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A Definitional Problem with the Pennsylvania Public Employe Relations Act: "The Employer"†

BACKGROUND OF ACT 195

For many years, beginning with the New Deal, *private* labor-management disputes have been subject to collective bargaining.¹ The public sector, and public employes, however, did not share such a luxury. Public employes were specifically excluded from federal collective bargaining protections.² The rationale underlying the exclusion of public employes from collective bargaining protections was premised on the belief that recognition of, and consultation with, public employe bargaining units would be inconsistent with the concept of sovereignty of the state, and the state as a non-profit employer.³

With the election of President Kennedy, who was heavily supported by labor, the formal position of sovereignty of the state as paramount over any rights public employes might wish to assert as to that sovereign, began to be abandoned. The first step taken in giving the federal employes some semblance of the rights, which private employes had attained under the Wagner Act of 1935 was taken in the Kennedy administration, when an executive order⁴ which allowed a small amount of representative power to be given to public employe unions, was put into effect. The trend of broadening these rights has continued through the administration of President Nixon with the issuance of another executive order⁵ broadening the effects of the original one.

Public employes on the state and local level, seeing collective bar-

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1. Section 7 of the National Labor Relations Act states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining

29 U.S.C. § 157 (1973).

2. *Id.* § 152(2) states:

The term "employer" includes any person acting as an agent for an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof

By excluding the public employer from federal protections, the public employe was effectively denied protection.

3. Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 460 (1971).

4. *Id.* See Exec. Order No. 10,988, 3 C.F.R. [1959-63 Comp.] 521 (1964).

5. See Exec. Order No. 11,491, 3 C.F.R. 510 (1971).

Comments

gaining breakthroughs on the federal level, began to clamor for collective bargaining rights. Until this point in time the only function served by local public employe groups⁶ was that of a sounding board as to the feelings of employes. This status of local employe groups varied widely throughout the country in direct proportion to the political strength of the membership and local attitudes toward administration of these groups. Groups were consulted on a limited basis with respect to grievances, but mere consultation without the power to force the employer to be receptive to their views was meaningless. The local public employes viewed the federal scene, saw the collapse of the sovereignty of the federal government argument, analogized their plight to the federal employes, and saw very little difference in their situation. It is not surprising that state and local governments followed the federal lead in providing collective bargaining protections to their employes.⁷ It should be noted that pre-dating action on the federal scene, some state legislatures had recognized the public employe problem and made provisions for it. An example of this is the State of Michigan's passage of public employe legislation in 1947.⁸ This statute gave public employes a forum from which they might collectively bargain as to grievances.⁹ Although this statute was far ahead of its time, it lacked the crucial element of the right to strike¹⁰ to reinforce the collective bargaining protections given; yet, it was clear that at least one state legislature had seen and attempted to deal with the problem.

Pennsylvania's protections for public employes did not come until 1970. The protections came in the form of the Pennsylvania Public Employe Relations Act.¹¹

ACT 195¹²

With the passage of Act 195, Pennsylvania public employes¹³ were given for the first time, the right to collective bargaining concerning

6. Reference is made to "employe groups" rather than unions, or units. Under the National Labor Relations Act these groups were not recognized as legitimate representatives of public employes.

7. See Tate, *Public Employees' Right to Strike*, 39 PA. B. ASS'N Q. 527 (1968). This article is based on an address by Mayor James H. J. Tate, then mayor of Philadelphia. The address was delivered to the Federal Bar Association's Conference on Public Unionism, March 28, 1968.

8. MICH. STAT. ANN. §§ 17.455(1)-(16) (1968).

9. *Id.* §§ 17.455(10)-(11).

10. *Id.* § 17.455(2).

11. PA. STAT. ANN. tit. 43, §§ 1101.101-.1602 (Supp. 1973). The Public Employe Relations Act is also referred to as Act 195 because it was Pennsylvania Pamphlet Law 195 of 1970. In this comment it will be referred to as either Act 195 or the Act.

12. *Id.*

13. When reference is made to public employes in this comment, it is exclusive of

disputes¹⁴ and were given a limited right to strike.¹⁵ The Act says that public employers¹⁶ must enter into collective bargaining with public employes.¹⁷ The two definitional sections of "employer" and "employee" seem to delineate fairly accurately who may be considered as an employer or employe under Act 195, but as will be shown in this comment, the legislature has left such a gap in definition as to make these provisions meaningless, and therefore useless.

Although Act 195 is relatively new and many sections of it have not as yet been construed by the courts,¹⁸ the Act has undergone some judicial scrutiny and scholastic comment. A brief examination of the sections which have received some interpretation may be helpful in providing a general skeleton of the Act.

