REV. 302, 305 (1965).

48. Polisar, *Public Employees and the Right to Strike*, in STRIKES AND SOLUTIONS 1 (K. Warner ed. 1968).

ample common law authority to quell such strikes even without specific anti-strike legislation.[49] The federal government leaves no doubt concerning its attitude on the subject. An individual, who participates in a strike, or asserts the right to strike, against the United States Government may not accept or hold a position in the federal service.[50] Anyone who violates this prohibition commits a felony with a penalty of not more than $1,000 fine, or imprisonment for not over a year and a day, or both.[51] At the state and local level there are currently at least thirty-five states which have proscribed strikes of some or all public employees by an affirmative act such as the passage of legislation, court decision, or opinions of attorneys general. Generally these strike prohibitions apply to all classes of public employees in all circumstances. The most notable exception consists of governmental proprietory functions, such as public utilities or mass transportation systems, especially where the system were originally privately owned before being taken over by the government.

However, the states and their political sub-divisions differ in the penalties they attach to the breach of an anti-strike policy. The harshest sanction imposed is modeled after the federal statute mentioned above. Another type of sanction is the use of job forfeitures and suspensions for various periods of time. Sometimes striking employees are not to be rehired at a wage higher than when they went on strike. Other states require that retired strikers be placed on probation for certain periods of time with their wages frozen at the strike-time level for a certain period. Of course, court injunctions are always available in those states where no specific penalty attaches to the strike prohibitions.

There have been several arresting developments at the non-federal level. Puerto Rico, for example, specifically recognizes in its constitution the right to strike against government agencies operating as private businesses, but the freedom of the legislature is reserved to handle emergencies threatening the maintenance of essential public services.[52] A 1967 Vermont statute provides:

> No public employee may strike or recognize a picket line of a labor organization while performing his official duties, if the strike or recognition of a picket line will endanger the health, safety or welfare of the public. The public employer concerned may petition for an injunction or

49. *See* Kirker v. Moore, 308 F. Supp. 615 (S.D. W. Va. 1970); Board of Ed. of Community Unit School Dist. No. 1 v. Redding, 37 Ill. 2d 567, 207 N.E.2d 427 (1965); Head v. Special School Dist. No. 1, 288 Minn. 496, 182 N.W.2d 887 (1970); City of Minot v. General Drivers and Helpers Union No. 74 of Minot, 142 N.W.2d 612 (N.D. 1966).
50. 5 U.S.C.A. § 7311 (1967).
51. 18 U.S.C.A. § 1918 (1970).
52. PUERTO RICO CONST. art. 2, § 18.

> other appropriate relief from the court of chancery within the county wherein such strike or recognition of a picket line in violation of this section is occurring or is about to occur.[53]

Although Puerto Rico makes its distinction turn on the nature of the government service and Vermont is concerned with the effect on the public, each allows sufficient flexibility to deal with emergency situations.

Pennsylvania implemented an all-encompassing Public Employee Relations Act in 1970[54] which duly prohibits strikes by prison guards, mental hospital workers, and court personnel. All public employees in Pennsylvania are barred from striking during the pendency of collective bargaining negotiations under the law. Other than these exceptions, public employees are free 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."[55] However, no public employee is entitled to pay or compensation during any strike, and if the strike is illegal, the law provides for criminal fines and injunctive relief. Finally, an unfair practice by a public employer is not a defense to a prohibited strike.

There have been three court decisions which in some way lend support for public employee strike rights. The court in *Los Angeles Metropolitan Transit Authority*[56] allowed a strike against the public corporation which ran the Los Angeles system of public transportation on the ground that the Los Angeles Metropolitan Transit Authority Act embodied a Norris-LaGuardia clause[57] allowing "concerted activities" for mutual aid and protection and contained no specific anti-strike provision. This decision, though limited on its facts to striking transit workers, has aroused support and opposition concerning the possible consequences of its rationale. The other two decisions are even more easily distinguishable and are not firm support for a right to strike.[58]

The reaction of foreign governments to public employee strikes is a constructive contrast to the usual reaction in the United States. Strikes of Norwegian public employees are allowable on condition of a three-month notice. Strikes are not prohibited by the Australian or

