Duquesne Law Review

Volume 10 | Number 3 Article 3

1972

The Developing Labor Relations Law in the Public Sector

Harry T. Edwards

Follow this and additional works at: https://dsc.duq.edu/dlr

Part of the Labor and Employment Law Commons

Recommended Citation
Harry T. Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 Duq. L. Rev. 357 (1972).
Available at: https://dsc.duq.edu/dlr/vol10/iss3/3

This Article is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

The Developing Labor Relations Law in the Public Sector†

*Harry T. Edwards**

There is no question that the most startling and significant recent development in labor relations has been the astounding growth of public employee unionism. While in part this growth may be attributed to the rapid expansion of the government itself (*e.g.*, the total number of government employees in June, 1957, was 7,616,000, while in June, 1971, it was 13,032,000),[1] the tide of public sector unionization makes even this inflation appear paltry. Indeed, even excluding the highly organized public school teachers, public sector union membership is now proportionally higher than union membership in the private sector:

> Membership in unions and employee associations currently totals about two million, or more than one-third of all non-instructional full-time employees of states, cities, counties, school districts and other local authorities, as compared with less than 30 percent organization of non-agricultural workers in the private sector. Furthermore, organization among public employees is increasing at a rapid rate while union membership in private industry has been declining relative to total employment in recent years.[2]

In raw numbers, the figures are rather revealing. For example:

1. Total state and local union membership is now over 2.6 million as compared to 1 million in 1960.[3]

2. At the federal level, there are currently about 2300 bargaining units covering nearly 1.5 million employees.[4]

3. The net increases for all unions (public and private) from 1958 to 1968 was 1.8 million members; of these, over 1 million were public

---

† Based on a speech delivered at Midwest Labor Conference, Columbus, Ohio, sponsored by Ohio Legal Center Institute, October 15, 1971. The article has been expanded and revised for publication in the *Duquesne Law Review*.

* Associate Professor of Law, University of Michigan Law School.

1. U.S. DEPT. OF LABOR/BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS 49, 57 (July, 1971).

2. Stieber, *State Local Unions Pass Industry and Still Going Strong*, 2 LABOR—MANAGEMENT RELATIONS SERVICE NEWSLETTER 7 (July, 1971).

3. U.S. DEPT. OF LABOR/BUREAU OF LABOR STATISTICS, NEWS BULLETIN # 71-492 (Sept. 13, 1971) [hereinafter cited as BLS Bulletin].

4. WOLLETT AND SEARS, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT xii (1971).

sector employees.[5] Nor does this rate of growth show signs of tapering off. Between 1968 and 1970, total public sector union gains in membership amounted to just over 200,000 employees.[6] In addition, recent figures show that three public sector unions ranked 1-2-3 in terms of percentage growth among all unions gaining more than 100,000 members between 1960 and 1970.[7] This last statistic illustrates an even more significant fact: public unionism seems by no means to have reached its peak. Indeed, present trends indicate that as bargaining in the public sector receives an aura of legitimacy, the corps of union adherents will grow in ever-increasing numbers:

> Of the 14 states which, in summer 1970, had mandatory laws governing collective bargaining, only two reported that less than 50 percent of their city employees were represented by unions and associations. Conversely, in the 22 states with no legislation, court decisions or attorney general opinions favorable to collective bargaining, 14 had less than 40 percent representation and only 3 reported that more than 50 percent of employees in cities were represented by organizations.[8]

The causes of this growth are legion and the search for them is basically beyond the purview of this presentation. What is important is that we have this growth, and it has caused a problem: how to create a viable system of labor relations for the public sector? The object of this article is to survey the current status of the law of labor relations in the public sector. Because the law is still in its formative stages, developing and changing almost daily, space does not permit a comprehensive study of all relevant legislation. Rather, the goal is to examine current trends and developments, in light of their precursors, to illustrate where we have come from and where we are going.

To understand current developments, however, it is first necessary to review some of the theoretical underpinnings of the present public sector structures. For example, the natural tendency of a labor relations expert, when confronted with the problems of the public sector, might be to ask whether private sector devices are applicable. Indeed, much of the scholarly debate over the public sector has focused on this very question.[9] Almost uniformly, commentators have urged that private

5. *Id.* at xii.
6. BLS Bulletin, *supra* note 3.
7. Steiber, *supra* note 2.
8. *Id.*
9. *See, e.g.*, Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes*, 68 MICH. L. REV. 260 (1969); Anderson, *Strikes and Impasse Resolution in the*

sector labor law practices cannot and should not be carried over without modification into the public sector, due to inherent differences between the public and private sectors.[10] Various theories have been put forth, detailing the distinctions between the sectors, in an effort to explain the inapplicability of one private sector practice or another. By examining these theories, we can both appreciate their impact on the growth of the public sector and perhaps understand why some structures, based upon obsolete theories, are no longer sound.

The oldest and now least revered mode of distinction between the two sectors is the sovereignty theory. The sovereignty theory holds that the government-employer, as the ultimate repose of all legitimate societal power, cannot and should not be opposed by the countervailing power of labor unions. One can clearly see the historical imprint of this theory in America, for it has generally been argued by both legal theoreticians and politicians alike, that:

> A strike of public employees manifests nothing less than an intent on their part to obstruct the operations of government until their demands are satisfied. Such action looking toward the paralysis of government by those who have sworn to support it is unthinkable and intolerable.[11]

It is clear, however, that sovereignty is no longer an adequate answer to public sector problems. For one thing, the idea of sovereignty is too vague; it offers little if any guidance as to the conduct of labor relations. The doctrine of sovereign authority historically has rested on the assumption that "The King can do no wrong." This notion found favor in early American legal precedents, especially in cases claiming tort liability against governmental units.[12] Recent years, however, have seen the comfortable consensus on this question fade into the uncomfortable realm of reconsideration and debate. The sovereignty theory, as applied to public sector labor relations, thus begs the question. If the real point is that labor relations must be different in the public sector be-

Public Sector, 67 MICH. L. REV. 943 (1969); Wellington and Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805 (1970).

10. *Cf.* citations *supra* note 9; *but compare* Kheel, *Strikes and Collective Bargaining*, 67 MICH. L. REV. 931 (1969).

11. Letter from Franklin Delano Roosevelt to L. C. Stewart, President, National Association of Federal Employees, August 16, 1937, in Vogel, *What About the Right of the Public Employee*, 1 LAB. L.J. 612 (1950).

12. One of the chief proponents of the sovereign immunity doctrine was Justice Holmes, who in 1907 wrote: "a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawanankoav v. Polyblank, 205 U.S. 349, 353 (1907).

cause we are dealing with government, then we must ask what should be the appropriate collective bargaining model—and not categorically reject all models.