Act 195 sets up the Pennsylvania Labor Relations Board as a sort of "mini" National Labor Relations Board. The Pennsylvania Board's main tasks now relate to public employe disputes because most of the private disputes fall within the jurisdiction of the National Labor Relations Board. This is the result of the policy of federal preemption in

police and firemen. Act 195 specifically excludes police and firemen who are covered under a separate act. See PA. STAT. ANN. tit. 43, § 1101.301(2) (Supp. 1973). Police and fire employes are provided for in the Collective Bargaining by Policemen or Firemen Act, PA. STAT. ANN. tit. 43, § 217.1 (Supp. 1973) [hereinafter referred to as Act 111]. This Act gives the right of collective bargaining to police and fire employes, but substitutes binding arbitration for the right to strike. *Id.* § 217.7.

14. PA. STAT. ANN. tit. 43, § 1101.101 (Supp. 1972). Section 1101.101 confers the general right of collective bargaining by requiring public employers to bargain with their employes. Section 1101.710 says that such collective bargaining will encompass wages, hours and other terms and conditions of employment. This section also says collective bargaining will take place as to the collective bargaining agreement and any questions which may arise under it. Section 1101.702 sets out matters not subject to collective bargaining but this section has limited importance within the context of this comment.

15. *Id.* §§ 1101.1001-1010.

16. *Id.* § 1101.301(1). Public employer is defined by this section as follows:

"Public employer" means the Commonwealth of Pennsylvania, its political subdivisions including school districts and any officer, board, commission, agency, authority, or other instrumentality thereof and any nonprofit organization or institution and any charitable, religious, scientific, literary, recreational, health, educational or welfare institution receiving grants or appropriations from local, State or Federal governments

Id.

17. *Id.* § 1101.301(2) defines public employe as follows:

"Public employe" or "employee" means any individual employed by a public employer but shall not include elected officials, appointees of the Governor with advice and consent of the Senate as required by law, management level employes, confidential employes, clergymen or other persons in a religious profession, employes or personnel at church offices or facilities when utilized primarily for religious purposes and those employes covered under . . . [Act 111]

Id. (emphasis added).

18. It should be noted that the reason that the Act has not been the subject of a great deal of judicial scrutiny is that most cases are settled prior to the entire appellate procedure being exhausted. The relevant appellate review and procedural sections of the Act can be found at PA. STAT. ANN. tit. 43, §§ 1101.1501-1505 (Supp. 1973).

matters which fall within the NLRB's jurisdiction. However, some cases have interpreted the powers and duties of the Pennsylvania Board as set out in Act 195.¹⁹ There has been judicial²⁰ as well as law review commentary²¹ on the appropriateness of the bargaining unit provision of the Act. The Act has also produced litigation as to the various strike provisions enumerated.²² Certain disputes have arisen and determinations have been made that given issues were not proper subjects for bargaining.²³

Act 195 is closely modeled after the National Labor Relations Act and other national labor legislation currently in force.²⁴ Pennsylvania decisions²⁵ interpreting provisions modeled after the national legislation conform closely to federal decisions in the area. One problem which has arisen is in the Pennsylvania legislature's attempted definition of the term employer. It has attempted to adopt the definition of employer under the National Labor Relations Act,²⁶ however when applied to the peculiarities of the Pennsylvania political system, the definition under Act 195 loses its intended useful effect. A hypothetical problem may be illustrative of the problem of applying the current Act 195 definition of employer to the reality of one phase of the Pennsylvania political system.

THE HYPOTHETICAL PROBLEM

Assuming arguendo, the following situation were to arise, the current body of law, and the Act itself, would be insufficient to give a conclu-

19. See *Get Set Organization v. Philadelphia Fed'n of Teachers*, 446 Pa. 174, 286 A.2d 633 (1971).

20. *Id.* See *Service Employees Int'l Union v. Lackawanna County Comm'rs*, 73 Lack. J. 1 (Pa. C.P. 1972).

21. See Comment, *Determination of the Bargaining Unit Under the New Pennsylvania Public Employe Relations Act*, 75 DICK. L. REV. 490 (1970).

22. See, e.g., *School Dist. v. Scranton Fed'n of Teachers*, 445 Pa. 155, 282 A.2d 235 (1971); *Armstrong Educ. Ass'n v. Armstrong School Dist.*, 5 Pa. Cmwlth. 378, 291 A.2d 120 (1970); *South Allegheny School Dist. v. South Allegheny Educ. Ass'n*, 55 Pa. D. & C.2d 94 (C.P. Alleg. Co. 1971).

23. *AFL-CIO v. Shapp*, 443 Pa. 527, 280 A.2d 375 (1971).

24. The National Labor Relation Act, 29 U.S.C. §§ 151-88 (1973) (popularly known as the Wagner Act), was approved on July 5, 1935. Twelve years later this statute was amended and supplemented by the Labor Management Relations Act of 1947 (popularly known as the Taft-Hartley Act), 29 U.S.C. § 141 (1973), passed on June 23, 1947, over presidential veto. Other relevant national labor legislation came into law in 1959 with the passage of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 (1973).

