PLANTING NEW SEED IN THE GARDEN STATE: THE PUBLIC EMPLOYEE STRIKE RIGHT

> There is no right to strike against the public safety by anybody, anywhere, anytime.
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> Calvin Coolidge, 1919.[1]

> [A] strike of Public Employees manifests nothing less than intent on their part to prevent or 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.
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> Franklin D. Roosevelt, 1937.[2]

> Under no circumstances will any grievances be discussed with any government employees when they are out on an illegal strike. Any strike involving essential services by Federal employees is illegal. What is at issue . . . is the survival of a government based upon law.
>
> Richard M. Nixon, 1970.[3]

The above quotations clearly illustrate the attitude which the federal government has embraced for over a half century regarding strikes by its employees. The states, with the exceptions of Vermont,[4] Pennsylvania,[5] and Hawaii,[6] have mirrored by way of legislation or case holding, the view that all employee work stoppages, whether guised as "sanctions", "sick calls" or "blue flu" epidemics, are illegal.[7] In spite of these governmental prohibitions, public employees have nonetheless struck at an increasing rate throughout the nation, including New Jersey.[8] Since all reliable indicia point to a steady continuance, the coming years have been dubbed "the Decade of the Public Sector."[9] With this

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1 II R. HOFSTADTER, W. MILLER & D. AARON, THE AMERICAN REPUBLIC 446 (1959).

2 Letter from Franklin D. Roosevelt to the president of the Federation of Federal Employees, Aug. 16, 1937.

3 N.Y. Times, Mar. 22, 1970, at 60, col. 1; N.Y. Times, Mar. 24, 1970, at 1, col 8.

4 VT. STAT. ANN. tit. 21, § 1704 (Supp. 1970).

5 Pa. Acts 195, S.B. No. 1333 (July 23, 1970).

6 Hawaii Acts 171, S.B. No. 1696-70 (June 30, 1970).

7 Annot., 31 A.L.R.2d 1142 (1953).

8 U.S. BUREAU OF LABOR STATISTICS, DEPT. OF LABOR, BULL. No. 348, WORK STOPPAGES IN GOVERNMENT, 1958-68 (1970).

9 Davey, *Resolving of Unrest in the Public Sector: The Use of Neutrals in the Public Sector*, 20 LAB. L.J. 529 (1969); *see also* Cohany & Dewey, *Union Membership Among Government Employees*, 93 MO. LAB. REV. 15 (July 1970); *and* Goldberg, *Changing Policies in Public Employee Labor Relations*, 93 MO. LAB. REV. 5, 6 (July 1970) for statistics on the increasing number of public workers and their enrollment in unions which is giving such impetus and strength to the public employee movement.

in mind, it is of necessity that this area of labor law be critically reexamined toward the end of formulating a constructive solution that will be palatable to all concerned parties.

THE PROBLEM

Due to its many legal, political, and emotional ramifications, the question of public employee strikes does not lend itself to simple analysis. Yet proper treatment of this subject must begin with the almost naive interrogative, "Why do public employees strike?" The answer should be obvious even to the most casual observer: "For the same reasons as do private employees!" This fact seems, however, to be repeatedly discarded by many writers who suggest that somehow government workers are intrinsically different from those in the private sector. In fact, they are not. Public workers have the same mortgages, rents, food bills and other financial obligations as do their counterparts in the private sector. The difference lies in the fact that when wages, working conditions, or other employment-related factors become unreasonable, private employees can bargain collectively and, if necessary, withdraw their services in order to coerce their employers into participating in negotiations on an equal basis. Government workers do not enjoy this ability and have for years been forced to accept whatever, if any, improvements the city, county, state or federal employer was willing to dole out. As a consequence, a distinct militance has flavored recent public employee thinking and demands; they will no longer be mollified by the stale fiction that their job security compensates for lacking benefits. They see their brother laborers in the private sector eating better each year, while often providing similar or even identical services. They have become determined to get the same slice of the pie, even if it entails facing fines and imprisonment.

It is for this reason that any consideration of this subject must take cognizance of the proposition that if employees feel they are up against the wall, they will strike, regardless of legality or consequences. This is also why adamant reliance upon existent judicial remedies, such as injunction and contempt proceedings, as the answer to government's vexations should be abandoned and a viable alternative sought.

The possibility of recourse to stiffer fines and sentences for government strikers has always been a first consideration, but has never enjoyed wide support or uniform application, even when utilized. In February, 1970, the teachers of the Newark, New Jersey school system struck in a demand for higher wages. Their strike was orderly and no

violence accompanied the picketing. Yet, over 200 teachers were arrested for failing to abide by the court's restraining order, all subsequently receiving varying fines and jail sentences.[10]

Less than six months later, another public employee strike occurred within the borders of the same state. This was the two-week "sick call" staged by some 600 correction officers who normally manned the New Jersey prisons. However, in this instance it was deemed wiser to forego all chastisement and penalization. After an agreement had been reached, the governor stated that he was "delighted" at the decision of the men to return to work, and that there would be no reprisals against the striking officers.[11] This determination was made in spite of the fact that this strike occasioned "state troopers . . . [to be] ordered in to state reformatories . . . in the wake of an escape at Annandale Reformatory, a murder of an inmate at Rahway State Prison and a riot at Bordentown Reformatory."[12] The inequity is blatant. If one cannot be sure that it would even be utilized, it is most unwise to suppose that in augmented draconian penalization lies the elusive panacea. Such a policy would succeed in only exacerbating an already tenuous relationship or, as in the case of the Condin-Wadlin Law, bringing about its own demise.[13]

The fact that employees in the public sector are desirous of the benefits enjoyed by employees in the private sector does not of itself justify their implementation of the strike weapon. The causal ingredient, claims labor, which precipitates this last resort measure is a lack of good faith on the part of the employer, arising out of New Jersey policy which does not obligate public employers to bargain with their employees. The New Jersey Employer-Employee Act of 1968[14] obliges them only to "meet at reasonable times and negotiate in good faith . . . ."[15] The phrase "collective negotiations" has evolved from this statute with the specific instruction that it is not to be confused with full collective

10 Evening News (Newark, N.J.), Feb. 26, 1970, at 9, col. 1. The typical sentence was three months incarceration reduced to thirty days with one year probation; fines were as high as $500.