Moreover, the application of a strict sovereignty notion—that governmental power can never be opposed by employee organizations—is clearly a vestige from another era, an era of unexpanded government when its proprietary role was not nearly so important. The huge growth of government and its expansion into new "non-essential" services has produced basic changes in thought which make the foundations of any absolute notions of sovereignty obsolete.[13] These changes are illustrated by the evolving theories employed in deciding the question of intergovernmental immunities. While such immunities were once routinely granted, immunity now is available only when the government performs a governmental (as opposed to proprietary) function, and even this distinction is beginning to break down due to the complexity of structure of modern government.[14]

From an employee's point of view, the expansion of government has increasingly important ramifications. With the rapid growth of the government, both in sheer size as well as in terms of assuming services not traditionally associated with the "sovereign," government employees understandably no longer feel constrained by a notion that "The King can do no wrong." The distraught cries by public unions of disparate treatment[15] merely reflect the fact that, for all intents and purposes, public employees occupy essentially the same position vis-à-vis the employer as their private counterparts. This is just another illustration that the sovereignty theory, as applied to labor relations in the public sector, is obsolete and unsatisfactory at best.

A close relative of the sovereignty doctrine is the theory that public employees have a commitment to further the programs of government even at a sacrifice of their own interests. This idea—that somehow the employment relationship in the public sector demands greater fealty from the employee—is (or should be) true of some public sector em-

13. One need only look at the historical change in Congress' exercise of the commerce power and intrusion into the world of business and commerce for convincing evidence of such attitudinal change. *See, e.g.*, Stern, *The Commerce Clause and the National Economy*, 59 HARVARD L. REV. 645, 883 (1946). *See also Governmental Tort Liability Symposium*, 29 N.Y.U. L. REV. 1321-1461 (1954); *Symposium*, 7 VAND. L. REV. 175-270 (1954).

14. *See, e.g.*, the distinctions in *New York v. United States*, 326 U.S. 572 (1946) as contrasted with different views on the somewhat similar problem of government immunity in tort in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). On the decline and fall of sovereignty in the latter context, see PROSSER, TORTS § 125 at 996 (3d ed. 1964).

15. *See, e.g.*, Bilik, *Towards Public Sector Equality, Extending the Strike Privilege*, 21 LAB. L.J. 338 (1970).

ployees, such as firemen or policemen. Indeed, this theory was applied to policemen as far back as 1892. Justice Oliver Wendell Holmes, in a Massachusetts case,[16] said that no individual had a constitutional right to be a policeman, and that a "city may impose any reasonable condition upon holding offices within its control."[17] The court held that reasonable conditions included a city rule which prohibited policemen from joining labor unions. Parenthetically, it is clear that such a ruling is unlikely to have any practical importance today, since numerous recent decisions have held that membership in a labor union is protected by the first amendment's freedom of association provision.[18]

It would seem the extra-loyalty theory is open to the same criticism as the sovereignty theory: it too is vague, conclusory, and not adequately founded in the realities of the modern situation. Based upon an assumed consensus as to the proper role of government in society, it offers no guidance as to what the employee must give up. Further, it puts forth no reason for this sacrifice, save the equation government equals sovereign equals absolute fealty. Such an equation is hardly a viable alternative in our modern society. Indeed, with so many "urgent" demands on the government's admittedly inadequate resources—coupled with the great gains of private sector unions (creating a considerable controversy as to just what the public employee's fair share really is)—it outrages modern notions of industrial democracy to relegate a large segment of the work force to dependence upon the conscience of the government. A degree of self-determinism has become a way of life for the American worker, and nowhere is it more necessary than in the public sector.

More persuasive than greybeard theories based on obsolete notions of the nature of the public sector are three arguments grounded in the realities of the modern economic and political system. First, it is argued that the public sector presents a unique problem, in that authority in government is often divided among various departments.[19] This argument raises a host of problems. The central one is: with whom is the public employee to bargain? Public employees, for example, may be forced to bargain with a government official in the executive branch of government, even though the money for settlement must come from the

16. McAuliffe v. Mayor of the City of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).
17. *Id.* at 220, 29 N.E. at 518.
18. *E.g.* McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968).
19. *See, e.g.*, Comment, *supra* note 9, at 283; Wellington and Winter, *supra* note 9, at 820.

legislative body.[20] Divided authority can cause other serious problems in bargaining structure concerning programs that are locally administered but state funded—such as state educational systems. This difference between the private and public sectors raises the question of how to structure the bargaining relationship so as to avoid multiple and inconsistent negotiations, lapses of good faith, and over-expenditure of governmental budgets.

Another significant argument that has been put forward is that the public sector lacks the natural limits inherent in the private sector.[21] These limits arise from the cross-elasticity of demand in the private sector. Union demands in the private sector which result in gains greater than productivity increases are likely to result in higher costs, leading to higher prices, greater substitution of other goods and services, lower sales, lower employment and a net loss for union members. Similar limits, it is argued, are not found in the public sector since the demand for government services is highly inelastic and substitution practically impossible. The lack of a natural ceiling, it is argued, may cause immoderate union demands.

Of these "economic" arguments, the lack of natural limits is the least persuasive. To begin with, the argument is highly unrealistic since it rests on a perfect competition model which does not exist. In the real world, many factors operate to distort the perfect substitutability of goods upon which this argument relies. Such distortion tends to make the presence of a natural ceiling in the private sector more problematical than might first appear.[22] And even if such a ceiling is present in the private sector, its influence on private sector union decision-making is a subject of some conjecture. One might well question the importance of the absence of such a limit in the public sector, if it does not provide a significant limitation on union demands in the private sector.

In addition, it can be argued that the demand for government services is not so inelastic as might ordinarily be assumed. No constitutional prohibition prevents the government from cutting back or eliminating some services—or deciding to subcontract others. It is not unusual to read about public pools, parks, or libraries being closed for want of

---

20. *See* note 26, *infra*.

21. This theme is developed at length by Wellington and Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969).

22. For example, these factors might include the absence of any excess capacity in a competitor, the time gap required to produce goods which would serve as an adequate substitute, or perhaps the control of an essential raw material by the employer. The list of such factors is theoretically endless.

funds; and it is no less unusual to find that garbage collection or maintenance work has been subcontracted. Such courses of action may be drastic measures, and particularly problematical because of the political consequences involved; but they cannot invariably be deemed more drastic than the decision of a private employer to reduce operations or go out of business entirely.

The most persuasive argument against the lack of natural limits as a point of major significance is that there *is* a natural limit to the public sector union's demands. The limit is imposed by the public itself. It is reached when the union's demands are exposed and are outrageous enough to raise public anger to the point where the public is not willing to accede to them. From experience, this limit is seldom reached. Still its presence serves as a significant deterrent to immoderate union demands. The efficacy of this sentiment as a factor in public sector labor relations might be increased by increasing the visibility of the costs of each individual settlement (for example, by a referendum or perhaps merely by publishing the details of unusual demands).[23]

The last "economic" theory is both the most far-reaching and troublesome of the three. It rests on a fear that institutionalizing private sector practices in the public sector may produce a perversion of the political process. As the decision as to allocation of resources in the public sector is a political rather than merely economic choice, it has been argued that full collective bargaining in the public sector may give labor the means to enforce its will to the detriment of other less highly organized suitors for government funds.[24]

It cannot be controverted that, in theory, decisions as to governmental priorities are properly political and should be responsive to the desires of the constituency as a whole, rather than the values of a labor union. In reality, we might well wonder about distortion in a political process where, to be heard, any interest group from welfare mothers to the local Chamber of Commerce must be organized. Even assuming that our political system is to some degree malfunctioning is, of course, no reason to institutionalize practices likely to insure such malfunction in the future. Thus careful attention must be paid to the political ramifications of public sector labor relations.