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53. VT. STAT. ANN. tit. 21, § 1704 (1967).
54. PA. STAT. ANN. tit. 43, ch. 19 (Supp. 1971).
55. PA. STAT. ANN. tit. 43, § 1101.1003 (Supp. 1971).
56. Los Angeles Metropolitan Transit Authority v. Bd. of R.R. Trainmen, 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960).
57. Norris-LaGuardia Act, 29 U.S.C.A. § 102 (1965).
58. Local 266, AFL v. Salt River Project, 78 Ariz. 30, 275 P.2d 393 (1954). A strike against a proprietary function of the state (a power district) is not against public policy in that the function of the power district was to serve its owners (consumers) not the public.
Board of Education of City of Minneapolis v. Local No. 63, AFL, 233 Minn. 144, 45 N.W.2d 797 (1951). Employees of a school district are not "charged with duties relating to public safety" and as such are not specifically forbidden, by statute, to strike.

French governments except that in France neither police nor high-ranking officials may strike. Great Britain, though having no specific legislation against such strikes, reserves the right to dismiss public employees if necessary.[59]

Canada has recently enacted the most interesting legislation of all in the area of the public employee strike. The Public Service Staff Relations Act,[60] assented to on February 23, 1967, provides that either party may notify the Public Service Staff Relations Board of a collective bargaining impasse and may request either binding arbitration[61] or conciliation for the settlement of disputed terms or conditions.[62] If the Chairman of the Public Service Staff Relations Board decides conciliation would not be helpful, or seven days after the finding and recommendations of the conciliation board have been reported, employees of a bargaining unit then have the right to strike.[63]

All other public employee strikes are prohibited under the Canadian legislation. Fines for a prohibited strike carry maximum penalties of $100 for each striker; $300 for each union officer who counsels, procures, or authorizes a prohibited strike; and $100 each striking day for every employee organization that declares or authorizes a prohibited strike.[64] Either the public employer or the bargaining agent may apply to the Public Service Staff Relations Board for a declaration that an actual or proposed strike is or would be prohibited. The Board then may make such a declaration.[65] It is unclear what would transpire if one party chose the route of binding arbitration and the other party chose the strike route.

Nevertheless, this writer has not discovered any public employer strike legislation other than the 1970 Pennsylvania legislation, which so directly confronts the problem and so adequately counterpoises conflicting interests as does this Canadian legislation. The fact is that most legislation in the United States has expended its creative efforts, if any, on the subject of collective bargaining and has been content to fulminate against any and all public employee strikes without much observable effect. The use of the public employee strike is admittedly an area of genuine concern.

The proportions of the increasing strike problem should not be exaggerated. Popular journals often tend to unduly emphasize the

59. Brinker, *Recent Trends of Labor Unions in Government*, 12 LAB. L.J. 13, 19 (1961), citing N. POWELL, PERSONNEL ADMINISTRATION IN GOVERNMENT 295 (1956).
60. Public Service Staff Relations Act, CAN. REV. STAT. c. 72 (1967).
61. *Id.* at § 63.
62. *Id.* at § 77.
63. *Id.* at § 101. Employees of a bargaining unit may not strike if there is not a collective agreement in effect; the impasse has taken the route of binding arbitration; or the employees have duties necessary to the safety or security of the public. It is also required that employees belong to a unit with a certified bargaining agent before they have the right to strike.
64. *Id.* at 104.
65. *Id.* at 103.

threatening aspects of public employee strikes. In 1969 there were 5,700 work stoppages in the United States but only 414 in the public sector. The total work stoppages involved about 2,481,000 employees and these specifically in the public sector involved only some 160,000 workers. Overall there were about 42,869,000 man-days idle in 1969 due to work stoppages, which represented .24 per cent of the estimated total working time. The man-days idle for public employee strikes in that year accounted for about 745,000 man-days idle, or only about .02 of the estimated total working time available.[66]

The trend in this unstable area of labor relations appears to be one of increasing public employee strikes of rather short duration and often termed "professional protest" or "sick leave protest." Unlike his compatriot in private employment, the public employee does not possess much economic leverage against the state. Most public employees are vulnerable to replacement and are incapable of causing direct financial injury to a specific public agency which does not operate on a profit system in a market economy and has no customers to lose. Above all, the public employee must be sensitive to the generally hostile mood of an inconvenienced public. As a result, public employee strikes are generally a study in public relations and political pressure rather than a case of direct economic power applied decisively against an employer. In such a situation, bluff and the threat of a strike are almost as important as the strike itself.