11 Evening News (Newark, N.J.), June 29, 1970, at 1, col. 7.

12 The Star-Ledger (Newark, N.J.), June 23, 1970, at 1, col. 6.

13 The severe penalties of New York's Condin-Wadlin Law, *e.g.*, jail sentences, fines, termination of employment, and loss of civil service status, were expected to bring an end to government strikes in that state. However, because the sanctions were so stringent, the provisions relating to punishments were rarely exercised and the law was ultimately repealed. *See* Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 952-53 n.35 (1969), *and* Weisenfeld, *Public Employees are Still Second Class Citizens*, 20 LAB. L.J. 138, 145 (1969).

14 N.J. STAT. ANN. § 34:13A-1 *et seq.* (1968).

15 N.J. STAT. ANN. § 34:13A-5.3.

bargaining and its attendant right to strike.[16] This lack of parity at the bargaining table has led government employees to feel emasculated and subject to what has been termed by one New Jersey writer as "collective begging."[17] Consequently, these employees view themselves as little more than second-class citizens laboring under a double standard which only full collective bargaining can ameliorate.

The mere existence of such a double standard begs the question, what are the salient differences between public and private employment that necessitate "less rights" to be afforded the former?[18] Labor experts have thoroughly examined this matter but the end product has been only a dichotomy and polarization of their opinions. Nonetheless, a plethora of reasons has been proffered to explain the disparate treatment given public employees. They range from the vacuous suggestion that "public servants . . . should set the good example"[19] to the three most prominent which will presently be considered.

The first is the postulation that the public sector is inherently dissimilar from the private in that, here, the political factor is juxtaposed with the economic and social of the private and resultantly relegates them to lesser positions of influence. Hence, the strike is not an appropriate weapon as it is by nature economic, and therefore does not perform the same function, threatening the employer with pecuniary loss and even bankruptcy, in the public arena as it does in the private. Moreover, in the public sector there do not exist the market restraints, trade offs between benefits and unemployment, and other factors which characterize the private, and thus, the theory goes, were strikes to be permitted in such a milieu, inordinate political power would inure to the strikers. And since comparable weaponry would be unavailable to other pressure groups acting upon the state or one of its political subdivisions, the present equilibrium would be destroyed and a distortion of the political decision-making process would ensue.[20]

16 Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409, 437-38, 262 A.2d 681, 696 (1970). This is a very significant public employment labor decision as it holds that there may only be exclusive representation of the employee unit and that each employee who did not vote for the elected representative may not choose to present his individual grievances through his own individual representative.

17 Weisenfeld, *supra* note 13, at 144.

18 Lullo v. International Ass'n of Fire Fighters, 55 N.J. at 416, 440, 262 A.2d at 684, 698 (1970).

19 *In re* Buehrer, 50 N.J. 501, 508, 236 A.2d 592, 596 (1967); *and see* Appeal of Alvah J. Gray, St. of N.J. Civ. Ser. Comm'n, March 6, 1970, at 4, where the decision centered around the question of whether Gray "maintain[ed] the appropriate degree of loyalty reasonably expected of all State employees."

20 Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*,

Conversely, it has been argued that it is futile to attempt to distinguish between economic and political power as a basis for denying public employees the right to strike,[21] and that the "economic impact of strikes in both the public and private sectors is similar on the ultimate consumer, the taxpayer in the public employees dispute and the user of product or service in the private dispute."[22] While it appears indisputable that there is truth in the assertion that the political complexion of the public arena makes it distinguishable from the private sector, it is less certain that this complexion should forever bar the strike from public employees. Rather, this should be regarded as merely an incidental distinction upon which the determination should not hinge. This being so, it would be well to place this first theory in abeyance and turn to the two major arguments which have perennially retarded the extension of the strike right and/or collective bargaining to government employees.

The first of these is the concept of sovereignty. It has been defined as "[t]he supreme, absolute, and uncontrollable power by which any independent state is governed,"[23] and has served the government well since the first public employee strike 135 years ago when workers at the Washington Navy Yard walked off their jobs in a demand for shorter hours and redress of grievances.[24] Sovereignty has lost none of its potency over the years, and the courts continue to zealously reiterate its precepts whenever the matter is sub judice. Paraphrased, sovereignty means that any challenge to government, for example, the withdrawal of services by its employees, is an attempt to control or undermine its "supreme" and "absolute" power. A good example of such thought is afforded by now Justice Nunez in *Board of Education v. Shanker*,[25] where he buttresses his statement that "[f]rom time immemorial, it has been a fundamental principle that a government employee may not strike,"[26] with those of Coolidge and Roosevelt as well as with the convictions of former Governor Dewey:

> Every liberty enjoyed in this nation exists because it is protected by a government which functions uninterruptedly. The paralysis

78 YALE L.J. 1107 (1969); Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805 (1970).

21 *See* Burton & Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418 (1970).

22 Weisenfeld, *supra* note 13, at 142.

23 BLACK'S LAW DICTIONARY 1568 (4th ed. 1957).

24 AMERICAN TEACHER, June 1970, at 2, col. 2.

25 54 Misc. 2d 941, 283 N.Y.S.2d 548 (Sup. Ct., Spec. T. 1967).

26 *Id.* at 943, 283 N.Y.S.2d at 552.

> of any portion of government could quickly lead to the paralysis of all society. Paralysis of government is anarchy . . . .[27]

Similarly, the Supreme Court of Indiana recently stated in *Anderson Federation of Teachers v. School City of Anderson*:[28]

> We thus see that both the federal and state jurisdictions and men both liberal and conservative in their political philosophies have uniformly recognized that to allow a strike by public employees is not merely a matter of choice of political philosophies, but is a thing which cannot and must not be permitted if the orderly function of our society is to be preserved. This is not a matter for debate in the political arena for it appears fundamental . . . public strikes would lead to anarchy . . . .