One method of dealing with the problem deserves special mention.

23. *Cf.* Wellington and Winter, *supra* note 9, at 849.

24. *See, e.g.*, Wellington and Winter, *supra* note 9; Comment, *supra* note 9; Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943 (1969).

In New York, the Taylor Act[25] provides that any labor agreement between a public employer and a union must include, "in type not smaller than the largest type used elsewhere in the agreement," the following clause:

> It is agreed . . . that any provision of this agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefore, shall not become effective until the appropriate legislative body has given approval.[26]

In other words, *final approval* of some items is vested in the legislature, a body which is at least nominally responsive to the community at large. A significant problem with the New York approach is that it gives a government employer two bites at the apple; that is, management might agree to a proposal as a "negotiator" and then turn around and effectively reject the same proposal as a "government."[27] The success of the New York approach can only be determined by the passage of time.

In sum, there are basic differences which should, to some extent, modify traditional private sector practices when and if they are extended to the public sector. It should be clear, however, that there are not as many differences, nor are those differences which exist so serious, as some would have us believe.

> Many believe that there are many similarities between private and public employment; in both there are: (1) an employer and employees; (2) attitudes which do not differ markedly from the attitudes in the private sector; (3) employers who want to be free from restrictions and to secure a work force as cheaply as possible; (4) employees who want to improve their living standards, to have legal rights, and to resolve grievances on their merits. Unions in both sectors have comparable goals for their members and in both instances they believe they should have the same rights.[28]

With the relationship between the public and private sectors in mind, we can now consider the current public sector structures. Our inquiry is directed first at the problem areas raised by the differences between

25. N.Y. Civil Service Law §§ 200-212 (McKinney Supp. 1971).
26. *Id.* § 204-(1)(a).
27. Of course, a similar charge could be made out against the private sector practice of allowing the union members to vote to ratify the results of negotiations. However, the two situations are not precisely analogous as many more external factors might influence a legislature than a private sector union whose concerns are much more homogeneous.
28. The Honorable Arthur J. Goldberg in New York State Governor's Conference on Public Employment 162 (1968).

the private and public sectors; second, where the current trends and developments indicate the public sector is moving; and third, where the public sector should be going.

Any consideration of current developments in the labor relations context must begin with a discussion of the right to organize and join a labor union. This right, the very essence of any viable labor relations system, now seems clearly established in the public sector. The viability of the right is due in large part to decisions such as *McLaughlin v. Tilendis*,[29] a 1968 Seventh Circuit decision holding union membership to be within the purview of the first amendment. Later district court decisions have held state statutes prohibiting membership in a labor organization unconstitutional.[30] Given this impetus, it is not surprising that virtually all state statutes dealing with public sector labor relations affirmatively guarantee the right of employees to join and form unions. In many states, this freedom is guaranteed by making it an unfair labor practice to coerce or interfere with the employee's choice.[31] A similar route has been taken by the federal government, where the right to join and form unions was first extended in 1962 through Executive Order 10988. This right has now been codified in Section 1 of President Nixon's Executive Order 11491,[32] and similar provisions are also found in the Postal Reorganization Act.[33] Clearly then, the public sector is on the same ground as the private sector as regards the right of union membership.

One must next consider what public employees can accomplish once they have formed unions; that is, their rights to bargain collectively with an employer. In the private sector there is no right, absent statutory authorization, which compels an employer to bargain with the representative of his employees. Not surprisingly, this is also true of the public sector. There is no common law or constitutional right to bargain collectively.[34]

A subsidiary problem in this context is the authority of the public employer, absent legislative authorization, to bargain with employees. A good many courts, as late as the mid-sixties, held that an employer did

29. 398 F.2d 287 (7th Cir. 1968).
30. Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D. N.C. 1969) and Melton v. City of Atlanta, 324 F. Supp. 315 (N.D. Ga. 1971).
31. *E.g.*, MICH. COMP. LAWS ANN. § 423.210 (1967).
32. Coercion in the exercise of this right is made an unfair labor practice by § 19(a)(1) of Executive Order 11491. 3 C.F.R. 520 (1971), 5 U.S.C. § 3301 (Supp. VI, 1970).
33. 39 U.S.C.A. § 101 (Supp. 1972).
34. See Indianapolis Education Ass'n v. Lewallen, 72 L.R.R.M. 2071 (7th Cir. 1969).

not have such authority and could not enter into binding negotiations.[35] A recent trend, however, has tended towards allowing the employer to bargain without specific authorization.[36]

Bargaining duties have generally been settled by statutes. These can be divided into two groups as regarding approach:

1) *The meet-and-confer-approach.* Such statutes, although requiring management to meet with and listen to the suggestions of the employees, give management a more or less free hand in making decisions. A precise definition of "meet and confer negotiations" indicates that it is a

> Term for process of negotiation of terms and conditions of employment intended to emphasize the differences between public and private employment conditions. Negotiations under "meet and confer" laws usually imply discussions leading to unilateral adoption of policy by legislative body rather than written contract, and take place with multiple employee representatives rather than an exclusive bargaining agent.[37]

Implicit in this pure meet-and-confer-approach is the assumption that the private sector model is overly permissive and that public employers —who are by definition political souls—should retain broad managerial discretion in the operation of a governmental agency. Thus, under the pure meet-and-confer bargaining model, the outcome of any public employer-employee discussions will depend more upon management's determination than on bilateral decisions by equals at the bargaining table.[38]

2) *Negotiations.* Such statutes reflect the general private sector approach in which the parties come to the bargaining table as equals trying to resolve differences through a give and take process. At present there is a definite trend towards the negotiation model in the public

35. *See, e.g.*, Fellows v. LaTronica, 151 Colo. 300, 377 P.2d 547 (1962).

36. Chicago Division of the Illinois Education Assoc. v. Chicago Board of Educ., 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966).

37. BNA GOVT. EMPL. REL. REP. 91:02-03 *(Glossary)* (1970).

38. Of course, the ultimate practical difference between "meet and confer" and "negotiations" in the present public sector structure may be slight. The trend towards similarity is due to a tendency to read the obligations imposed by "meet and confer" statutes broadly, and to read their counterparts in the negotiation statutes narrowly. Indeed, with the exception of Missouri, Alabama, and California, no state with meet and confer legislation actually approaches the "pure" meet and confer notion. And even in states like New York, where the Taylor Act provides one of the most specific and comprehensive "negotiations" statutes, the fact that the end product of bargaining may be no more than a conditional agreement (see note 26 *supra*), makes one wonder how true the statute is to the orthodox "negotiations" approach. Moreover, when the severely restricted scope of bargaining in many of the "negotiations" states is added to the calculus, the degree of difference between "meet and confer" and "negotiations" as presently found in the public sector is minimal at best. *See* Edwards, *An Overview of the "Meet and Confer" States—Where Are We Going?* 16 LAW QUADRANGLE NOTES 10 (Winter 1972).

sector, with only ten states[39] having enacted some form of meet-and-confer statute.