25. See cases cited in notes 19-23 *supra*.

26. See 29 U.S.C. § 152(2) (1973), for the definition under the National Labor Relations Act of the term "employer."

sive answer to the problem posed. The hypothetical is quite simply: What would be the result if common pleas court employes²⁷ sought to organize and be represented by a bargaining unit? With whom would the duly elected bargaining unit bargain? Would the county commissioners, as the executives who "pay" these employes be the employer, or would the local judiciary be considered the employer for purposes of Act 195?²⁸ Given the definition the Pennsylvania legislature has chosen to enact, it is the contention of the author of this comment that no definitive answer, *i.e.*, one logically and legally sound, can be reached given the present state of the statute.

As yet, the courts of Pennsylvania have not resolved this problem, but an examination of problems inherent in such a determination will prove useful.

A PREFATORY NOTE: WHO WILL HEAR THE ISSUE?

One interesting point which should be noted before any analysis of the merits of arguments of who is the public employer under the Act, is a jurisdictional point. Litigation such as that posed by the hypothetical will entail the president judge of common pleas court bringing an action against the county commissioners involved, but it could arise in the opposite manner with the commissioners as the initiating party. There exists an inherent problem in such litigation each time a judge is both a party and interpreter of the law. It can be argued that under the new judicial article of the Pennsylvania constitution,²⁹ that it is within the power of the Supreme Court of Pennsylvania to appoint a judge of common pleas from another judicial district³⁰ to hear the ac-

27. The "employes" referred to in the hypothetical problem are employes in the offices of the prothonotary, clerk of courts, register of wills, register of deeds as enumerated in PA. STAT. ANN. tit. 16, § 4301 (1956). Employes as used in this article will also include stenographers and tipstaves as enumerated in PA. STAT. ANN. tit. 16, § 4422 (1956).

28. Examples will be given in the sections on the judiciary and county commissioners as to appointment and payment *infra*.

29. PA. CONST. art. V.

30. *Id.* § 10(a) provides:

The Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace, including authority to temporarily assign judges and justices of the peace from one court or district to another as it deems appropriate.

Id. § 10(c) provides:

The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions

Comments

tion, and by doing so relieve any prejudice which might have existed if the judges of the county involved also sat as interpreters of the law. However, this argument is somewhat undermined by the very fact that the judicial articles function seems to have been to create a "unified judiciary," *i.e.*, a system in which local courts are not local functionaries with independent interests from other courts throughout the Commonwealth.³¹ Rather local courts were conceived to be totally interrelated to the central judiciary, with the supreme court as overseer.

Given the fact that all local courts can be said to have the same interests under a unified judicial system, the interest of a local judge in being designated as employer under Act 195 is necessarily equal to that interest of another judge who might be appointed from another judicial district. Therefore, the visiting judge would still not be divorced from his colleague, and prejudice to the opposing party would still ensue.

This problem is further magnified in that there would be no way for this cause of action to be heard in a federal court.³²

It should be noted that cases have been heard in state court where the

or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

31. *Id.* § 1 states:

The judicial power of the Commonwealth shall be vested in a *unified judicial system* consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in *this unified judicial system*.

Id. (emphasis added). See PA. R. JUD. ADMIN. 503 (explanatory note). This explanatory note attempts to justify the supreme court's overall power as to staffing of the "entire" Pennsylvania judicial system but is also relevant to show that article V of the Pennsylvania constitution did indeed attempt to create a "unified judiciary" in the Commonwealth. The note provides:

This rule is intended to establish the principle that *district court administrators are not local county functionaries, but they are an indispensable arm of the new central court administration apparatus* mandated by the Judiciary Article with a view to the coordinated management of all courts as part of a single system. Although this result is obvious from even a superficial analysis of the Judiciary Article [particularly the reference to "staff" in section 10(c)] and its history, resistance by county officers requires that this clarification take the form of a Supreme Court rule rather than by legislation.

Id. (emphasis added). For a good explanation of rule 503, and the necessity for its formulation in Pennsylvania see Meyer, *Court Administration in Pennsylvania*, 11 DUQ. L. REV. 463, 474-75 (1973). See also *In re Smith's Estate*, 442 Pa. 249, 275 A.2d 323 (1971), for the general proposition that Pennsylvania does indeed have a unified judicial system.

32. There is no basis for diversity jurisdiction nor is there a substantial federal question. Therefore, federal courts would have no inherent jurisdiction to hear such an action. This would appear to be a purely state court issue.

judiciary was a party,³³ but this does not justify the ensuing prejudice to the opposing party which is manifest in a system where a unified judiciary exists. The choice facing the Pennsylvania judiciary is not an easy one. If a forum is to be provided at all it must be the state court, yet the hearing of such an action could indeed be violative of the commissioners right to due process in that it seems fundamentally unfair to have an adversary sit as judge under a unified judicial system. Only litigation of this issue will produce an answer to this problem and the fate of the definitional problem of the employer under Act 195 may hinge on its outcome. If and only if this problem can be surmounted, the judiciary and commissioners will present the following arguments as to why they should be the employer for Act 195 purposes.

THE JUDICIARY'S POSITION:
THE ONE WHO "APPOINTS" THE EMPLOYEE
IS THE EMPLOYER

The position of the judiciary in seeking to be considered as the "employer" of persons rendering services to them is grounded on statutory, constitutional, and caselaw arguments.

