

PUBLIC SECTOR COLLECTIVE BARGAINING: PERSPECTIVE AND LEGISLATIVE OPPORTUNITIES

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A recent study by experts in the field of public sector labor relations concluded, after a careful and thorough investigation:

The members of the Task Force are of the firm opinion that inaction in developing and initiating basic policies for employee relations in any government unit is short-sighted at best. Indeed we think continued inaction will prove to be a serious error. We believe that policies that will provide for the orderly participation of employees and their organizations in matters affecting their welfare are essential in all areas of government employment and should be inaugurated where they do not now exist.¹

The charge that legislative inaction is "short-sighted" and a "serious error" should not be dismissed lightly. Although several states have enacted legislation providing a comprehensive framework for collective bargaining in the public sector, most states either have legislation of a limited scope or have yet to establish any means by which the growing number of public employee unions may negotiate improved conditions of employment. It is appropriate, therefore, that those states presently seeking to assess or reassess their legislative needs should be provided a perspective of the statutory, extra-legal, judicial, and political developments in this area, in order that they may have full advantage of the years of experience and experimentation of other states in developing and applying public employee collective bargaining legislation.

I. THE GROWING NEEDS OF PUBLIC SECTOR LABOR RELATIONS

Public sector collective bargaining has proven itself to be a fact of life rather than a passing phenomenon. Indeed, labor relations involving

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1. "Pickets at City Hall"—*Report and Recommendations of the Twentieth Century Fund Task Force on Labor Disputes in Public Employment*, in *THE CRISIS IN PUBLIC EMPLOYEE RELATIONS IN THE DECADE OF THE SEVENTIES* 213 (1970) [hereinafter cited as *TASK FORCE*]. See generally Smith & Clark, *Reappraisal of the Role of the States in Shaping Labor Relations Law*, 1965 *Wis. L. Rev.* 411.

public employees is easily the fastest growing area of the law, reflecting an increase from 10 to almost 15 million public employees within the last decade,² with a correlative increase in public sector union membership at a rate of more than 600 percent that of private industry union membership.³ Of approximately 2.7 million federal employees, 52 percent are covered by union agreements and about a million are union members; of the over 10 million persons employed by state and local governments, about 28 percent are covered by union agreements and over 2.6 million belong to unions.⁴

Although the debate over the legitimacy of unionism in the public sector has lost much of its fervency, it is not overly academic to consider the reasons for the explosive growth of the movement. Although employees may be expected always to seek better working conditions, it has become apparent that public employees are seeking improvement with unparalleled and increasing militancy. Arguably, for too many years the public employer has given economic credence to the traditional "public servant concept" of public employment, as reflected by low compensation levels and paternalistic personnel practices.⁵ Moreover, many public employees feel that because of their advanced skills or education, they can contribute to the decisionmaking process affecting their employment situation, including the nature of the service they provide. For example, teachers have sought guaranteed participatory rights on such issues as class size, discipline, calendar, and educational leave policies; policemen have argued for the right to have their voices heard on the issues of citizens' review boards and two-man patrol car requirements for dangerous neighborhoods; firefighters want to know that

2. *Hearings on H.R. 12532, H.R. 7684, and H.R. 9324 Before the Special Subcomm. on Education and Labor*, 92d Cong., 2d Sess. 70, 71 (1972) [hereinafter cited as *Hearings*]. See also Stieber, *Collective Bargaining in the Public Sector*, in *CHALLENGES TO COLLECTIVE BARGAINING* 65, 87 (Ulman ed. 1967).

3. Ross, *Those Newly Militant Government Workers*, *FORTUNE*, Aug. 1968, at 104. Private industry union membership increased by 12 percent, while public sector union membership grew by 88 percent.

4. *Hearings*, *supra* note 2, at 71.