The trend towards private sector practices is further illustrated by a survey of recent legislation in the public sector. At the present time, over thirty states and the District of Columbia have enacted legislation which establishes some species of collective bargaining in the public sector. The statutes vary widely. Some are permissive; some are mandatory. Some apply to all public employees; others apply only to employments at particular levels, *e.g.*, counties, cities, transit authorities. Some states cover virtually all public employees, but have separate statutes for different groups, *e.g.*, state employees, local employees, and elementary and secondary school teachers. Other states have coverage limited to particular occupational groups, such as nurses, policemen, and firefighters.[40]

Most collective bargaining legislation follows the private sector model and opts for the principle that the organization with majority support in the bargaining unit shall be the exclusive representative of all members of that unit. At least one statute, however, the one covering elementary and secondary school teachers in California,[41] provides for proportionate representation. The statute governing other local employees in California appears to provide for members-only representation.[42] The private sector exclusive representation approach seems clearly preferable, as it avoids the dangers of strife (between unions) as well as simplifying the employer's problems by requiring him to engage in one negotiation rather than many.

States which provide for bargaining are faced with the extremely difficult problem of attempting to structure the bargaining process so as to create an efficient, yet fair, method conducive to agreements and industrial peace. The first problem which surfaces in this connection is the definition of the appropriate bargaining unit. The proper unit must be small enough to have at least relative homogeneity of interests among its members, but large enough so that the employer is not caught up in multiple negotiations resulting in whipsawing and conflicts between

39. ALA. CODE tit. 37, § 450(3)(2) (Supp. 1969); CAL. GOV. CODE § 3505 (West 1969); IDAHO CODE tit. 44, § 1804 (Supp. 1971); KAN. STAT. ANN. ch. 75, § 75-4322(l) (Supp. 1971); ME. REV. STAT. ANN. tit. 26, § 965(1)(c) (Supp. 1972); MINN. STAT. § 179.50 (1969); MO. STAT. ANN. § 105.520 (Supp. 1971-72); ORE. REV. STAT. ch. 243, § 243.745 (1969); S.D. COMP. LAWS ANN. § 3-18-2 (1967); Pub. L. No. 455, § 5 (Montana, 1971).

40. See generally WOLLETT AND SEARS, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT (1971).

41. CAL. ED. CODE §§ 13080-13088 (West 1969).

42. CAL. GOV. CODE §§ 3525-3536 (West 1969).

unions. In the public sector, the problem of appropriate bargaining units is additionally complicated by divisions of authority between local and state agencies over certain aspects of employment. An example would be state pension plans for teachers who otherwise bargain locally. The response to this problem has been quite varied and space prevents an extensive catalogue of the different approaches followed. However, four basic criteria repeatedly seem to provide the foundation for appropriate unit determination in almost every state. These criteria are:

1. A clear and identifiable community of interest among the employees in the proposed unit;
2. The effect of the proposed unit on the efficiency of operations;
3. The history of employee representation;
4. The extent of employee organization (which is not to be the controlling factor in unit determinations).

In addition to these criteria, two specific exclusions from the unit are found in many of the laws. First, professional employees are excluded from a non-professional unit unless a majority of the professional employees involved vote for inclusion. Second, supervisors are excluded, at least from non-supervisory units. While the exclusion of professional employees is relatively straightforward and causes few problems, the exclusion of supervisors generates considerable controversy and ill will.

The difficulty in excluding supervisors stems from the fact that the line between supervisors and employees in the public sector is not nearly so clear as it is in the private sector. In fact, many public sector unions were pioneered by people who might be called supervisors, and in many situations (*e.g.*, principals and teachers) the interest of the supervisors and the rank and file are closely entwined, if not identical. This homogeneity of interests is undoubtedly fostered by close daily contacts between supervisors and union members, coupled with infrequent demands upon supervisors to ally themselves with managerial objectives.

This problem is not solely one of definition, for even assuming we can decide who is and is not a supervisor, we are faced with the question of whether the supervisors can themselves organize. Executive Order 11491 answers this question in the affirmative for those organizations, "which historically or traditionally represent the management officials or supervisors in private industry and which hold exclusive recognition for units

of such officials or supervisors in any agency *on the date of this order*."[43] The most sensible solution may be to allow established management units to continue, but to deny other management personnel the right to organize, and then attempt to make sure that their interests are truly management-oriented by fully integrating them into the supervisory structure.

The most pervasive problem in establishing appropriate bargaining has been the proper size of the unit. Both from the standpoint of economic and harmonious bargaining as well as the desire to avoid problems raised by divided authority in the public sector, the recent trend has been towards larger units. An example of the earlier "small" unit statute is the earliest public sector law in Wisconsin.[44] Passed in 1959, the law allows for the certification of a union in *any* appropriate unit rather than in the most appropriate unit.[45] Perhaps in reaction to problems raised by such an approach, the Pennsylvania law explicitly provides that the Public Employees Relations Board (PERB) shall take into account the effects of "over-fragmentation,"[46] as does the Kansas Act.[47] In some states the establishment of state-wide bargaining units may run into constitutional home-rule problems. Nevertheless, for purposes of ease of negotiation and the efficient functioning of the bargaining system, broad units are a necessity. At the very least, those items which are exclusively state-funded or legislatively established, should be exempted from local negotiations. This approach has been adopted in Hawaii.[48] A general state-wide agreement, with separate agreements negotiated locally to take into account essential variations (much like a private sector master agreement with subsidiary local settlements) seems to be both the desirable direction and the present trend in the public sector.

Once the appropriate unit has been determined and the parties are ready to negotiate, one is faced with the question of what the subject matter of negotiations should be. In the private sector parties are free to discuss all matters concerning wages, hours and conditions of employment. The only delineation drawn between bargaining topics in the private sector is a separation into those subjects which are "mandatory" and may be insisted upon to the point of impasse, and those terms

43. § 24(2), 3 C.F.R. 522 (1971), 5 U.S.C. § 3301 (Supp. VI, 1970).
44. WIS. STAT. ANN. ch. 111, § 111.70(d) (1969).
45. *Cf, Id.* § 111.81(2) (1969).
46. PA. STAT. ANN. tit. 43, § 1101.604(1)(ii) (Supp. 1971).
47. KAN. STAT. ANN. ch. 75, § 4327(e)(5) (Supp. 1971).
48. HAWAII REV. LAWS tit. 7, ch. 89, § 9(d) (Supp. 1970).

which are merely "permissive" and may not be the source of an impasse. The NLRB has tended to construe the category of "mandatory" subjects liberally. The result has been that when the parties face each other across a private sector bargaining table, they are in effect free to discuss virtually all matters which affect the employment relationship.

Although some state acts use the same language as the NLRA as regards the subjects of bargaining and might well be broadly interpreted,[49] the broad private sector approach stands as the exception rather than the rule. For example, the language in certain state statutes provides for negotiations in good faith only "with respect to grievance procedures and conditions of employment"—seriously eviscerating the range of bargainable topics.