The first argument is that the statutory law concerned "clearly" shows that the judiciary is the employer under Act 195. The statutory law states that the judiciary has the power to *appoint* stenographers³⁴ to aid in producing official transcripts, and to *appoint* tipstaves³⁵ or constables

33. See *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 274 A.2d 193 (1971) (action in mandamus where president judge of Philadelphia Common Pleas Court sought to compel the mayor and City Council to provide the necessary funding to maintain judicial expenditures); for an explanation of *Carroll*, see 10 DUQ. L. REV. 491 (1972).

34. PA. STAT. ANN. tit. 17, §§ 1801, 1802 (1962). Section 1801 provides: The law judges of each of the several courts of common pleas, and the judges of the several orphans' courts, in this commonwealth, shall select and appoint a stenographer, or stenographers, to report all suits and proceedings in their respective courts, as hereinafter provided. Such appointees shall be known as official stenographers of the respective courts, and shall hold their positions during the pleasure of the court. Any official stenographer appointed under this act may, with the consent of the court, temporarily supply a competent assistant or substitute stenographer. Such stenographer and assistant stenographer shall be competent in the art of stenography, and, before entering upon the duties herein provided, shall make oath or affirmation, before the prothonotary or clerk of the particular court, to perform such duties with fidelity; and a copy of such oath or affirmation, signed by the affiant, shall be certified by the prothonotary or clerk administering the same, and filed of record in the proper office. *Id.* § 1801 (emphasis added).

35. *Id.* § 1861, which provides:

The judges of the several courts of this Commonwealth shall have power to appoint one or more criers for the respective court or courts, and so many tipstaves or constables as may be necessary to attend upon the courts. The said officers shall be paid

Comments

to tend to court. The judiciary may also *appoint* court interpreters³⁶ if needed, and probation officers and assistants³⁷ necessary to aid the Domestic Relations Division. In fact, an overall reading of the statutory material involved shows the judiciary does indeed have the power to *appoint* the employes with which the hypothetical problem deals. This position is further substantiated by the Pennsylvania Rules of Judicial Administration, rule 503³⁸ which states the the Supreme Court of Pennsylvania may *appoint and remove* such court employes as it deems necessary and proper to maintain the judicial system.

Therefore, any assertion by the judiciary that appointment is indeed their function is true, but the question remains whether appointment and removal of employes is tantamount to being their employer under the Act.

The judiciary's assertion that it is to be considered the employer under Act 195 is also premised on the argument that the Pennsylvania constitution article V, entitled "The Judiciary," is all encompassing as to judicial power and instrumentalities touching the judiciary. The judiciary must be independent, free from coercion by the other

by the respective county such sum for each day's attendance as the said judges shall allow,—except in districts where the compensation has been heretofore fixed or limited by law, in which case such compensation shall remain as heretofore authorized.
Id. (emphasis added).

36. *Id.* § 1875, which provides:

The court of *common pleas of each county is authorized to employ* such number of interpreters and in such languages as the court may deem necessary for the proper transaction of its business. Such interpreters may be removed by the court at any time. *Any interpreter so appointed shall*, when required, act as interpreter in any court of the county, and shall receive out of the county treasury such annual or per diem compensation as the appointing court shall fix

Id. (emphasis added).

37. PA. STAT. ANN. tit. 62, § 2043.34(b), which provides:

A probation officer, together with such assistants as may be necessary, *appointed by the court*, shall be in charge of the Domestic Relations Division, for the purpose of processing the complaints filed and making effective the orders of support entered. Said probation officer shall keep an account of all orders made by the court and a record of all payments made thereunder and shall bring promptly to the attention of the court and the district attorney any default in compliance with the court's order. The probation officer shall make an annual report to the court of the full activity of the Domestic Relations Division.

Id. (emphasis added).

38. PA. R. JUD. ADMIN. 503, which provides:

(a) The Supreme Court may *appoint and remove* such Deputy Court Administrators of Pennsylvania and such district court administrators and other personnel of the system as may be necessary and proper for the prompt and proper disposition of the business of all courts and justices of the peace.

(b) Subject to any inconsistent orders of the Supreme Court or the Judicial Council, the Court Administrator may *appoint and remove* such Deputy Court Administrators of Pennsylvania, district court administrators, and their staff, as are authorized for the system.

Id. (emphasis added).

branches. The argument continues that any designation of the executive or legislative branches as employer of basically judicial employes would violate the time honored principle of separation of powers contained in the Pennsylvania constitution and subject the judiciary to possible coercion from the other two branches.