These opinions, that it is "fundamental" that public employee strikes will surely lead us down the path to anarchy, are blatantly anachronistic, smacking of the early fears entertained a century ago that labor unions were nothing more than criminal conspiracies.[29] As surely as the passage of time has proven this contention to be unjustified, so shall it with regard to the idea that government strikers are waving black flags instead of picket signs. It would therefore seem that as far as the subject of public employee strikes is concerned, sovereignty is at best an outdated antiunion make-weight which has been equated with sacrilege and dramatized as "sinning against the Holy Ghost."[30]

Was the paralysis of government and the destruction of our society the impetus behind the postal workers strike of March, 1970, or was it the fact that the members of this branch of the government were among its lowest paid, having a twelve step salary schedule leading to a maximum of $8,442.00 over a period of twenty-one years?[31] Small wonder that the carriers first withdrew their services in New York City where the cost of living is so great that one postal spokesman stated that "seven percent of their members were receiving welfare aid."[32] Within days half the nation, including several major cities in New Jersey, had been

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27 *Id.* at 944, 283 N.Y.S.2d at 552-53.

28 252 Ind. —, —, 251 N.E.2d 15, 18 (1969), *petition for rehearing denied*, 252 Ind. —, 254 N.E.2d 329 (1970), *reviewed in* 93 MO. LAB. REV. 66 (Feb. 1970).

29 *Cf.* Krystad v. Lau, 65 Wash. 2d 827, 400 P.2d 72 (1965). This case traces the history of the law of labor unions from 1349 in England, through the Industrial Revolution and into the United States.

30 Goldman, *The New York School Crisis*, COMMENTARY, Jan. 1969, at 58.

31 *Developments in Industrial Relations*, 93 MO. LAB. REV. 77, 78 (May 1970).

32 N.Y. Times, Mar. 19, 1970, at 1, col. 8; *see also* N.Y. Times, Aug. 2, 1970, at 56, col. 3, where John F. Griner, President of the American Federation of Government Employees, stated that 500,000 federal workers are living at or below the poverty level.

affected.[33] One would be hard pressed to honestly conclude that the 210,000 participants of the nationwide strike were motivated by anarchic tendencies as opposed to desires of securing employment reforms. It was the first time in its 195 year history that employees of the Post Office Department struck; it was also a novel experience for their employer, since heretofore it had never negotiated directly with employees over pay matters.[34]

It therefore seems most implausible to find credence in the maxim that strikes by public employees are strikes against government itself. To regard the sovereignty concept as an all-purpose technique to avoid confrontation with the real issue, that a public employee strike is a mechanism to change adverse conditions of employment, would do much to end the ferment. As Chief Justice DeBruler wrote in his dissent to *Anderson*:[35]

> I find it very easy to think of a strike against the sovereign *and* justify it. In fact, I find it unthinkable that any sovereign worthy of the name would strive to remain insulated from all pressures to act fairly and decently, without arbitrariness, towards its employees. The conflict of real social forces cannot be solved by the invocation of magical phrases like "sovereignty."

It is to the credit of the New Jersey courts that they have not leaned very heavily upon this weak reed of sovereignty,[36] but have looked instead to the more reasonable and practical doctrine of essentiality as the ground upon which to rest their decisions. It would therefore appear unlikely that sovereignty will enjoy the same influence that it does in some of our sister states, especially in view of recent incursions into sovereign immunity by the New Jersey courts in other areas.[37] At any rate, sovereignty should best be considered as only an aspect of the third and final theory, essentiality.[38]

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33 N.Y. Times, Mar. 22, 1970, at 1, col. 8.

34 *Developments in Industrial Relations*, 93 MO. LAB. REV. 77, 78 (1970).

35 252 Ind. at —, 251 N.E.2d at 20.

36 The term "sovereignty" as used in regard to public employee strikes, is only mentioned in the case of Donevero v. Jersey City Incinerator Auth., 75 N.J. Super. 217, 223, 182 A.2d 596, 599 (L. Div. 1962), *rev'd on other grounds sub nom. McAleer v. Jersey City Incinerator Auth.*, 79 N.J. Super. 142, 190 A.2d 891 (App. Div. 1963), where the trial court first encountered the issue of public employee strikes and cited the authority of Norwalk Teacher's Ass'n v. Board of Educ., 138 Conn. 269, 272, 83 A.2d 482, 484 (1951).

37 *Cf.* Willis v. Department of Cons. & Ec. Dev., 55 N.J. 534, 264 A.2d 34 (1970); P,T&L Constr. Co. v. Commissioner Dep't of Transp., 55 N.J. 341, 262 A.2d 195 (1970); Czyzewski v. Schwartz, 110 N.J. Super. 255, 265 A.2d 173 (App. Div. 1970).

38 What is meant here is that a public employee work stoppage should only come under the penumbra of disloyalty if it has been brought to life by tacit desires to overthrow the government or if the services withdrawn are of such a nature that their con-

The essentiality principle appears to have been contrived to supplement the logical shortcomings of sovereignty and has become a term of art for the justification of the strike ban in the public sector. Yet, in this doctrine lies the ultimate hope for solution. Defined, essential means that which is "absolutely necessary; indispensable."[39] It has a second connotation, however, vis-à-vis governmental functioning, that any service which government provides, the absence of which would endanger the public's health and safety, is essential. Actually, both definitions are proper under certain circumstances. The difficulty, however, is that courts do not specify which definition they are using, but rather assert carte blanche that all governmental services are "essential." This sentiment has been spirited by the syllogistic reasoning that: (a) government functions by means of its organs; (b) public employees constitute these organs; ergo, strikes should not be allowed because (c) public employees are "essential" to the function of government. This deductive posit seems hardly rebuttable since the *raison d'être* for governmental branches and subdivisions is that they are required and necessary for the good of the body politic: "When government undertakes itself to meet a need, it necessarily decides the public interest requires the service . . . ."[40] But since need is "a want of something requisite, desirable *or* [*merely*] *useful*,"[41] it could readily come under either version of essentiality.