Some states exclude specific subjects from the range of items bargainable through the medium of a statutory management rights clause. Executive Order 11491, for example, specifically excludes:

> [M]atters with respect to the mission of the agency; its budget; its organization; the number of employees; and the number, types, and grades of positions or employees assigned to an organizational unit, work project, or tour of duty; the technology of performing its work; or its internal security practices.[50]

And even this provision seems tame in comparison to the following statutory language found in the New Hampshire statute:

> The State retains the exclusive right through its department heads and appointing authorities, subject to the provisions of law and the personnel regulations (a) to direct and supervise employees (b) to appoint, promote, discharge, transfer or demote employees (c) to lay off unnecessary employees, (d) to maintain the efficiency of government operations, (e) to determine the means, methods and personnel by which operations are to be conducted, and (f) to take whatever actions are necessary to carry out the mission of the agency or department in situations of emergency.[51]

Outside of the creation of specific management rights clauses, the largest controversy in the scope of bargaining context is the role to be played by the civil service system. While this system originally was

---

49. CONN. STAT. tit. 7, ch. 113, § 470(c) (1958); HAWAII REV. LAWS tit. 7, ch. 89, § 9(d) (Supp. 1971); ME. REV. STAT. ANN. tit. 26, § 965(1)(c) (Supp. 1970-1971); MICH. STAT. ANN. tit. 17, § 455(15) (1968); R.I. GEN. LAWS tit. 36, ch. 11, § 1 (Supp. 1970); WASH. REV. CODE tit. 41, ch. 56, § 030(4) (1967); WIS. STAT. tit. 14, ch. 111, §§ 81(2), 91(1) (1969).

50. § 11(b), 3 C.F.R. 517 (1971), 5 U.S.C. § 3301 (Supp. VI, 1970).

51. N.H. REV. STAT. ANN. ch. 98-c, § 7 (Supp. II, 1971).

designed to favor workers by eliminating patronage and rewarding merit, it has gradually expanded to the point where,

> Many merit systems over the years have come to encompass other aspects of employee relations and personnel management not essentially related to the merit principle. These aspects include the handling of grievances, labor-management relations, employee training, salary administration, safety, moral and attendance control problems.[52]

For many years the civil service system appears to have filled the gap caused by the lack of public sector bargaining. Now that the gap has been filled, a conflict has arisen between the civil service system and the collective bargaining process.

It is fairly clear that if the collective bargaining process is going to have any value at all, the civil service system in its expanded form must yield to bargaining. Thus, civil service should have, at the utmost, control over hiring, promotions, and demotions. Michigan has resolved the conflict in this manner. In *Civil Service Commission for the County of Wayne v. Wayne County Board of Supervisors*,[53] the Michigan Supreme Court held that the Michigan Public Employee Relations Act superseded *pro tanto* those provisions of the civil service law dealing with rates of pay, hours of work and other terms and conditions of employment which are negotiable items under the Public Employees Relations Act. Whether this decision is the beginning of a trend towards the total demise of the civil service system and the merit principle itself remains to be seen.

At the other end of the spectrum, some states have enshrined the civil service system by exempting it from the scope of bargaining. For example, Hawaii provides that the parties "shall not agree to any proposal which would be inconsistent with merit principles."[54] Other states go even further and protect not only the merit principle, but the entire civil service system as it exists. For example Massachusetts provides that nothing in its statute "shall diminish the authority and power of the Civil Service Commission, or any retirement board or personnel board established by law. . . ."[55] And Executive Order 11491 provides[56]

52. REPORT OF TASK FORCE ON STATE AND LOCAL GOVERNMENT LABOR RELATIONS 18 (1967).
53. 384 Mich. 363, 184 N.W.2d 201 (1971).
54. HAWAII REV. LAWS tit. 7, ch. 89, § 9(d) (Supp. 1970).
55. MASS. GEN. LAWS ANN. ch. 149, § 178(N) (1971).
56. § 12(a), 3 C.F.R. 517 (1971), 5 U.S.C. § 3301 (Supp. VI, 1970).

that all agreements shall be subject to any "policies set forth in the Federal Personnel Manual," which is a detailed code of regulations dealing with many subjects normally treated by collective bargaining agreements.

If there is no one preferred way of resolving the civil service problem, there does appear to be a trend towards a wider scope of bargaining in general in the public sector. In theory and in practice, the trend is eminently sensible. Indeed, the question may be asked whether it makes any sense to even attempt to limit the scope of bargaining. The collective bargaining process is itself a therapeutic process and should permit the parties fully to address all problems which affect the bargaining relationship. If the employer is opposed to a given union demand, it can discuss the problem raised and, if necessary, persist in rejecting it. This is a more satisfactory approach, in terms of achieving stable and harmonious labor relations, than having the employer refuse to discuss an issue because it is legally nonnegotiable. In this regard, the dissent of Justice Harlan in *NLRB v. Wooster Division of Borg-Warner Corporation* is worth remembering:

> The bargaining process should be left fluid, free from intervention . . . leading to premature crystallization of labor agreements into any one pattern of contract provisions, so that these agreements can be adapted through collective bargaining to the changing needs of our society and to the changing concepts of the responsibilities of labor and management.[57]

One further issue in creating a public sector system—the right to strike—makes the controversy over all other issues insignificant by comparison. The emotional issues surrounding this problem are made all the more urgent by the great increase in the number of strikes in the public sector. While in 1958, the number of public employee strikes totalled 15, ten years later that figure was 254, and in 1969 had risen to 411.[58] This trend graphically illustrates that present methods of dealing with public sector strikes are seriously defective and that new and

57. 356 U.S. 342, 358-59 (1958).

58. Work Stoppages in Government, 1958-1968, BNA Govt. Empl. Rel. Rep. § 1011 (1971); U.S. Dept. of Labor / Bureau of Labor Statistics, Work Stoppages in Government 1970 (August, 1971). Interestingly enough, in terms of absolute numbers, strikes in 1970 did not show a marked increase compared to 1969; as in 1970 the total was 412 as compared to 411 in 1969. However, man-days of idleness rose sharply, from 745,700 in 1969 to 2,023,300 in 1970, and the percentage of working time lost also rose from 0.02% to 0.06%, indicating that, although there may not have been many more strikes, the strikes occurring were far more severe.

creative thought must be brought to bear in an attempt to solve this serious problem.

It should be understood that the resolution of the strike question is not presently regarded as one mandated by the constitution. In the private sector, granting of the right to strike under the NLRA was not due to recognition of any constitutional right, but rather was the result of a public policy decision that the right to strike was a valuable step in guaranteeing self-determinism to employees. The Supreme Court, in the 1926 case of *Dorchy v. Kansas*[59] said:

> *Neither the common law nor the Fourteenth Amendment confers the absolute right to strike.*[60]

This same logic has been carried over into the public sector, as exemplified by the recent case of *United Federation of Postal Clerks v. Blount.*[61] The plaintiffs in this litigation argued that the federal law, plus Executive Order 11491, were unconstitutional insofar as they denied them the right to strike. It was argued that the right to strike was a fundamental right guaranteed by the first amendment, and that denial of such a right without compelling justification denied the plaintiffs equal protection of the laws (under the fifth amendment). The district court rejected this argument, saying that although "the right to organize collectively and to select representatives for the purpose of engaging in collective bargaining is a fundamental right,"[62] there is no constitutional right to strike.