This separation of powers argument is a weighty one and deserves scrutiny. There is, however, no reference in the Pennsylvania constitution which specifically refers to the separation of the branches.³⁹ But "judicial interpretation" of the constitution has held that in order to maintain independence between the branches some idea of separation of powers must be recognized.⁴⁰ Legal writers have also come to the same conclusion.⁴¹ There have been many cases holding that this inherent separation of powers prevents one branch from usurping another's function.⁴²

In summary, the judiciary's constitutional argument seems sound and would be one factor weighing heavily in any determination as to whether the courts are employers under Act 195. An independent judiciary is a cornerstone of American government and if it can be shown that not elevating the judiciary to the status of employer would indeed allow the executive and legislative branches to coerce the judiciary, the Pennsylvania Labor Relations Board, and courts themselves, would undoubtedly find the courts to be the employer of judicial employes.

A strong argument and perhaps a possible direction of Pennsylvania courts on this issue, can be found in recent caselaw. The case most directly affecting the issue is *Carroll v. Tate*.⁴³ As previously stated in the prefatory note to this comment, this case concerned an action in man-

39. See Nutting, *Delegation and Separation of Powers*, 21 U. PITT. L. REV. 163 (1959). See generally *Wilson v. Philadelphia School Dist.*, 328 Pa. 225, 195 A.90 (1937).

40. *Stander v. Kelley*, 443 Pa. 406, 25 A.2d 474 (1971); *Wilson v. Philadelphia School Dist.*, 328 Pa. 225, 195 A.90 (1937); *Bailey v. Waters*, 308 Pa. 309, 162 A.819 (1932).

41. See Brownell, *Separation of Powers: Executive and Legislative Branches*, 60 DICK. L. REV. 1 (1955); White, *Disturbing the Balance*, 85 U. PA. L. REV. 678 (1937).

42. *United States v. 15.3 Acres of Land*, 154 F. Supp. 770 (M.D. Pa. 1957) (the ascertainment of just compensation in an eminent domain proceeding is a judicial rather than legislative function); *Cannon v. United States*, 45 F. Supp. 106 (E.D. Pa. 1941), *aff'd*, 128 F.2d 452 (3d Cir. 1942) (held that courts have nothing to do with purely legislative matters of public finance); *In re Moore*, 447 Pa. 526, 291 A.2d 531 (1972) (statutory requirement that hearings on objections to nominating petitions be held within ten (10) days of the last allowable day for filing nominations was held to be an encroachment on the judicial function); *Leahey v. Farrell*, 362 Pa. 52, 66 A.2d 577 (1949) (legislature has no affair in the administration of the courts); *Appeal of Ervine*, 16 Pa. (4 Harris) 256 (1851) (legislature cannot encroach on the judicial function).

43. 442 Pa. 45, 274 A.2d 193 (1971).

Comments

damus to compel a city council to deliver funds necessary to carry on the judicial function. The argument of the judiciary will likely be that the ability to maintain an independent judiciary is just as much dependent on receiving sufficient funds as it is being classified as employer of employes rendering services to the courts. Whether the judiciary is coerced directly through its purse or directly via its employes is of little consequence. Coercion of any type would be intolerable.

In *Carroll*, the Supreme Court of Pennsylvania viewed the financial maintenance of the judiciary problem. An examination of this case, therefore, may shed some light on how the court might rule as to the employer status of courts. The majority in *Carroll* stated that the judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities if it is to be in reality a coequal independent branch of the government.⁴⁴ The majority continued by citing a brief passage from *McCulloch v. Maryland*,⁴⁵ which may have reflected the court's overall philosophy as to the problem, when it said the power to tax involves the power to destroy. A legislature has the power of life and death over all courts and over the entire judicial system.⁴⁶ With this thought in mind, the majority in *Carroll* had little difficulty in holding that the courts must possess sufficient facilities to cause the legislature to accede to reasonable financial demands. If the courts lacked this power of self-perpetuation, they would be lost. In a separate concurring opinion, Judge Pomeroy advanced another reason for holding that the judiciary must have the inherent power to maintain itself by having access to reasonable financial resources. He stated that with belief, faith, and reliance in the judiciary already at a low, if the court were to be given insufficient funds such public trust would almost vanish.⁴⁷

Given the tenor of the court in *Carroll*, it seems the defense of the judiciary of coercion by finance, as in *Carroll*, or coercion by employment as in the hypothetical, may receive ready acceptance by the Supreme Court of Pennsylvania. The citing of *Carroll* by the judiciary in its quest to be designated employer over the employes in question will indeed carry a great deal of weight.

44. *Id.* at 52, 274 A.2d at 197.

45. 17 U.S. (4 Wheat.) 316 (1819).

46. 442 Pa. at 57, 274 A.2d at 199.

47. *Id.* at 62-63, 274 A.2d at 200 (Pomeroy, J., concurring).

THE COUNTY COMMISSIONERS' POSITION:
WE PAY, WE EMPLOY

The position of the county commissioners⁴⁸ in such a dispute can be phrased quite readily. The entity who *pays* the employes is the employer under Act 195.⁴⁹ This position seems quite tenable since one normally feels that the person paying the employe is really an employer. Therefore, the questions arise as to what is meant by *payment*, and do the county commissioners truly *pay* these employes?