5. See, e.g., Weisenfeld, *Public Employees Are Still Second Class Citizens*, 20 *LAB. L.J.* 138 (1969).

Recent data indicate that nearly 800 full-time employees of state-operated hospitals in Ohio receive welfare benefits, while "Ohio penitentiary guards are so badly underpaid and overworked that the turnover rate in 1968 was an astonishing 242%." Because of the shortage of guards, "all were required to work a minimum of 60 hours a week." Moreover, "[u]ntil recently, Pennsylvania created and dispensed poverty in that state by providing 10% of its employees with take-home pay of \$3,000 a year." Wurf, *The Right to Strike*, *TRIAL*, Jan. 1970, at 11.

in exchange for their protecting property and being on call for long hours, they not only will be paid properly but also will have a guaranteed right to participate in decisions concerning safety equipment and procedures.⁶

The growing frustration with working conditions has coincided with a rising tide of "status consciousness" among public employees, who formerly worked at "jobs," then were employed in "occupations," and finally were engaged in "professions."⁷ This bogus currency of "professionalism" has been used as a counterfeit issue either to encourage unionism and militancy to achieve recognition of "professional" status or to chasten proponents of unionism who fail to perceive that once a "professional" status is achieved, it would be inappropriate to unionize. Furthermore, as membership rolls have expanded in public employee unions, employee demands for professional status have precipitated inter-union rivalries, as well as an increase in organizational activities.⁸

The final and perhaps most significant impetus to public sector collective bargaining has been recent federal and state legislation reflecting acceptance of the concept of public employee collective bargaining. As late as 1960, collective bargaining by government employees was relatively unheard of, with the exception of the authorization in Wisconsin for municipalities to bargain with their employees.⁹ In 1962, President Kennedy issued his historic Executive Order 10988 which extended organizational and collective bargaining rights to federal employees.¹⁰ The order was comprehensive in that it not only guaranteed the right to negotiate a written agreement but also established election procedures and methods to determine appropriate units and created unfair labor practices.¹¹ Executive Order 11491, issued in 1969 by President Nixon,

6. See H. WELLINGTON & R. WINTER, JR., *THE UNIONS AND THE CITIES* 137 (1971).

7. See Brown, *Professors and Unions: The Faculty Senate: An Effective Alternative to Collective Bargaining in Higher Education?*, 12 WM. & MARY L. REV. 252, 267-69 (1970).

8. Union membership during the decade ending in 1970 showed increases of 265 percent by AFT to 205,000 members, 110 percent by AFSCME to 445,000 members, and 53 percent by firefighter unions to 146,000 members. NEA membership totals over one million, although not all members are employed under union arrangements. *Hearings*, *supra* note 2, at 71.

9. Wis. Laws ch. 501, § 1 (1959), *as amended*, WIS. STAT. ANN. § 111.70 (Supp. 1973).

10. 3 C.F.R. § 521 (Comp. 1959-63), *revoked*, Exec. Order No. 11,491, 3 C.F.R. § 861 (Comp. 1966-70), 5 U.S.C. § 7301 (1970).

11. It also contained a strong management rights clause, placed wages and hours outside the scope of bargaining, and established advisory arbitration for grievances.

updated the earlier provisions by allowing consultation on personnel matters and by providing for administration by a Federal Labor Relations Council of the procedures established by the two executive orders.¹² Under the Postal Reorganization Act of 1970, postal employees were granted rights substantially the same as those guaranteed private sector employees under the National Labor Relations Act, except for the right to strike.¹³ That this act may presage future developments for federal employees is suggested by recent statements by Secretary of Labor Hodgson that Executive Order 11491 should be viewed only as an interim measure that will gradually be revised to provide rights similar to those guaranteed postal employees.¹⁴

Over 30 states, having observed the lead taken at the federal level as well as noting that strike prohibitions do not necessarily prevent strikes, have passed legislation imposing some degree of formalized bargaining obligation upon the public employer.¹⁵ Although developments at the federal level may have provided impetus to the states to develop legislation, the approaches taken by the states vary from the federal pattern. At least 20 states have enacted reasonably comprehensive statutes of general applicability¹⁶ Many of the same states, as well as several others, have statutes dealing specifically with teachers.¹⁷ At least 10 states single out firefighters, policemen, or both for specific legislation.¹⁸ Although in a number of states, the courts have addressed the question of public sector collective bargaining without the guidance of legislation, there

12. 3 C.F.R. § 861 (Comp. 1966-70), 5 U.S.C. § 7301 (1970), as amended, 3 C.F.R. § 505 (1972).

13. In an apparent compromise, no management rights provision is included, and most union security devices are forbidden. 39 U.S.C. §§ 1201-09 (1970).

14. See Shaw, *The Development of State and Federal Laws*, in PUBLIC WORKERS AND PUBLIC UNIONS 20, 25 (Zagoria ed. 1972).