In order to develop a reasonable standard, the above two interpretations of essential must be considered in the light of what might be called, for want of a recognized title, the "public tolerance theory." This would not deny the veracity of either definition, but rather make them relative to the duration of time which a public employer, and the public, could endure a strike before the withdrawn services became truly indispensable or the strike created a tangible threat to the public. Examples could be drawn from most governmental functions, for instance, park attendants, librarians and welfare workers whose services, withdrawn for a temporary span, would not tend to bring government to a halt, yet might accomplish the same if allowed to continue simul-

tinued withdrawal would seriously threaten the existence of the nation, state or municipality. Then only should sovereignty be the countervailing argument. Consequently, absent a showing of such intent or a probability of irreparable effects, it seems specious to accuse government workers of being disloyal anarchists. *But cf.* Anderson, *Legal Aspects of Collective Bargaining in Public Employment*, PUB. PERSONNEL ASS'N at 147 (Chicago 1965) reprinted in part in Bloedorn, *The Strike and the Public Sector*, 20 LAB. L.J. 151, 156 (1969).

39 RANDOM HOUSE DICTIONARY 487 (1966).

40 *In re* Block, 50 N.J. 494, 499, 236 A.2d 589, 592 (1967).

41 MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY 1512 (3d ed. 1963).

taneously with other withdrawn services or for an unreasonable duration.

The obvious exceptions are the manifestly "essential" government functions, the protective services of police and firemen. As to these services there is little dispute. The imbroglio rather hovers over the services furnished by sanitation men, transit workers, hospital employees, and the like, whose services lie in the marginal area between police and firemen on the one hand and park attendants, etc., on the other. The standard suggested, however, is nonetheless capable of intelligent discrimination. For example, assume *arguendo* that public employees, excluding police and firemen, have been granted a right to withdraw "essential" services; all governmental services would then be permitted to strike until such time as they became "essential" according to either of the suggested definitions. Consider, for instance, the controversial teacher's strike. The New Jersey Constitution mandates that free public school systems be maintained.[42] The New Jersey Supreme Court has said, in *Board of Education, Borough of Union Beach v. NJEA*,[43] the leading case in this area, that it is the demand for services which makes illegal a strike or other concerted action designed to deny government "necessary" manpower.[44] Thus, teacher services, if not examined within the framework of the tolerance theory set forth above, would be absolutely essential. But realistically, such services are only truly essential in the long run. It is pure fantasy to believe that the upshot of a day, week, or month-long strike of educators will be the downfall of government or a condition inimical to the general health and welfare. The fact is that dozens of municipal governments have weathered teachers' strikes without showing signs of collapse. But because public education is close to the taxpayer's heart, this service is cloaked in the robes of pure essentiality, rather than, as Albert Shanker suggests, inconvenience.[45] And if the Louis Harris Poll is accurate, it would seem that American public opinion is almost evenly split on the issue of strikes by public school teachers.[46] In this climate of opinion it would appear that a relative interpretation of essentiality would not cause a public outcry.

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42 N.J. CONST. art. VIII, § 4, par. 1 provides:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.

43 53 N.J. 29, 247 A.2d 867 (1968).

44 *Id.* at 37-38, 247 A.2d at 872.

45 Author's interview with Albert Shanker, President of the United Federation of Teachers, Local 2, in New York City, July 15, 1970.

46 AMERICAN TEACHER, June 1970, at 7, col. 1.

Consequently, one must agree with the assertion that "essentiality is not an *inherent* characteristic of government services but depends on the specific service being evaluated,"[47] as well as upon the duration and correlative threat of danger to the public. With these thoughts in mind we would do well to construct a definitive yardstick which would delimit essential services to those, the withdrawal of which would bring "direct, immediate, certain, and serious danger to a primary interest of the community" and thus "should be prohibited by law, with certain sanctions . . . ."[48] It seems somewhat ironic that this observation, propounded over twenty years ago and reflecting the most sensible and pragmatic approach, does not enjoy the influence it merits.

Theoretically, under the sophistic reasoning put forth to date, anything could be stretched to the point of being considered inherently essential. The solution, though, must be practical: "The criterion of distinction is therefore the consequence of a strike upon the public interest, not the status of the employer."[49]

A canvass of the New Jersey decisions reveals that the courts' penchant is to ban strikes under the second connotation of essentiality, that is, the endangerment of the public health and safety. In *Donevero v. Jersey City Incinerator Authority*,[50] the gist of the opinion was that "[t]he primary reason for the vitality of the view that the government is immune to strikes is to *safeguard and protect public health and safety*."[51] On appeal the defendant was found to be a public body politic which had been "established . . . to administer a necessary governmental operation, the collection and disposal of garbage and other refuse."[52] Therefore, a strike against it was illegal since "the uninterrupted carrying out of governmental functions is *vital to the public health and welfare*."[53]

The next time the problem was encountered was in *New Jersey Turnpike Authority v. AFSCME*,[54] where the court relied on the wording of the statute creating the Authority[55] and stated that it was a "body corporate and politic and . . . constituted an instrumentality exercising public and *essential* governmental functions

47 Burton & Krider, *supra* note 21, at 426.

48 White, *Strikes in the Public Service*, 10 PUB. PERSONNEL REV. 3, 6 (1949).

49 *Id.*

50 75 N.J. Super. 217, 182 A.2d 596 (L. Div. 1962), *rev'd on other grounds*, 79 N.J. Super. 142, 190 A.2d 891 (App. Div. 1963).

51 75 N.J. Super. at 222, 182 A.2d at 599 (emphasis added).

52 *McAleer v. Jersey City Incinerator Auth.*, 79 N.J. Super. at 146, 190 A.2d at 893.

53 *Id.* (emphasis added).

54 83 N.J. Super. 389, 200 A.2d 134 (Ch. 1964).