Under the county commissioners' system, the commissioner has a dual role in serving in a legislative and executive capacity.⁵⁰ Therefore, when payment is made to employes, two possible meanings of payment can be inferred. The first is that payment is made when the physical task of paying occurs. The second is that payment occurs when the monies necessary are appropriated.

If payment is taken to mean the department actually disbursing the pay checks, then the county commissioners are incorrect in saying that they pay the employes, because this function is handled by the county controller.⁵¹ If payment is taken to mean the party signing or authorizing signature of the payroll checks, again the county commissioners are in error saying that they, in fact, make payment. This task is handled by the county treasurer or his agent, the paymaster.⁵² Therefore, the only tenable definition of payment left open to the commissioners is

48. When the term county commissioners, or cites to employe sections, are used in this comment, citations are to the second class county code, PA. STAT. ANN. tit. 16, §§ 3101-6302 (1956). Parallel citations to the county code and third class county code have been omitted.

49. Interview with David Donahoe, Secretary to the County Commissioners of Allegheny County, in Pittsburgh, Sept. 13, 1973 [hereinafter referred to as the Donahoe Interview].
50. See PA. STAT. ANN. tit. 16, §§ 501, 3501-09 (1956).

51. *Id.* § 4950. This reference to the county controller actually disbursing funds is taken from the Donahoe Interview note 49 *supra*, and is the case in Allegheny County. Most counties in Pennsylvania handle disbursements in this fashion. But ten years ago this function was carried on by the commissioners and to a limited extent in some counties may still be the practice. The change to the controller disbursing payments was made because of the controller's access to computerized methods of disbursing payrolls, and it was felt that the function would be more appropriately and efficiently done by the controller. The switch was made by *agreement* rather than by *statute*.

52. *Id.* § 4953 provides:

The treasurer shall pay no money out of the county treasury except on warrants drawn by a majority of the commissioners and countersigned by the controller. He shall cancel all warrants, when paid, by distinctly spearing or cutting them, and shall deliver such warrants to the controller who shall also cancel the same. He shall report daily to the controller all monys paid out by him, giving the number of the warrant and the party to whom paid. All outstanding warrants issued before the controller enters upon the duties of his office shall be presented to him as other claims against the county.

Comments

that of appropriating⁵³ the funds used for payment. The mechanics of the appropriation process require that the commissioners draw a warrant on the treasurer,⁵⁴ but this formality in no way lessens the fact that appropriation would be tantamount to payment.

Assuming arguendo, that appropriation is indeed the same as payment, a question still exists as to whether the existence of salary boards,⁵⁵ which determine salaries in given situations, weakens the

53. Appropriation of necessary county salaries is provided for in PA. STAT. ANN. tit. 16, § 4980 (1956), which provides:

The fiscal year of the county shall begin on the first day of January and end on the thirty-first day of December of each year. On or before the first day of February of each year and at least thirty days prior to the adoption of the annual budget, the controller shall transmit to the commissioners a proposed budget giving a detailed estimate of and for the legitimate purposes of the county for the current year, including interest due and to fall due on all lawful debts of the county bearing interest. *Such budget, when finally adopted by the commissioners, shall be the guide to the commissioners in fixing the tax rate.* Said budget shall be prepared as provided therein. The commissioners shall, at the same time the budget is adopted, fix such rate of taxation upon the valuation of the property taxable for county purposes as will raise sufficient sum to meet the said expenditures. The commissioners shall not, by contract or otherwise, increase the expenditures of the county in any year to an amount beyond the taxes assessed as aforesaid for said year.

Id. (emphasis added).

54. *Id.* § 4951 provides:

The commissioners shall draw no warrant on the treasury for any debt, claim or demand whatsoever not audited and approved by the controller, as provided for in the foregoing section, except for the fees of jurors, witnesses, criers and tipstaves of the several courts of the county. The amount of said fees shall be ascertained by said courts and entered on the records thereof and duly certified by their respective clerks to the commissioners, being first sworn to before the controller. Said certificate shall be delivered by the commissioners to the controller for preservation as soon as the warrants are issued.

Id. § 4952 provides:

All warrants drawn on the county treasury by the commissioners shall be countersigned by the controller, who shall keep a correct register thereof, noting the number, date and amount of each, the date of payment, and to whom and for what issued. The controller shall report to the commissioners monthly, or oftener if required by them, the amount of outstanding warrants registered and the amount of money in the treasury.

55. The relevant sections which relate to the salary board are PA. STAT. ANN. tit. 16, §§ 4820, 22-24, 25(c) (1956). Section 4820 provides:

The salaries and compensation of county officers shall be as now or hereafter fixed by law. The salaries and compensation of all appointed officers and employes who are paid from the county treasury shall be fixed by the salary board

Section 4822 provides:

There is hereby created in the county a salary board, which shall consist of the three individual members of the Board of county commissioners and the county controller. The chairman of the board of county commissioners shall be chairman of the salary board and the county controller secretary thereof. The Board shall meet and organize on the first Monday of January of each year.