With this in mind, an examination of the legislative and judicial responses of the various states is in order to determine the peculiarly troublesome problems involved. These approaches can, for the sake of discussion, be divided into four groups: 1) states relying on the common law proscription of the right to strike; 2) states that have statutorily proscribed the right to strike; 3) states with a limited right to strike created by the courts; and finally, 4) those with a legislatively created limited right to strike.

By far the most populous are states relying on either the common law or legislated proscription of the right to strike. Such proscriptions are vigorously denounced by labor leaders, who insist that the right to strike is the cornerstone of any bargaining system and that without it, collec-

59. 272 U.S. 306 (1926).
60. *Id.* at 311.
61. 325 F. Supp. 879 (D. D.C.), *aff'd* 404 U.S. 802 (1971).
62. *Id.* at 883.

tive bargaining is reduced to collective begging.[63] The problem with both proscription approaches is obvious—they have not worked. Strikes by public employees have continued and spread regardless of the illegality of such action.

While many theories have been forwarded to explain this failure,[64] probably the most accurate assessment of the problem is simply that, in most states which prohibit public sector strikes, there has been no conscientious attempt to try to solve the practical problems of enforcement raised by the strike ban. Certainly in those states relying on the common law, and also in many states legislatively outlawing strikes, no attention has been paid to such seemingly obvious questions as: What is a strike? What sanctions and penalties should be imposed? Against whom should such penalties be directed? Who is to enforce the ban? Are there any mitigating circumstances which will justify a strike? Without working out such necessary details, it is small wonder that the traditional strike bans have not been effective.

This is not to say, of course, either that these problems are insoluble or that no state which has banned public sector strikes has wrestled with them. For example, the provisions of New York's Taylor Act[65] address themselves to many of the above mentioned problems. Section 210-1 of the Act flatly prohibits all public sector strikes. Further provisions specify sanctions aimed at both employees and unions; for the employee, one year's probation, the loss of two days' pay for each day on strike, and possible dismissal or discipline at the discretion of the employer are provided, while the union may lose its right to dues checkoff.[66] The administration of these sanctions is also legislatively mandated. For the employee sanctions, the local government's executive department determines the existence of a strike, in which case the penalties are mandatory.[67] Either the state public employee relations board or the employer may initiate proceedings against the union before the Public Employees Relations Board, which decides whether a penalty is justified and, if so, how long the loss of dues checkoff is to continue.[68]

63. *See, e.g.*, Bilik, *supra* note 15; and *cf.* the remarks of Jerry Wurf, AFSCME President, quoted in BUSINESS WEEK, Dec. 3, 1966, at 94-96, and Victor Gotbaum, President, District 37, State and County Municipal Employees Union, in Wolk, *Public Employee Strikes—A Survey of the Condin-Wadlin Act*, 13 N.Y. L. FORUM 69, 77 (1967).

64. *See, e.g.*, G Hildebrand, *The Public Sector* in FRONTIERS OF COLLECTIVE BARGAINING, 125 (Dunlap and Chamberlain ed. 1967); Burton and Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970), and Kheel, *supra* note 10.

65. N.Y. CIVIL SERVICE LAW §§ 200-212 (McKinney Supp. 1971).

66. *Id.* §§ 210-2, 210-3(a).

67. *Id.* § 210-2(d), (e).

68. *Id.* § 210-3(d), (f).

The Act also provides the union with affirmative defenses if it can show either, that the employer refused to mediate the underlying dispute, or that the strike was prompted by acts of extreme provocation on the part of the employer.[69]

If many states banning strikes suffer from a lack of comprehensive planning, certainly the same is true of those states which permit the courts to determine the existence of a right to strike. Such a state of affairs usually arises in a state where the legislature has not passed a law dealing with the public sector. The net result of such inaction is the same in either case—to allow the judiciary to make the law in a vital area affecting not only numerous employees but the public at large. It should be noted that the court makes this law, not as a carefully debated and reasoned outgrowth of a full appreciation of the problems involved, but rather on the basis of the equities of a particular case.

An example of this phenomenon is the Illinois case of *County of Peoria v. Benedict.*[70] The *Benedict* case held that the Illinois anti-injunction act was applicable to a public sector dispute between nurses and a county-owned nursing home. Whether the decision means that such an act is applicable to other public sector disputes is not clear at present. If so, Illinois would be the first state with a virtually unlimited judicially created right to strike. What is most interesting about the *Benedict* case is that it goes squarely against the clear trend in the public sector towards exempting public employee strikes from the terms of any little Norris-LaGuardia acts, thus permitting injunctions in such situations.[71]

While the Illinois case seems mired in the equities of a particular situation, the Michigan Supreme Court's decision in *School District for the City of Holland, Ottawa and Allegan Counties v. Holland Education Association,*[72] offers a less parochial viewpoint (and perhaps even a principle of general applicability). In response to a lower court decision to peremptorily enjoin a labor dispute, the court said:

> [I]t is basically contrary to public policy in this State to issue injunctions in labor disputes absent a showing of violence, irreparable injury, or breach of the peace . . . we suggest that [injunctive] proceedings inquire into whether, as charged by the defendants, the

69. *Id.* § 210-2(f); *cf.* Massapequa Federation of Teachers Local 1442, A.F.T., *PERB* ¶4-8000 (1970).
70. 47 Ill. 2d 172, 265 N.E.2d 141 (1970).
71. *See, e.g.,* United States v. United Mine Workers of America, 330 U.S. 258 (1947), Anderson Federation of Teachers v. School City of Anderson, 252 Ind. 558, 251 N.E.2d 15 (1969), *cert. denied,* 399 U.S. 928 (1970).
72. 380 Mich. 314, 157 N.W.2d 206 (1968).

> plaintiff school district has refused to bargain in good faith, whether an injunction should issue at all, and if so, on what terms and for what period in light of the whole record to be adduced.[73]

It seems reasonable to hold that an injunction in a labor dispute in the public sector should only be issued to an employer with clean hands, one who has made every attempt to resolve the existing labor dispute. In this sense Michigan's decision is an admirable one, well worthy of imitation.[74]

The last group of states—those with a legislatively granted limited right to strike—is certainly the most daring of the four. The problem in granting such a limited right to strike, in general, has been to define precisely the tolerable degree of pressure which the government and the public can withstand. Almost invariably, this is done by attempting to draw a line between essential services (wherein a strike is impermissible) and non-essential services where a strike may be tolerated. However, in most laws this line is very imprecisely delineated—usually by a formula based on some variant of "the public health, safety, or welfare" standard. Such a definition, while admirably flexible, may not be a sufficiently precise formulation to give meaningful guidance.

Another problem with the essential/non-essential calculus is that, in general, it fails to take into account the temporal dimension. A strike, for example, in a highly automated industry, such as the telephone system, may be tolerable for a time. As it endures and the machines begin to break down, it may become intolerable. Other problems of a practical nature—such as who is to make the decision as to essentiality, when this decision is to be made, and whether the strike ban should be mandatory or imposed at the employer's option—are also involved in any partial strike programs.