55 N.J. STAT. ANN. § 27:23-3 (1966).

. . . ."[56] The court, in granting a permanent injunction against defendants, heartily endorsed and agreed in principle and application with the thesis that the "prohibition is not without good reason, for *the public health and safety must be safeguarded.*"[57]

In *Delaware River & Bay Authority v. International Organization*,[58] the New Jersey Supreme Court came to grips with the strike question and affirmed the illegality of the strike. In this case reliance was again placed upon statutory terminology as the court held that a ferry service between New Jersey and Delaware was an essential governmental function.[59] Justice Jacobs, however, frankly stated:

> While there may be many other agencies which more directly affect the public health, safety and welfare, the Authority is nonetheless engaged in what is now widely taken to be an essential public operation. Its employees are hardly to be distinguished from public transit and similar employees who have been repeatedly denied the right to strike.[60]

This reasoning does not sound in concrete legalistic justification. To brand a ferry service essential may, of course, be justified under certain exigent circumstances, but hardly should the argument that it is *widely taken to be essential* or that there is a similarity to other services which have traditionally been denied the strike privilege, be accepted as the rule. Under the relative context of essentiality, this strike would not have been prima facie illegal, because it would not have deprived the public of imminently essential services. If it endured to a point where it created a hazard to health or safety, it would then have been enjoined.

An examination of essentiality would be incomplete if the comparison were not drawn between essential private services and those under consideration. Can it be intelligently argued that the sector in which a service operates, rather than the nature of the service itself, should determine whether or not it will be allowed to strike? Hardly. Yet this is the present situation. In the private sector, all

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56 83 N.J. Super. at 395, 200 A.2d at 137-38 (emphasis added); *but cf.* S.J. Groves & Sons Co. v. New Jersey Turnpike Auth., 268 F. Supp. 568 (D.N.J. 1967), where the court held that the New Jersey Turnpike Authority was autonomous and distinct from the State of New Jersey. Cited at 576 n.16, were Mathews v. Finley, 46 N.J. Super. 175, 134 A.2d 441 (App. Div. 1957), which held that employees of the Highway Authority were not employees of the state, and *New Jersey Turnpike Authority* for the proposition that, despite *Mathews*, these employees have the same rights and duties of public employees.

57 83 N.J. Super. at 396, 200 A.2d at 139 (emphasis added).

58 45 N.J. 138, 211 A.2d 789 (1965).

59 *Id.* at 147, 211 A.2d at 793-94; *cf.* N.J. STAT. ANN. § 32:11E-1, art. IV (1961).

60 45 N.J. at 146, 211 A.2d at 793.

services are initially allowed to strike, regardless of the probability of danger to the public. Several examples may be taken from the recent history of "Fun City" where fuel oil drivers struck during a flu epidemic in subfreezing weather, leaving 200,000 heatless, and causing the deaths of several citizens.[61] More recently, building service employees subjected over half a million New Yorkers to health hazards until their return to work was prompted by an appellate court ruling, Justice Nunez again at the pen, that the city could take "emergency action to restore essential services . . . ."[62] The argument that the same standards of relative essentiality and tolerance could not be applied to both sectors is unrealistic.[63]

THE PROPOSALS

Ideas advanced to resolve the question are legion, each having its attendant opponents and supporters. Theodore Kheel, noted labor mediator, feels that the only way to "prevent strikes that imperil the public interest while still providing . . . public employees with the opportunity to participate in the process of determining the conditions of their work"[64] is through collective bargaining which must include the right to strike. This would put the accent on the bargaining process and the negotiator's skills rather than on striking.

> Our primary reliance would then be placed, as I believe it must if we are to prevent strikes, on joint determination by parties in a true bargaining atmosphere.[65]

Arvid Anderson, Chairman of New York City's Office of Collective Bargaining, agrees that in collective bargaining, as it is known in the private sector, lies the solution to the problem, yet he disagrees that the strike is a *sine qua non* for its effectiveness:

> Experience indicates that in most instances the right to strike is not an *essential* part of the public employment collective bargaining process. Thus, the crucial issue is not really whether strikes

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61 N.Y. Times, Dec. 27, 1968, at 1, col. 5.

62 The Star-Ledger (Newark, N.J.), July 18, 1970, at 3, col. 1.

63 Intellectual hypocrisy seems to be the phrase that best describes the double standard which is perennially applied to public employee strikes. Why the same jurist should label a set of circumstances akin to anarchy, and not apply the reasonable and practical theory which he does toward the later more hazardous activities, is enigmatic. The same standard, *i.e.*, does the activity imperil the public's health and safety, should have been used in both situations.

64 Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 932 (1969).

65 *Id.* at 941.

> should be permitted or prohibited in the public sector, but whether the collective bargaining process itself can be made so effective absent the right to strike that the need for work stoppages will be obviated. It is my conclusion that certain proven impasse resolution procedures—mediation, fact-finding, and in some cases, even arbitration—can be substituted for the strike weapon . . . without substantial loss in the effectiveness of collective bargaining . . . .[66]

George W. Taylor, father of New York's Taylor Law, has stated that strikes are not the answer to public employee disputes; he prefers to rely on "procedures":

> Methods of persuasion and political activity, rather than the strike, comply with our traditions and with the forms of representative government to which we are dedicated as the appropriate means of resolving conflicts of interests in this area.[67]

Other writers continue to debate the merits and shortcomings of mediation,[68] fact-finding,[69] voluntary arbitration,[70] compulsory arbitration,[71] and labor courts,[72] assembling various plans and blueprints which apply some or all of these measures.[73] It should be accepted, however, that any empirical avenue to be followed must be of a hybrid nature utilizing the best advantages of each procedure. This would not be nearly as complicated as it might seem, for once the impediments of the old arguments and interpretations of essentiality have been removed or reformed, what remains to be done is merely mechanical.

General considerations should first be mentioned. Of great importance is the idea that employers and employees should be given every opportunity to resolve their differences among themselves through joint resolution. It is agreed that this cannot be accomplished unless,

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66 Anderson, *supra* note 13, at 947-48.