Section 4823 provides:

The Board, subject to limitations imposed by law, shall fix the compensation of all appointed county officers, and the number and compensation of all deputies, assistants, clerks and other persons whose compensation is paid out of the county treasury, and of all court criers, tipstaves and other court employes, and of all officers, clerks, stenographers and employes appointed by the judges of any court and who are paid from the county treasury.

Section 4824 provides:

argument of the county commissioners that appropriation is equal to payment. The salary board is a creature of legislative initiative formed in an attempt to rectify certain salary problems arising in departments of the given county. The board is composed of the three county commissioners,⁵⁶ the county controller,⁵⁷ and in the case of salary disputes concerning appointees of the judiciary, the judge⁵⁸ of the court served by that appointee, is also a member of the board. The board is chaired by the chairman of the county commissioners.⁵⁹ Meetings of the board are initiated by the administrative head of the department from which the salary dispute emanates.⁶⁰ In the case of salary disputes of "judicial employes," the president judge of the court would be the initiating force.⁶¹

The board meets and does, indeed, deal with the budget. It also meets to hear adjustments needed by the various departments because departmental needs may have varied from the time of the original appropriation. These adjustment meetings are confined, however, to the limits of the budgeted amount for the year.⁶² Any adjustment made must be below the budgeted amount for that department. It should be remembered that the commissioners set the original budget.

Therefore, although the salary board may to some extent indirectly "alter" appropriations throughout the year, it cannot be said that it does so sufficiently to deny the claim of the commissioners that they "pay" because they "appropriate."

THE PROBLEM IN FOCUS

The term employer has been defined as follows: "One who employs the services of others; one for whom employes work and who pays their

At each annual meeting, the board shall revise the salary schedule so far as it shall deem such action necessary. From time to time between annual meetings, whenever required by any judge, county officer or executive head of any separate board, commission or division the number or compensation of whose deputies, assistants, clerks and employes is sought to be fixed, the board shall meet and consider and shall fix and determine the same. All salaries fixed under the provisions of this act shall be paid out of the county treasury.

Section 4825(c) provides:

Whenever the board shall consider the number or salaries of officers or employes appointed by any judge of any court, such judge shall sit as a member of the board, as long as any matter affecting any of this appointees is under consideration and no longer.

56. *Id.* § 4822.

57. *Id.*

58. *Id.* § 4825(c).

59. *Id.* § 4822.

60. *See Simon v. Allegheny Co.*, 337 Pa. 436, 11 A.2d 868 (1940).

61. PA. STAT. ANN. tit. 16, § 4825(c) (1956).

62. Donahoe Interview, note 49 *supra*.

wages and salaries.”⁶³ Act 195 defines employer only in terms of which political subdivisions, agencies, and authorities, etc., may be considered as employers without any further definition as to criteria necessary to be a public employer within the Act.⁶⁴ Thus the dilemma is made clear. By merely enumerating a list of public entities who could be employers within the meaning of the Act, and not further defining functions, such as payment or appointment etc. as criteria, the legislature left sufficient room for both the judiciary and county commissioners to present plausible, workable, definitions which are in no way contradictory to the definitional provisions of Act 195.

Both groups seeking to be employers for collective bargaining purposes fit within the Act's definition. Therefore, the trier of fact is faced with the following alternatives.

The first alternative would be an inquiry leading into some balancing of the need for an independent judiciary versus a power of the purse argument. Whatever the result of such an inquiry, neither side would be justified in calling itself the employer, given the other side's qualifications under the language of the Act. Such a result would be contra to the fundamental idea of *jus cogens*⁶⁵ in the law. The court under this approach would be relegated to the unhappy position of deciding litigant's rights in much the same fashion as it might in the situation of a true owner of property suing an innocent purchaser who purchased from a thief. Both litigants before the court are “in the right.” The judicial task is never an easy one but when confronted with this type of a determination becomes nothing more than a guessing game.

The next alternative which a court might choose is one which some writers have advanced to apply to the situation where because of failure in legislative definition the court is forced into its guessing game posture.⁶⁶ These writers have said that when a given area of law is felt to be best suited to legislative amendment rather than judicial determination, that some determination of the case should be given on the merits, but in such a manner as to effectively remand the issue to the legislature. The court, in making such a determination, throws the issue back to the political and legislative forces within the government

63. BLACK'S LAW DICTIONARY 618 (4th ed. 1951).

64. PA. STAT. ANN. tit. 43, § 1101.301(1) (Supp. 1973).

65. *Jus cogens* is a latin phrase which delineates a legal concept that there must be some idea of “fairness” in the law.

66. See generally A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); Bickel & Wellington, *Legislative Purpose And The Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

who will then feel the necessity and pressure of redefinition of the troublesome term. Thus the court in no way can be accused of judicial legislation and the desired amendment in definition occurs in what the judiciary feels is the proper forum. This "effective judicial remand" to the legislature could be accomplished by "deciding on the merits" that one party is the employer for Act 195 purposes, but included within such an opinion would be the fact that this decision is made within the present confines of the Act's definition and a statement that the definition is somewhat unclear. The court might then legitimize its decision by saying that it could have decided this problem in such a way as to judicially legislate the result it wished but it refrained from doing so. The court could then say that legislation, *i.e.*, redefinition, is a legislative function, and the judiciary has no place in such a function. The judicial function is interpretation not legislation.

