11-20-2012

Public-Sector Unions, Public Employees: May You Live in Interesting Times

Anne M. Lofaso

Public-Sector Unions, Public Employees: May You Live in Interesting Times

Author : Anne Marie Lofaso

Date : November 20, 2012

Joseph E. Slater, Public Sector Labor Law in the Age of Obama, 87 **Ind. L. J.** 189 (2012).

In 1959, Wisconsin became the first state to grant collective-bargaining rights to its public workers. The next half-century witnessed the rise of public-sector unions. As union density declined in the private sector, it increased in the public sector such that, by 2010, 7.6 million public-sector employees belonged to a union as compared with 7.1 million private-sector union workers. Many celebrated the public-sector union as the big success story. The fortune of public-sector unions and their members seemed, however, to turn on a dime with the 2010 mid-term elections. The past two years have witnessed some of the most pernicious attacks on public employees and their unions in the past half-century. Too contrived to be ironic, among the first and most virulent of these attacks began in Wisconsin.

Here's where Professor Joseph Slater's latest article, *Public Sector Labor Law in the Age of Obama*, begins. Professor Slater tackles four big issues: (1) recent political attacks resulting in legislative changes in the context of the current economic crisis and debate over public employee pensions; (2) bargaining and legal issues created by the current economic crisis; (3) the debate over whether and to what extent certain categories of employees (specifically Transportation Security Administration employees, police, and firefighters) should have collective-bargaining rights; and (4) the Missouri state constitutional requirement that employees have a right to bargain collectively.

In Part I, Professor Slater surveys the main reasons for recent political attacks on public-sector unions, carefully separating myth from fact. Myth: Greedy public-sector unions heavily contributed to state budget shortfalls by insisting on fat pension plans for their members. Fact: Most states set their employees pension plans by statute or regulation, not by collective bargaining. Fact: Public employee pension funds only account for 3.8% of state and local spending. Fact: Many state pension plans are underfunded. Fact: Most of the contributing causes to state pension underfunding—including state politicians' having diverted state monies away from pension plans toward other projects, questionable actuarial practices, and stock market declines—were outside the control of public-sectors unions. Fact: Collective-bargaining rights are not correlated with state budget deficits.

Professor Slater also debunks the myth of the overly paid public servant, including the belief that public-sector pension plans are always too generous. According to Slater, the data reveal that most such pensions are modest and that states are increasingly cutting back on their contributions. These data must be judged in light of the fact that over one-third of all public employees are not eligible for social security. Along these lines, Slater recounts studies that have cogently contradicted the myth that public servants are over-paid. These studies, Slater explains, are more reliable because they break out categories of workers, comparing apples to apples rather than comparing private-sector janitors to public-sector lawyers. Accounting for education, experience, and other significant factors, these studies show that public servants remain undercompensated by several percentage points. This is true even when factoring in benefits, including pension plans.

Part I ends with a survey of states, most notably Wisconsin and Ohio, that have eliminated or attempted to eliminate collective-bargaining rights for public employees. In this section, Slater argues that, because such laws have no effect on budget deficits, they must be intended to harm unions as an institution.

These arguments naturally segue into Part II's review of how the current economic crisis has shaped legal and bargaining issues. Slater details interest-arbitration cases and furlough disputes based on contract clauses to highlight

the observation that public employers have been shifting the burden of budget management onto public employees.

To be sure, someone has to pay for budget deficits, which can be cut by reducing spending or increasing revenue, most notably through tax increases. Increasing revenue is difficult in a recessional era of unprecedented unemployment rates and a shrinking tax base. Blaming public employees for state budget deficits and reducing spending by cutting payroll—either by slashing public employee benefits or furloughing employees—is much more politically expedient than either tax increases or cutting popular public programs. This problem for public workers is exacerbated by the reality that most public employees cannot strike and many arbitrators have been persuaded, at least to some extent, that state governments need to cut expenses. But public officials who furlough without dialogue are taking the easy way out. Wouldn't it be better for society to have an honest dialogue that revealed that public-sector unions have no control over the budget and that to the extent that unions gained benefits for public workers they did so through bargained-for exchanges. That means that public employees gave up something, perhaps wages, in exchange for delayed compensation in the form of benefits. Parts I & II of Slater's article provide ample evidence to support such a dialogue.

Parts III and IV present several instances of the right to bargain among transportation safety employees, firefighters, police officers, and in general under one state's constitution. As Slater points out, after the 9/11 terrorist attacks, the Bush administration's newly minted Department of Homeland Security (DHS) created the Transportation Security Administration (TSA). Shortly thereafter, TSA Administrator James Loy issued an order forbidding TSA employees from engaging in collective bargaining. The stated rationale for this order was the employees' "critical national security responsibilities." This order, together with other moves by the Bush administration to decollectivize federal employees, has renewed debate over the question whether public servants in certain critical positions should be permitted to engage in collective bargaining—as a matter of public policy and of law. As of now, TSA employees are represented by the American Federation of Government Employees (AFGE) with limited collective-bargaining rights. But this, of course, could change with a change in administration.

By contrast, as Slater points out, the proposed the Public Safety Employer-Employee Cooperation Act of 2009 would have granted collective-bargaining rights to public safety officers employed by state or local governments. The proposed bill is "a substantial departure from traditional public-sector labor law. The federal government has never attempted to grant collective bargaining rights to large groups of state and local government employees." Perhaps for this reason, if passed, this bill is likely to come under constitutional challenge. Slater acknowledges that the bill is unlikely to pass, but if it did pass (and survived constitutional challenge), "this Act could be seen as a bold assertion of the importance of collective bargaining rights."

Slater lastly explores the meaning of collective bargaining by focusing on the right to bargain collectively under Missouri's constitution, which provides that "employees shall have the right to organize and to bargain collectively through representatives of their own choosing." Although originally construed as not applying to public employees, the Missouri Supreme Court recently reversed its 60-year old decision, holding that the constitutional provision does, in fact, apply to public workers. Lower courts are now exploring what it means for public workers to have such a right. Does the principle of exclusive representation apply? Apparently not. Does a system devised by the employer requiring employees in each school to select representatives and permitting the largest union to select a representative, a process the court called "collaborative bargaining," meet the requirements of collective bargaining? The court held that it did not. These cases, Slater explains, allows us to re-explore the concept of collective bargaining. Is this concept some sort of platonic ideal or is it ever-evolving to meet the challenges and circumstances of the times?

In such interesting times, perhaps the answer to that question is . . . interesting.

Cite as: Anne Marie Lofaso, *Public-Sector Unions, Public Employees: May You Live in Interesting Times*, JOTWELL (November 20, 2012) (reviewing Joseph E. Slater, *Public Sector Labor Law in the Age of Obama*, 87 **Ind. L. J.** 189 (2012)), https://worklaw.jotwell.com/public-sector-unions-public-employees-may-you-live-in-interesting-times/.