While the difficulties are legion, there are four states—Hawaii, Pennsylvania, Montana, and Vermont—which have given public employees a limited right to strike. Of the four states, the most limited right is found in Montana, where a nurses law permits strikes, provided that another health care facility within a radius of 150 miles has not simultaneously been shut down.[75] Of more general applicability is the Vermont Act covering municipal employees,[76] which provides that "no

73. *Id.* at 326-27, 157 N.W.2d at 210-11.
74. In the context of states with the judicially created right to strike, see also the Arizona decision in Local 266 I.B.E.W. v. Salt River District, 78 Ariz. 30, 275 P.2d 393 (1954).
75. MONT. REV. CODE tit. 41, §§ 2201-2209 (Supp. 1971).
76. VERMONT STAT. ANN. tit. 21, §§ 1701-1710 (Supp. 1971).

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."[77] Vermont totally prohibits strikes by "state employees," but it appears to insulate teachers' strikes from injunctive orders in the absence of a showing of a "clear and present danger to a sound program of school education."[78]

Neither of these states have shown the creativity of Hawaii and Pennsylvania in responding to the problem. The Hawaii law,[79] covering all public employees, conditions the right to strike upon:

(1) Good faith compliance with statutory impasse procedures;
(2) Passage of sixty days after findings and recommendations of a fact-finding board are made public; and
(3) The giving of 10 days' notice of desire to strike to PERB and employer.[80]

And while all categories of public employees are covered by the act, the Hawaii law also provides:

> When the strike occurring, or is about to occur, endangers the public health or safety, the public employer concerned may petition the board to make an investigation. If the board finds that there is imminent a present danger to the health and safety of the public, the board shall set requirements that must be complied with to avoid or remove any such imminent or present danger.[81]

Pennsylvania has adopted a slightly different approach. First, the law[82] prohibits strikes by guards at mental hospitals or prisons or personnel necessary to functioning of the courts.[83] (Police/Fire workers are covered by a separate compusory arbitration statute.[84]) For all other personnel, strikes are permitted if:

(a) Mediation and fact-finding procedures "have been completely utilized and exhausted"; and
(b) [U]nless or until such a strike creates a clear and present danger or threat to the health, safety, or welfare of the public."[85]

77. *Id.* § 1704.
78. *Id.* tit. 57, § 2010.
79. HAWAII REV. LAWS tit. 7, ch. 89, §§ 1-20 (Supp. 1971).
80. *Id.* § 12(b).
81. *Id.* § 12(c).
82. PA. STAT. ANN. tit. 43, §§ 1101.101-.2301 (Supp. 1971).
83. *Id.* § 1001.101.
84. *Id.* §§ 217.1-.10.
85. *Id.* § 1101.1003.

The basic difference between the Hawaii and Pennsylvania approaches is that when a strike endangers the public health, safety, or welfare, Hawaii's law allows the PERB to make adjustments as it sees fit to eliminate the dangerous aspects of the strike (such as requiring essential employees to work), while Pennsylvania presumably would ban the strike in toto. In the first court decision on record, Pennsylvania's judiciary has indicated the unsoundness of leaving the decision as to the tolerable limits of public employee strikes entirely to the courts. In *SEPTA v. Transport Workers of Philadelphia,*[86] the question of whether a strike of municipal transportation workers was prohibited by the threat to public welfare was answered affirmatively. The court based its holding on some rather tenuous findings that the strike caused increased traffic congestion. The court said that congestion was more than mere inconvenience since it caused a distinct threat to the safety and welfare of those travelling by car as well as pedestrians. It also increased the risk of crime and fire, prevented the aged from obtaining required medical assistance, and markedly interfered with the operation of job training programs, the school system, and the economic welfare in general.[87] Under the rationale of the court in *SEPTA*, few if any public sector strikes will be held to be protected under the new state law.

While various state laws indicate that the solution to the strike problem is not easily arrived at, the Canadian experience indicates that a solution is not impossible. Under the Canadian law covering public employees,[88] the exclusive bargaining agent is required, at the inception of the bargaining relationship, to decide which of two paths the relationship will follow:

1. Binding arbitration (with no right to strike) or;
2. Conciliation with the right to strike.

If the latter alternative is chosen, certain employees whose jobs "consist in whole or in part of duties, the performance of which at any given time or after any specified period of time is or will be necessary in the interest of the safety or security of the public"[89] are forbidden to strike. These employees are chosen, within twenty days of the decision on the conciliation alternative, by the employer, whose decision becomes final if no objection to it is filed. In the event of such an objection, the Public

86. 77 L.R.R.M. 2489 (1971). *But see* Hazelton Area School District v. Education Assoc., 2 CCH State Lab. Cases ¶ 52,684 (Pa. Comm. Pleas 1971).
87. *Id.* at 2489-90.
88. Public Service Staff Relations Act, CAN. REV. STAT. c. 72 (1967).
89. *Id.* c. 79.

Service Staff Relations Board (PSSRB) established by law, holds a hearing to decide the matter. The PSSRB also provides accurate wage cost data to facilitate the factual side of negotiations.

This program has met with fairly good success. As of March 31, 1970, only 7.5% of the workers had opted for the conciliation route.[90] These employees represented only fourteen of one hundred fourteen units. Of the fourteen, only once has there been a strike, while of the other one hundred, 70% of the disputes which had arisen had been settled without arbitration.[91]

The decision whether to grant the right to strike in the public sector, of course, is ultimately a value judgment which may depend upon local political and economic considerations. The more challenging and ultimately more productive approach to the problem, however, is to attempt to diagnose and treat the causes as well as the symptoms. This means establishing devices which will settle bargaining controversies in a manner which is fair to both sides and which will eventually obviate the need for strikes. Thus, the need for useful impasse resolution schemes is evident. An examination of some of the existing state schemes for impasse resolution may indicate the range of choices available.

Most states, lacking any comprehensive labor relations statute for the public sector, make no provision for impasse resolution devices. When states do make such a provision, the most popular choice has been a combination utilizing both mediation and fact-finding. The model statute for such devices is the law in Wisconsin.[92] This statute provides for voluntary arbitration of disputes "over the interpretation and application of the contract."[93] As to interest disputes, the law provides for meditation plus fact-finding which may be invoked at the initiative of either party once an impasse is reached,[94] and provides that the criteria for fact-finders shall include:

> [T]he logical and traditional concepts of public personnel and merit system administration concepts and principles vital to the public interest in efficient and economical governmental administration.[95]

90. ARTHURS, COLLECTIVE BARGAINING BY PUBLIC EMPLOYEES IN CANADA 34 (1971). Even if one extracts the 27,500 postal workers, by far the largest single component of Canada's public service, the percentage still remains at 25%.
91. *Id.* at 39-40.
92. WIS. STAT. tit. 13, ch. 111, §§ 111.80-.94 (1969).
93. *Id.* § 111.86.
94. *Id.* §§ 111.87-.88.
95. *Id.* § 111.88(2).