Thus, the court would decide the controversy before it but make its feeling known as to the legislative definition with which it must work.

REDEFINITION BY THE LEGISLATURE

There appear to be two viable alternatives for the legislature if the legislature heeds the judiciary's call to redefine the term employer.

This first redefinitional answer should be clear by this point: add to the definition terms such as pay, appoint or similarly specific terms to further modify the definitional class of public employer scheme now within the Act.

The other alternative is somewhat more indirect and will require some background. A point not mentioned until now is that the judiciary in Pennsylvania is paid from state funds⁶⁷ while the employes, concerned, as previously mentioned, are paid by county funds.⁶⁸ It would

67. For statutory authority showing that judges are paid from state funds, see PA. STAT. ANN. tit. 17, §§ 830.26, .29-.30, .31(a) (Supp. 1973).

68. The payment out of the county treasury of the employes concerned was mentioned in the section of this comment where arguments on behalf of the commissioners were advanced. Illustrative of this point are sections on the salaries of tipstaves in counties of the first and second classes. PA. STAT. ANN. tit. 17, § 1866 (1962), states:

From and after the passage of this act, each tipstave of any county of the first class of this Commonwealth shall receive, out of the county treasury, such annual salary as the appointing court shall fix: Provided, That the salary paid shall not exceed three thousand dollars (\$3,000) per annum.

Id. (emphasis added). PA. STAT. ANN. tit. 17, § 1868.1 (1962), states:

Salaries of tipstaves in the courts of common pleas, oyer and terminer and general jail delivery, quarter sessions of the peace, County Court of Allegheny County, and orphans' courts in counties of the second class shall be fixed by the salary board of

Comments

seem that the legislature could redefine salary provisions either to include the judiciary in the county scheme or include the employes within the state salary picture. The choice of paying a state branch, the judiciary, on a local level is not a good one. Separation of powers would be a bar. The other choice of paying employes, now paid by county funds, with state funds seems a much more plausible answer.

The alternative of paying "county" employes with state funds, however, faces practical considerations which might preclude it. These practical considerations are that the Commonwealth tax base is already spread thin, and the Commonwealth would not be anxious to add employes to its payroll. Assuming that the Commonwealth would accept this alternative, certain legal points remain. Are there constitutional or statutory problems in such a change?

There appear to be no real constitutional blockades to such a course of action. In fact one provision in the local government article of the Pennsylvania constitution would seem to foster within it sufficient breadth to allow such a change. Section five⁶⁹ of that article calls for *intergovernmental cooperation* and could supply the constitutional basis for such a change. The relevant statutory sections also give weight to the argument that the Commonwealth could legally accept such an obligation. This is shown by a recent amendment as to the salaries of county stenographers and clerks which shows that the Commonwealth has indeed accepted the salary obligation.⁷⁰ There would seem to be no rational distinction between the payment with state funds of stenog-

the county at an amount not less than three thousand, one hundred forty-four dollars (\$3,144) per annum, and shall be uniform and of equal amounts.
Id. (emphasis added). PA. STAT. ANN. tit. 17, § 1875 (1962), is the corresponding salary section applying to court interpreters.

69. PA. CONST. art. IX, § 5 states:

A municipality by act of its governing body may, or upon being required by initiative and referendum in the area affected shall, cooperate or agree in the exercise of any function, power or responsibility with, or delegate or transfer any function, power or responsibility to, one or more other governmental units including other municipalities or districts, the Federal government, any other state or its governmental units, or any newly created governmental unit.

70. PA. STAT. ANN. tit. 17, § 1835 (Supp. 1973), states:

To facilitate the labors of the judges of the court of common pleas and orphans' court of the county in which the seat of government is or may be located in the disposition of the business of the Commonwealth, the said judges are hereby authorized to appoint and set the salaries of stenographers and clerks provided the cost of such help shall not exceed the sum of seven thousand two hundred fifty-eight dollars (\$7,258) per annum for each of said judges, and a like sum of seven thousand two hundred fifty-eight dollars (\$7,258) for an administrative assistant to such courts. *Such salaries shall be paid by the Commonwealth.*
Id. (emphasis added).

raphers or the payment of interpreters with county funds. The legal obstacle is far from insurmountable.

CONCLUSION

Legislative redefinition would best be served with a simple redefinition of the term employer to include criteria such as payment or appointment. The Pennsylvania legislature will be slow to reorganize the salary structure of employes within the Commonwealth. Political opposition would most probably be to keen. Also, it seems incongruous to disturb an entire salary structure just to get a desirable result as to who should be an employer for collective bargaining purposes under Act 195.

Therefore, an effective judicial remand with a redefinition to include qualifying language of the term employer seems to be the optimal solution to the problem.

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