67 Taylor, *Public Employment: Strikes or Procedures?*, 20 IND. & LAB. REL. REV. 617, 636 (1967).

68 *See* Stutz, *The Resolution of Impasses in the Public Sector*, 1 URB. LAW. 320, 323 (1969).

69 *See* Taylor, *Using "Factfinding and Recommendations" in Impasses*, 92 MO. LAB. REV. 63 (July 1969); McLaughlin, *Collective Bargaining Suggestions for the Public Sector*, 20 LAB. L.J. 131, 137 (1969); McKelvey, *Fact Finding in Public Employment Disputes: Promises or Illusion?*, 22 IND. & LAB. REL. REV. 528 (1969).

70 *See* Zack, *Dispute Settlement in the Public Sector*, 14 N.Y.L.F. 249, 261-67 (1969).

71 Kheel, *supra* note 64, at 937-40; Taylor, *supra* note 67, at 632; Zack, *supra* note 70, at 257-61; *and* Stutz, *supra* note 68, at 327.

72 *See* Judge S. Rosenman, *A Better Way to Handle Strikes*, THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 33 (1968); Fleming, *The Labor Court Idea*, 65 MICH. L. REV. 1551 (1967).

73 *See* Bloedorn, *supra* note 38, at 159-60; Taylor, *supra* note 67, at 633-36; *and* Zack, *supra* note 70, at 268-69.

as Mr. Kheel has stated, one side or the other can say no.[74] Therefore, the theory of a limited or qualified strike should be permitted. This would mean that all but the protective services would be allowed to strike until such time as the continuation of such strikes would constitute a hazard to the public.

Second, and perhaps most important, is the idea that if negotiation, mediation and fact-finding do not resolve the differences within a reasonable time, they will be settled by an outside body. Lack of finality is very much the crux of public employee-employer dilemmas; time goes by and little or nothing is accomplished. The strike of teachers in Newark, New Jersey, in February, 1970, was the culminating event of unsuccessful negotiation, mediation and fact-finding, which had been dragging on for over a year.[75] Having some variety of binding proceedings looming over their heads may be just the inducement the parties need to come together, discard bargaining leverage and get down to serious negotiations. This would not destroy the necessary component of "voluntaryism,"[76] and would follow the public policy of New Jersey, which states that

> the best interests of the people of the State are served by the prevention or *prompt settlement* of labor disputes, both in the private and public sectors . . . [because] strikes, lockouts, work stoppages and other forms of employer and employee strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic and public waste . . . .[77]

Consequently, strikes should be allowed to continue until some point in time when the tolerance level would be exhausted and society could exert its right to protect itself. The ideal plan, modeled after the emergency provisions of the Taft-Hartley Act,[78] would allow the governor to subject disputants to an eighty day "cooling-off" period during which supplemental negotiations, mediation and fact-finding would continue. At the end of such period the impasse may have been settled or the issues narrowed sufficiently to encourage the parties to voluntarily submit to binding arbitration which would be in accord with the current statutory provisions.[79] Such arbitration would be conducted by a tripartite impasse panel consisting of one employee representative, one employer representative, and one "neutral" selected by

74 1969 LAB. REL. HANDBOOK 317 (B.N.A. 1970).

75 *See* N.J. PUB. EMP. REL. COMM'N REP. No. 9 (July 24, 1969).

76 Zack, *supra* note 70, at 258.

77 N.J. STAT. ANN. § 34:13A-2 (Supp. 1969-70) (emphasis added).

78 Labor Management Relations Act (Taft-Hartley Act) 29 U.S.C. §§ 176-80 (1965).

79 N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1969-70).

the first two, perhaps from a list compiled by the American Arbitration Association.

To assist during these earlier stages, two suggestions should be followed. The first is that the need for well-trained and hopefully experienced negotiators and mediators be met through expansion of the statutory program at Rutgers University,[80] as well as by the New Jersey Public Employment Relations Commission. The absence of such persons has often been noted as a real factor in the deterioration of public employment negotiations into quagmires of hostility and stubbornness.[81]

Second, PERC should be given the authority to intervene of its own initiative as soon as it perceives an impasse in negotiations. At present, the Commission must idly stand by and wait until one of the parties requests its assistance.[82]

If all these measures should fail to assuage the situation during the "cooling-off" period, several alternatives are at hand. Prerequisites of any proposal, if it is to be at all effective, must include objectivity, fairness and reasonableness. Yet it must be distasteful enough to both sides that the probability of forced submission will be sufficient impetus to coerce the parties to agree on a settlement.

The first suggestion is compulsory arbitration. Several arguments have been put forth against it, including the theory that it will lead to a "chamber of horrors" in which there would be a fully controlled economy and labor-management relationship.[83] Generally, the disfavor has evolved from the fact that it has usually been proposed as a substitute for the strike weapon. But with the strike being legally tolerated for possibly unlimited periods, and the arbitration proceedings merely a complement instead of a replacement, much of the vitality of this premise is lost.

It is also contended that the presence of a third party will hardly be effective since "it is just as likely that a law requiring compliance with an award will be broken as will a law forbidding a strike without compulsory arbitration."[84] While this may be true, it would be much harder for the violator to justify his position after having progressed through the many voluntary procedures available before injunction and the ensuing independent mediation, fact-finding and recommendations

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80 N.J. STAT. ANN. § 34:13A-8.3 (Supp. 1969-70).

81 Davey, *supra* note 9, *passim*; Kheel, *supra* note 64, at 941; *and* Taylor, *supra* note 67, at 630.

82 N.J. STAT. ANN. § 34:13A-6 (Supp. 1969-70).

83 Zack, *supra* note 70, at 260.

84 *Id.* at 261.

of PERC, than if he merely raised the defense that the strike ban was oppressive. If the popular idea that public employee strikes are won or lost in the arena of public opinion is accurate,[85] then the strikers would lose much of their strength and support.