15. For a comprehensive listing of these statutes, see Blair, *State Legislative Control over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Municipal Employees*, 26 VAND. L. REV. 1, 3-4 n.18 (1973). For a list summarizing the various provisions, see *Hearings*, *supra* note 2, at 132-34.

16. These states include California, Connecticut, Delaware, Hawaii, Kansas, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, Washington, and Wisconsin. BNA GOV'T EMPLOYEE REL. REP. RF-1 51:1011 (1970)

17. There are statutes providing specifically for collective bargaining for teachers in Alaska, California, Connecticut, Delaware, Idaho, Kansas, Maryland, Montana, Nebraska, North Dakota, Oregon, Rhode Island, Vermont, and Washington. *Id.*

18. These states include Alabama, Florida, Georgia, Idaho, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Wyoming, and Vermont. *Id.*

remain eight states in which there is no positive law—legislative or judicial—on the problem.¹⁹

It thus would appear that the focus of attention in states developing public sector labor relations policies should no longer be on the propriety of public employee unionism but rather on the formulation of an appropriate legislative response. To permit the continued development of extra-legal means of dealing with labor relations in the public sector whereby unregulated power politics is the currency used in negotiating collective bargaining agreements would invite disrespect for the law and result in a quagmire of labor relations policies. Is it not a more responsible and responsive government which assesses the needs of its public constituency and initiates and implements a statutory framework providing strong power groups such as public employers and public employee unions with a means of accommodating their interests within certain predictable boundaries and under the watchful eyes of trained public officials? Just as the proverbial ostrich who sticks his head in the sand may end up on his predator's dinner table, the public stands to be victimized by the failure of its government adequately to prepare and plan for a situation which shows no signs of abating. It is preferable for a government to *act* rather than *react* to a situation of such vital concern to its citizens.

Today, the position of a state without a statutory framework for bargaining, although somewhat untenable, is enviable, in light of the very real opportunity for such a state to assess the legislative experiments of other states in public sector labor relations. By careful study, a state can benefit greatly in extracting the best and deleting the worst features of other legislative programs in its attempts to establish appropriate legislation for the unique needs of its own citizens.

A consideration which adds to the urgency of the situation is the possibility that unless the states enact adequate legislation in the near future, Congress may preempt their authority to regulate collective bargaining in the public sector. Although the National Labor Relations Act blocks out the area of public employee labor relations, leaving its regulation to the states,²⁰ there are indications that Congress may reconsider that exemption in view of the paucity of comprehensive state legislation in the

19. *Hearings, supra* note 2, at 283 (statement of James D. Hodgson, Secretary of Labor).

20. Under the definition of "employer," the Act specifically excludes "the United States or any wholly owned Government corporation; or any State or political subdivision thereof" 29 U.S.C. § 152(2) (1964).

area. In 1970 the National Labor Relations Board asserted jurisdiction over private colleges, a category of employers formerly left to state regulation, in an action predicated in part upon the failure of the states to provide a framework within which the employees of such institutions could bargain collectively.²¹ In addition, there has been increasing pressure for federal legislation which would cover nonfederal public employees of all state and local subdivisions, public and quasi-public corporations, housing authorities, and other public agencies.²² Since the spring of 1972, the House Special Subcommittee on Labor has held hearings on this subject and is considering several bills with approaches varying from removing the public employee exemption from the NLRA²³ to creating a separate labor relations agency²⁴ or establishing separate legislation specifically for teachers.²⁵

Whether or for how long Congress will permit the states to experiment legislatively or to grant public employees a limited nonstatutory right to bargain collectively is a matter of debate.²⁶ What should be noted, however, is that the growing concern over questions of labor relations in the public sector has achieved a national dimension.

II. THE EMERGING PATTERNS OF RESPONSE

Accompanying the organizational revolution of public employees in the 1960's and the rising concern over the militancy and conflicts affecting labor relations in the public sector was a variety of societal responses. Because of the economic, political, and social ramifications of permitting public employees to bargain collectively, it was inevitable that no single solution would emerge. For those states which have not yet responded to the problem, the diversity of approaches in other states accentuates the desirability of examining the experiences thereunder in an effort to discern any emerging dominant or desirable patterns. Although development has occurred predominantly in the area of affirmative legislation,

21. Cornell University, 183 N.L.R.B. No. 41, 74 L.R.R.M. 1269 (1970).

22. See Boynton, *Industrial Collective Bargaining in the Public Sector: Because It's There?*, 21 CATHOLIC U.L. REV. 568, 568-71 (1972).