It seems likely, therefore, that the law will have to come to terms with the use of the strike in the public sector. Either public employee strikes must be effectively stopped or they should be legitimized in some manner. Even were the first course desireable, it is unlikely that government can or will make the public sector strike-free without unacceptable consequences. It is improbable that injunctions will be any more omnipotent in the public sphere than they were in the private sphere at a time when unions were not nearly so well organized as now. Despite absolute strike prohibitions, it is the ability of militant unionism, to achieve results, which has convinced teachers to take to the union path. The conclusion of European experience is that a militant civil service has been able to obtain settlements more speedily than have workers in the private sphere. The pattern of activity in the recent past is such that public employee strikes and work stoppages have generally led to union victories and not to penalties or serious resistance. Jerry Wurf, President of AFSCME, AFL-CIO, has stated:

> Strike prohibitions are not simply ineffectual, though they are

66. U.S. DEPT. OF LABOR, WORK STOPPAGES IN GOVERNMENT: 1969, at 3, 6 (1970). *See also* Nolan & Hall, *Strikes of Government Employees*, 1942-1961, 86 MONTHLY LAB. REV. 52 (1963).

> undeniably that. What is far more serious, they warp this vital process. They bring employees to the bargaining table, but as inferiors. Simultaneously they provide false reassurance to management representatives and induce less than genuine negotiations.[67]

It is sometimes suggested that the answer to the increasing frequency of public employee strikes is the use of compulsory arbitration. However, compulsory arbitration will not and cannot be a comprehensive solution for the striking public employee. The basic fact is that traditionally, both unions and management have been opposed to compulsory arbitration.[68] There is absolutely nothing to indicate that either government or the unions, both for legal and practical reasons, will leave basic terms of a contract in the hands of a third party. It can only be academic to assume that compulsory arbitration should be applied in the public sector when it has been so firmly rejected in the private sector. Basically, compulsory arbitration is seen at best as an unpleasant but necessary surrogate for the basic right to strike.[69]

The literature in the field all too often fails to note the difference between compulsory arbitration of rights under a given contract and compulsory arbitration of interests in the absence of a contract. The arbitration of rights has proved far more successful in the private sector for a variety of reasons. On the other hand, basic interests will rarely be left to a third party decision which of necessity will be broadly stated and not confined to narrow issues more readily rationalized and interpreted within the framework of a written document. Furthermore, the possibility exists that compulsory arbitration will blunt good faith bargaining with the fears that any offer or compromise by either party will weaken its position before the arbitrator. Experience also indicates that arbitrators frequently proceed from the last stated position and not from a position made but abandoned in negotiations. Finally, unlike typical litigation, the parties to compulsory arbitration must live together. An unhappy litigant could cause continuing unrest. The mutual acceptance of the arbitration decision is an important factor, whether the arbitration be voluntary or compulsory.

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67. CITY PROBLEMS OF 1967, at 45 (W. Buildinger ed. 1967).

68. Fiester, *The Case Against Compulsory Arbitration*, pamphlet reprint from AMERICAN FEDERATIONIST (Oct. 1965); Phelps, *Compulsory Arbitration: Some Perspectives*, 18 IND. & LAB. REL. REV. 81 (1964).

69. Shenton, *Compulsory Arbitration in the Public Service*, 17 LAB. L.J. 138, 147 (1966).

IV. CONCLUSION:

A COMPROMISE PROPOSAL

It is evident that the drive for collective negotiations by public employees will continue. It is also clear that the demands of public employees for collective negotiations will be a perennial and increasingly serious problem until it is squarely faced and resolved. The anonymity and standardization of a burgeoning public service has engendered resentment among public employees. State and local employees especially find themselves mistrusted by the public, ignored by a bureaucratic hierarchy, and embittered by alleged faster gains in the private sphere. In an age where modern business strives to develop a feeling of participation among employees, state and local government managers are still accustomed to issue unquestioned orders to educated employees of professional or semi-professional caliber.