Of course, in enacting a statute implementing compulsory arbitration, the legislature would have to outline the types of public employee disputes which could be arbitrated, for example, monetary expenditures by the employer. If extensive fact-finding, as provided, properly crystalized the issues and investigated whether the employer could supply the necessary funds, there would seem to be no reason why the award should not resolve the issue. Regarding this proposal, even Theodore Kheel has said:

> [A]rbitration can be a legal and feasible method of settling disputes in certain situations . . . . [But it] will be effective only if viewed as a last resort after other steps have failed and the dispute has reached a stage where the issues remaining unresolved have been sharply narrowed and can be stated within specific bounds. Framing the issues properly, and providing some standards for determination . . . is essential if arbitration is to be of any use . . . . *When bargaining has framed the issue with precision, then arbitration may be possible.*[86]

Closely related to the compulsory arbitration plan is that of a public show cause proceeding which would follow the fact finding of PERC and the involved parties. If either side declined to accept the fact-finder's recommendations it would be forced to go before a standing panel of legislators created for this purpose, to explain and justify its refusal, and "[i]f the findings of the panel confirm the fact-finder's recommendations as being fair and reasonable, the parties should be obligated to accept them and put them into effect."[87]

The second alternate suggested, that of a labor court, has long been anathema to labor and almost as vehemently opposed by management.[88] Perhaps in their dislike lies its utility. In all other areas of legal conflict, after bargaining has failed, justice is sought in a "day in court." A party's fear that the matter will be decided against him often gives rise to second thought settlements even within the shadow of the bench. Although the protest has been acrimonious, it would be a good

85 *See* Wellington & Winter, *supra* note 20; *also* author's interview with Albert Shanker, *supra* note 45, where Mr. Shanker stated that were it not for the enhancement which illegality lent to public employee strikes, especially teacher strikes, via the press, these work stoppages would be considerably less effective.

86 Kheel, *supra* note 64, at 939 (emphasis added).

87 Weisenfeld, *supra* note 13, at 148.

88 Zack, *supra* note 70, at 254.

guess that the future will show a reversal of thought on the subject of labor courts, especially if the problem of government strikes is either left status quo or other methods forwarded fail to meet the challenge.

The foremost advocate of labor courts, Judge S. Rosenman,[89] has said:

> I am convinced that the present statutes relating to labor disputes, which provide for cooling-off, mediation, conciliation, fact-finding and even recommendations by boards must be expanded to meet present-day demands and to prevent the widespread public suffering, damage and waste which strikes . . . bring in their wake.[90]
>
> My thesis, baldly and broadly stated, is that . . . [the] right to strike should be curtailed when it is in conflict with the public interest, and that some form of final compulsory decision must be provided. . . .
>
> By compulsory decision . . . I mean . . . a separate system of labor courts and a separate labor judiciary with the sole and exclusive function of deciding labor disputes *which the parties themselves cannot settle.*[91]

Concisely, the theory runs that when a strike, if permitted to occur or continue, would adversely affect the public interest to a substantial degree, it must be expeditiously enjoined and finally settled on the basis of law, equity and justice in a duly established and impartial court experienced both in law and labor relations. During the period of injunction the court could require the parties to attend hearings, produce evidence as to the causes and circumstances of the dispute and discuss proposals for settlements. The court could also make any orders it deemed appropriate to require the parties to make every effort to voluntarily settle their differences in good faith. If at the termination of the injunction period an impasse still exists, the court could continue the injunction and either stay the adjudication or set it down for immediate determination of the merits. Powers and authority would also be given to impose fines or penalties on one *or both* parties if the court found that they had not bargained in good faith, or defied the injunction. This decision would be final and compulsory unless arbitrary, capricious or contrary to a constitutional right; and the state supreme court would have exclusive appellate jurisdiction.[92] Because of

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89 *See* Judge S. Rosenman, *supra* note 72.

90 *Id.* at 45.

91 *Id.* at 43 (emphasis added).

92 *Id.* at 33-35. Although Judge Rosenman's article is directed toward implementing the labor court idea at the federal level, there is no reason why it could not as well be instituted at the state level.

the trust and respect which have been reposed in our court system and judiciary, it might be accurate to predict that this proposal will enjoy increasing support.

The antagonistic views of those who either favor or disapprove of the strike should be successfully compromised by the approaches outlined above. The procedures allow for full collective bargaining and exercise of the strike right for a period limited and controlled by the overriding public interest. Employees would no longer feel inferior at the bargaining table and decisions would be of a bilateral rather than unilateral nature. The arguments of those opposing the strike would be met since the common claim of danger to health, safety and welfare would be circumvented by the governor's emergency strike provisions. Only nonessential services would be allowed to strike and then only while they retained their nonessential nature. All the methods suggested include the necessary features of finality, flexibility, and fairness which must be embodied in any proposal which seeks to realistically alleviate the vexations of public employer-employee disputes.

THE PROGNOSIS

Things look bleak for the public employees of New Jersey. No beat resounds when they place their stethoscopes to the state's heart, the Legislature. In the Legislature lies the hope for transition, but this body has not yet been disposed to take the initiative and deal directly with the question of government strikes. It has preferred to leave matters in the hands of the courts which can do nothing but reluctantly enforce the common law prohibition. In *Union Beach,* Chief Justice Weintraub declared:

> We should not be thought to recommend legislative departure from the common-law rule . . . .[93] *Yet it need not follow that the Legislature could not find strikes to be tolerable within certain areas and limits.* As to a public service the Constitution does not expressly require to be furnished, the Legislature, which may withdraw the service, may find some interruption should be permitted. *And even where the Constitution requires a public service to be rendered . . . there may be room for legislative judgment as to what interruptions are compatible with the fulfillment of that mandate.*[94]

The only caveat extended was that since "the subject is so vital . . . we

93 53 N.J. at 46, 247 A.2d at 876.