Michigan also has a general scheme calling for fact-finding plus mediation for public employees.[96] In addition, Michigan has a compulsory arbitration statute covering all of the state's police and fire workers.[97] Arbitration may be invoked by a request of either party to the PERB thirty days after submission of the dispute to mediation and fact-finding. If arbitration is ordered, it is held before a three man panel with the neutral chairman selected by the other two members of the board (who are chosen by the parties). Standards for the arbitrators are extremely broad, including the financial ability of the employer, the cost of living, and comparable wage/hour data. An award is final, binding, and enforceable in court.

The results of the Michigan experiment have been encouraging. Since 1969, there have been few reported fire or police strikes. It would not be surprising to witness a general trend towards compulsory arbitration in the public sector. The Michigan experience, and particularly the fact that the law is so highly valued by public employees, indicates that arbitration may be one of the more promising alternatives to the public sector strike.

A more creative approach, utilizing a combination of devices rather than just arbitration, is reflected in the Hawaii statute. That law encourages parties to settle their own disputes, and indeed exhorts them to fashion impasse resolution devices of their own choosing.[98] However, the statute also provides that either party may call upon the PERB for help.[99] If the PERB determines that an impasse exists, mediation may be ordered within three days. If the dispute continues more than fifteen days after the finding of impasse, the board may appoint a fact-finding board, which must report with recommendations within ten days of its appointment. If the dispute then continues more than thirty days after a finding of impasse, the parties may mutually agree to arbitration, which is final. However, if no arbitration agreement is reached, the parties "shall be free to take whatever lawful action [they deem] necessary to end the dispute,"[100] 60 days after the fact-finding recommendations are published.

More highly structured, and perhaps more ingenious, are the impasse resolution procedures established by New York's Taylor Act. While the

---

96. MICH. COMP. LAWS ANN. §§ 423.201-.216 (1967).
97. *Id.* §§ .231-.247.
98. HAWAII REV. LAWS tit. 7, ch. 89, § 11(a) (Supp. 1971).
99. *Id.* § 11(b).
100. *Id.* § 11(c).

law grants authority to employers to participate in voluntary and binding interest arbitration, and encourages the parties to establish their own modes of dispute settlement,[101] it also provides that the PERB may take the initiative in an impasse situation and order mediation to begin with.[102] If the dispute is not settled, a fact-finding board may be appointed to hold hearings and, if the dispute continues, make and publish recommendations.[103] If the dispute persists, the PERB may make further recommendations or otherwise assist in voluntary arbitration.[104] Finally, if all else fails, a legislative hearing may be held and the dispute resolved by the outcome of that hearing.[105]

As these widely divergent models indicate, the most effective approach to the problem of public sector bargaining is likely to turn on local conditions, such as intergovernmental structure and methods of funding various programs. This makes it impossible to offer a detailed public sector model of general applicability. It is possible, however, to recommend a broad framework which can be adapted to local conditions. This framework should include:

1. A state agency charged with administering the state's public sector act. The role of the state agency is essential as it creates a coherent and uniform body of law and, in addition, makes labor relations experts available to municipalities that need (and otherwise would not have) them.
2. The state agency should have some latitude of choice of procedures to use in an impasse situation. This will introduce some uncertainty into the post-impasse process, and make reliance on the bargaining process itself more appealing. It will also tend to insure that the appropriate device is matched with the proper dispute.
3. Whatever impasse resolution devices are adopted, a limited right to strike should be granted to public employees engaged in non-essential services. The right to strike has become a fundamental part of the American labor movement and, both for psychological and economic reasons, it should not be abridged without cause. In non-essential services, a strike may be inconvenient (but certainly no more inconvenient than a strike by electrical or telephone company employees). This inconvenience should not produce a perversion of the political process and the public outcry over such a strike should not be

101. N.Y. Civil Service Law § 209(2) (McKinney Supp. 1971).
102. *Id.* § 209(3)(a).
103. *Id.* § 209(3)(b)(c).
104. *Id.* § 209(3)(d).
105. *Id.* § 209(3)(e).

critical, if by definition, the services are non-essential. Indeed, such a strike may be needed by this class of employees to make their demands heard in a political arena besieged by a plethora of organized interest groups. Such a strike is not likely to disrupt the government process any more than the pressure of a lobby, to which it may be likened.

4. Useful impasse resolution procedures must be developed to deal with unsettled negotiations disputes involving employees engaged in essential services—where the strike proscription has some validity.
5. The few states which to date have failed to adopt meaningful and comprehensive legislation dealing with public sector labor relations (resulting in muddled patterns of labor law in the public sector) must be goaded into action. Public sector unionism is here to stay and every state must now be prepared to address the problem with legislative sophistication, tolerance and imagination.
6. The most prevalent "trend" in public sector labor relations thus far has been the variety, indeed the patchwork, of legislative and judicial responses to the problem. There has been no uniformity of solution but this in itself may be a positive development. As Justice Holmes so aptly said, "The life of the law has not been logic; it has been experience." The greater the variety of approaches tried, the greater will be our chance to find useful solutions to the problems raised by public sector labor relations.

DUQUESNE LAW REVIEW

Published by Students of the Duquesne University School of Law, Pittsburgh, Pennsylvania

SINGLE COPY, $2.50

BOARD OF EDITORS

J. STEPHEN KREGLOW
Editor-in-Chief

CHARLES W. KENRICK
Article Editor

HENRY S. PERKIN
Comment Editor

ROSS WEISS
Recent Decisions Editor

MARCIA I. LAPPAS
Book Review Editor

CHARLES J. FONZONE
Managing Editor

ASSOCIATE EDITORS

JANICE I. GAMBINO
JOSEPH B. GREEN
ROBERT W. MCCLURE
M. LAWRENCE SHIELDS III

STAFF

RICHARD F. ANDRACKI
PAUL F. BARCHIE
WILLIAM C. BARTLEY
BART M. BEIER
KAREN J. BERNAT
THOMAS C. BLACK
FRANK L. BRUNETTI
RICHARD D. CARLETON
NORMAN K. CLARK
JOY FLOWERS CONTI
JAMES E. DUNN, JR.
EUGENE M. FIGNAR
MARK L. GLOSSER
WILLIAM H. HAUSER
JOSEPH F. HMEL, JR.
DANIEL JOSEPH
JOSEPH P. KELLY
ALAN C. KLEIN
THOMAS A. KOZA
JOHN K. LEWIS
RICHARD D. LINDERMAN
BERNADINE MEYER
JAMES R. MILLER
RONALD C. MOKOWSKI
WALTER J. ORZE
ERIC R. PEARSON
LAWRENCE S. POPE
JOHN J. REID
JAMES L. ROSS
THOMAS M. SCHULTZ
SIDNEY SOKOLSKY
RONALD M. STEIN
RICHARD A. STOLTZ
RICHARD I. THOMAS
FRANCIS R. TUNNEY, JR.
FRED W. VEIL
DENNIS L. VERALDI
JOSEPH E. VOGRIN III
JOHN E. WALL
MARK A. WILLARD
MARK J. ZOVKO, JR.

CORNELIUS F. MURPHY, JR.
Faculty Advisor

MARIANNE LENTZ
Business Secretary