Only the legislature is equipped to deal with the scope of the problem involved. The precise machinery of negotiation to be established in a state must be sufficiently flexible to permit a form of collective negotiation fitted to the needs of the parties. Existing legislation in the United States provides an essential base by often providing for collective bargaining, representation elections, mediation, and fact-finding. However, it often provides no guidance concerning the identity of the public employer in a given situation.

The danger is that public employees will endure needless frustration in trying to determine which government spokesman has the authority in a particular situation. This ambiguity could be alleviated by having personnel representatives and budget representatives participate in initial negotiations. Such an approach would help to prevent conflicts with state budgets or state civil service laws before positions become entrenched. The effective date of any legislation or portions thereof should be prospective so as to allow a gradual psychological and administrative transition and adjustment.

Most terms of employment, excepting the statutory proscription of the union and closed shops, should be left to solution by collective negotiation. However, financial and political realities in many states would seem to dictate that wage negotiation be subject to a more regulated procedure. Any wage agreement reached at the state or local level should probably be subject to approval by the financing body or some committee thereof. The effect of approval would be an informal guarantee that sufficient funds would be available to affirm the negotiation promised. Logically, the body which promises should have the authority to finance its promises. Secondly, wage

negotiations should be geared to the legislative appropriating process. Wage negotiations, for example, could be required to commence at least ninety days before the submission date of an agency budget, and if no agreement were reached within thirty days, the statute would automatically set in motion the process of mediation, conciliation, and advisory fact-finding, if such machinery had not been invoked earlier by either party.

There is even a more basic suggestion to be made concerning public employee strikes. A fundamental premise of this article is that the absolute strike prohibition has almost always failed. Its further fitful and ineffectual use will serve only to embarrass political authority and legal theory. Few public officials will rigidly enforce an anti-strike law for the sake of a legal nicety where they do not feel a genuine threat exists to the public welfare. The most promising solution from a legal viewpoint is for the enactment of qualified public employee strike laws that are more likely to be enforced. Even under the Taft-Hartley Act, distinctions are drawn between strikes in the nature of a national emergency and those that are not, on the basis that government intervention is justified only where public interest is at stake.[70] Public employees could be divided into three categories. The first category would involve essential services, such as law enforcement or firefighting, and would be subject to compulsory arbitration in lieu of the strike right. The second category would include public employees, such as sanitation workers and school teachers, who would enjoy a qualified right to strike. The third category would consist of nonessential employees who would be allowed an unqualified right to strike.

The recent Canadian legislation in this area could be used as a framework.[71] In order to be certified, a union would be obligated to include in any collective agreement a declaration of its intent to be bound by the qualified strike laws of the particular state in question. Strikes would be in no event allowed during a contract period, or where mediation, conciliation, or fact-finding was in progress. Strikes would also be absolutely prohibited as to fire-fighters, law enforcement officials, and other specifically designated classes of public employees whose services are vital for social functioning, but mediation, conciliation, fact-finding, and if necessary, compulsory or advisory arbitration would be available at the request of either party in place of the strike. Illinois, for example, already provides for firemen's arbitration boards which render advisory decisions in matters of

70. *See* Foegen, *A Qualified Right to Strike—in the Public Interest,* 18 LAB. L.J. 90, 98 (1967). President Nixon sought recognition of a limited right to strike in the transportation industry so long as national health or safety was not endangered. White House Press Release (Feb. 3, 1971).

71. *See* CAN. REV. STAT. c. 72 (1967).

wages, hours and conditions of employment.[72] A Public Employee Labor Relations Board[73] could be empowered in its discretion to assess fault in its fact-finding and to hold either private or public fact-finding hearings. It is essential that at least part of the Public Employee Labor Relations Board be composed of nongovernmental members, so that it is not viewed as a biased tool of the public manager. The Board would be obligated to constantly re-evaluate its classification of essential employees and to make periodic recommendations to the state legislature for inclusion or exclusion in view of administrative experience.