94 *Id.* at 45, 247 A.2d at 876 (emphasis added).

will not attribute to the Legislature an intent to depart from the common law unless that intent is unmistakable."[95]

In *Lullo v. International Ass'n of Fire Fighters,* Justice Francis replicated the court's views by saying that "the Constitution is silent and neutral on the subject of such strikes, neither authorizing nor banning them,"[96] and that the Legislature could grant further and more expansive rights.[97]

Obviously, the court has placed the problem where it should be, with the lawmaking body. But in recent years the Legislature has declined to move in either direction. In Governor Hughes' seventh annual message to the Legislature on January 14, 1969, he urged in vain that it "immediately declare *solemnly* and *finally* that the public employees of this State enjoy no right to strike."[98] A month later, following the strike of the Newark teachers, bills were introduced in both the New Jersey Senate[99] and the Assembly[100] calling for a law prohibiting public employee strikes. Neither was enacted. Bills introduced during the succeeding term, however, proceeded in the opposite direction, calling for collective bargaining for all public employees except those of the state;[101] public employer-employee negotiations, conducted in the same manner as those of other employers and employees, with no injunction issuing without prior testimony that, *inter alia,* unlawful acts of violence were committed or are likely to be committed;[102] employees of a private industry taken over by the state to retain a right of collective bargaining and the right to joint or concerted economic action;[103] compulsory arbitration in public utility labor disputes;[104] and a law in which the governor could order a ninety day postponement of a public employee strike which in his determination would be against public interest and detrimental to the citizens. During this time PERC could call for a review of the facts and, if expedient, order binding arbitration.[105] All of these died in committee!

In addition to its lack of affirmative action, the state has actually regressed in regard to public workers. In April, 1970, when PERC,

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95 *Id.* at 46, 247 A.2d. at 876; *see also* Delaware River & Bay Auth. v. International Org., 45 N.J. 138, 148, 211 A.2d 789, 794 (1965).

96 55 N.J. at 440, 262 A.2d at 697.

97 *Id.* at 416, 262 A.2d at 684.

98 Weisenfeld, *supra* note 13, at 145 n.20 and accompanying text.

99 *See* N.J. Senate Bill 528, introduced Feb. 17, 1969.

100 *See* N.J. Assembly Bill 540, introduced Feb. 17, 1969.

101 *See* N.J. Assembly Bill 810, introduced Mar. 19, 1970.

102 *See* N.J. Assembly Bill 1049, introduced May 7, 1970.

103 *See* N.J. Assembly Bill 544, introduced Jan. 29, 1970.

104 *See* N.J. Assembly Bill 542, introduced Jan. 29, 1970.

105 *See* N.J. Assembly Bill 780, introduced Mar. 12, 1970.

the agency which the Legislature had seen fit to create to guard the rights of New Jersey's employees, exhausted its funds and had to suspend much of its activities, the $46,000 appropriation sought was refused. This refusal was accompanied by the Governor's statement that monies were available in other accounts.[106] Such a stand by the administration prompted the chairman of PERC to resign. This agency has been a valuable and active body,[107] handling over 930 cases during the first eighteen months of its existence.[108] It is difficult to understand why an agency was created to deal with a critical problem and then sterilized financially. This hardly seems the way to cure the ills of public employment.

It is the aim of this comment then, not merely to reiterate already posited formulas, nor add a new variation, but rather to stimulate those in the position to act, to do so. This is far more important than the actual implementation of any particular plan. We must not wait for some incident to arouse the public's emotions, either for or against the strike, and have as a result legislation pushed through as a balm which will soothe the passions but not solve the problems. What is needed is experimentation and innovation, making New Jersey part of the prediction that the states will try both the strike and arbitration.[109] Study commissions should be formed to investigate the experiences of other jurisdictions which have enacted statutes allowing public employee strikes. Special attention should be focused on the Canadian experience,[110] as well as Pennsylvania, where very recently the legislature adopted a limited strike statute to allow withdrawals over wage and working conditions.[111] If the consensus of expert opinion is correct, there is nothing to be lost in such legislation since legalization will paradoxically reduce the occurrence of strikes,[112] as the advantages peculiar to them will have been removed.[113]

106 The Jersey Journal (Jersey City, N.J.), June 27, 1970, at 3, col. 5.

107 *See* Evers, *The First Year of Public Collective Negotiations in New Jersey*, 2 URB. LAW. 78 (1970), *and* INST. OF MANAGEMENT REL., RUTGERS UNIV., BULL. NO. 3 (June 1970) for analyses of all PERC decisions as of that date.

108 The Star-Ledger (Newark, N.J.), June 27, 1970, at 26, col. 3.

109 Text of speech of Robert Howlett, Chairman of the Michigan Labor Mediation Board, given at the Federal Mediation and Conciliation Service, Atlanta, Georgia, Jan. 23, 1969, reprinted in 1969 LAB. REL. YEARBOOK 318, 327 (B.N.A. 1970).

110 *See* Muir, *Canada's Experience with the Right of Public Employees to Strike*, 92 MO. LAB. REV. 54 (July 1969).

111 N.Y. Times, July 13, 1970, at 19, col. 1.

112 Weisenfeld, *supra* note 13, at 143; Zack, *supra* note 70, at 268; Kheel, *supra* note 64, at 941; McKelvey, *supra* note 69, at 543; *and* Kheel & Kaden, *A Plan to Resolve Impasses in Hospital Bargaining*, 93 MO. LAB. REV. 45, 46 (April 1970).

113 *See Federal Standards for Collective Bargaining "Premature at Best"*, 93 N.J.L.J. 525 (July 16, 1970), where Prof. St. Antoine states that the law loses much of its effectiveness because the persons regulated have more to gain by flouting it than by obeying it.

The following sentence cogently expresses the thesis upon which this comment was written: "The time has come for us to forego the view that *all* strikes by *all* public workers under *all* circumstances and for *all* time must be considered illegal."[114]

Michael F. Spiessbach

114 Kheel, *Resolving Deadlocks Without Banning Strikes*, 92 MO. LAB. REV. 62, 63 (July 1969).