Subject to the general rule that only a duly certified employee organization could do so, a certified bargaining agent would be allowed a qualified right to strike after approval of two-thirds of the voting membership at a strike election held under the auspices of the Public Employee Labor Relations Board. Armed with this qualified strike right, a certified bargaining agent would have two alternatives in the event of a negotiations impasse. The choice of alternatives would be solely the prerogative of the bargaining agent since it would be bound by its choice for the period of contract negotiations. The first alternative would be conciliation followed by fact-finding and then by compulsory or advisory arbitration of disputed issues. A qualified strike of not over one month would be allowed only in the event that the state or local authorities refused arbitration or refused to honor the reward. The other alternative would be conciliation followed by fact-finding and then an immediate right to a qualified strike not in excess of one month. The period of one month is chosen on the theory that most public employee strikes are even of shorter duration when allowed to run their natural course. Every qualified strike would require a period of notice, perhaps two weeks, so that public services are not cut off by surprise. Mediation machinery should be available at any stage and regardless of what alternative is chosen.

At all times, either during or after the one-month period, the Public Employee Labor Relations Board would retain the authority to declare a strike officially terminated, after public hearings and findings on the basis of substantial damage to the public health, welfare, or safety. The test of a qualified strike should not be based on the severe principle of "inconvenience" to the particular public service being performed. Every strike by nature causes some inconvenience and obstruction to the immediate function involved. The test must not be a mechanical one which necessarily always decides for

72. ILL. REV. STAT. ch. 24, §§ 10-3-8, 10-3-10 (1962).

73. This board could be modeled after the Public Service Staff Relations Board established by the Public Service Staff Relations Act § 11, CAN. REV. STAT. c. 72 (1967).

the public employer but one which acknowledges that conflicting interests must be weighed and evaluated in light of the public "health and welfare."

Occasional demand for a strike beyond one month could be met by placing the burden on the bargaining agent to show that the public health, welfare, or safety would not be damaged or unreasonably threatened by such a strike. A union, for example, might try to prolong its strike time by making provision for a skeleton staff or by agreeing to carry on with particularly necessary functions. Either party would have the right to apply to the Public Employee Labor Relations Board for a declaration that an actual or proposed strike is or would be illegal. Of course, the Board would also reserve the right to act on its own initiative in the case of an actual strike. A determination by the Board that a particular strike was or was not illegal under the indicated test should be subject to judicial review under the provisions of a state administrative review act. It should be made clear that a declaration of public emergency by the chief executive should be allowed to override a declaration of the Board which did not find a public emergency. In this manner, the Board would be ultimately subject to the highest elected official of the public. It is unlikely that a chief executive of the applicable governmental unit would lightly enter into the hornet's nest of a public employee strike without compelling cause.

The penalties to be imposed on a union which violates a qualified strike could provide for graduated options. The machinery of dispute settlement could be suspended in the discretion of the Board. The union could also be punished either by loss of its certified status for a certain period or by fines directed at the union treasury. Moreover, any collective agreement obtained perchance during a prohibited strike should be declared null and void by statute. Its terms would have to be renegotiated either when the public employees returned to work or during the course of a legally qualified strike. A prohibited strike should be declared an unfair practice. Moreover, the Public Employee Labor Relations Board should be able to issue cease-and-desist orders against a prohibited strike and to seek injunctions in support of such orders. The finding and imprisonment of individual employees or leaders should be used as a last resort.

To sum up, the present system of most states in dealing with public employee bargaining and striking is doomed to inefficiency, inequity, and failure. The proposed suggestions offer no guarantee of success. They do, however, attempt to build a system upon a basis of honest compromise so that all interests have some stake in preserving the law. The future of public employee labor law cannot be

built on abstract shibboleths, such as state sovereignty or the inalienable right to strike anytime, anywhere, but on a realistic appraisal and creative compromise of whatever interests are involved. It is fundamentally unrealistic to allow the right to organize and the right to negotiate or bargain, whether expressly or impliedly, without expecting to seriously deal with the issue of public employee strikes and the regulation of such strikes.