23. H.R. 12532, 92d Cong., 2d Sess. (1972).

24. H.R. 7684, 92d Cong., 2d Sess. (1972).

25. H.R. 9324, 92d Cong., 2d Sess. (1972).

26. Associations such as NEA, AFSCME, and IAFF generally support federal legislation on this matter. BNA GOV'T EMPLOYEES REL. REP. No. 444, at B-5 (1972). If the motive for this support is to generate pressure on the states to pass legislation, the effort may of course become academic if the subcommittee recommends the enactment of federal legislation.

the courts have provided aggrieved public employees with an increasing array of rights to organize and bargain collectively. Extra-legal, de facto arrangements have also been significant.

A. Legislative Response

Virtually all of the state statutes regulating collective bargaining in the public sector affirmatively provide that public employees have the right to join and form unions and to bargain collectively; however, only the comprehensive statutes establish unfair labor practice procedures which limit both public employer and union interference with those rights. Beyond this major point of distinction, the statutes differ in the manner in which they treat seven basic issues: coverage, administrative machinery, representation questions, bargaining obligations, impasse procedures, strike resolution, and union security arrangements.

The initial question in formulating legislation is the extent of coverage. In the field of labor relations, this involves either selecting special categories of employees for particular legislative treatment or providing one omnibus bill covering all employees. The collective judgment on the issue varies,²⁷ with seven state statutes covering all state and local employees, eight covering all public employees except those in specified occupations such as teaching, firefighting, or police work, and three providing for total coverage contingent upon local option. Six states have statutes covering state employees only, and eight other statutes apply only to local employees. In terms of categorical legislation, seven states have statutes applying to firefighters only, one to police only, and four to police and firefighters, while 16 state statutes apply to teachers only. If any pattern can be discerned from this checkerboard listing, it escapes obvious detection. What is probably most reflected by the varied approaches is not the unique needs of the different public employee groups but rather their ability to apply political pressure on particular legislators. Such a piecemeal approach surely invites interunion rivalry and political skirmishes. Political pressures for legislation granting "most favored status" to a particular group can best be answered with an omnibus law, which, with adequate drafting, satisfies the special needs of all classes of public employees.²⁸ Additionally, a single comprehensive statu-

27. See *Hearings*, *supra* note 2, at 133-34.

28. Hawaii, for example, sets forth appropriate units in its law, including separate units for blue collar supervisory and nonsupervisory employees, "teachers and other personnel of the department of education under the same salary scale," college faculty,

tory scheme dealing with all occupational categories of public employees and administered by a single agency with exclusive jurisdiction is more economical and contributes to a smoother functioning labor-management relations process by precluding the possibility of conflicting rulings and procedures of different tribunals.²⁹

Another issue requiring legislative resolution is the type of administrative machinery, if any, which is needed to regulate collective bargaining in the public sector. Fifteen states have utilized existing administrative agencies, including state departments of labor, while eight states and the District of Columbia have created new agencies specifically charged with the administration of the public employee-management relationship.³⁰ Ten states have delegated labor relations responsibilities to existing specialized agencies, such as state boards of education for teachers and state boards of health for nurses. The policy judgment on this issue hinges on the economic and practical feasibilities involved in utilizing no agency (thus leaving the duty of administering the law to the courts), using an existing agency, or creating a new agency. It would appear that most states have found it preferable to place administration of public sector collective bargaining legislation with agencies which have or can develop an expertise in labor relations matters rather than to leave enforcement of statutory rights solely to the courts.

Representation issues in labor-management relations involve questions essentially of allocating power. In resolving the conflicting interests of unions and employers, an adequate statute covering labor relations in the public sector must provide effective procedures for selection of bargaining representatives and for determination whether they represent appropriate bargaining units. Most statutes permit secret ballot elections, and 19 states have a separate state agency which makes the determination of appropriate units.³¹ However, seven states permit the local employer to determine the appropriate bargaining unit.³²

firemen, policemen, nurses, and other classes of public employees. HAWAII REV. STAT. § 89-6 (Supp. 1971).

29. The Advisory Commission on Intergovernmental Relations (ACIR) has endorsed the omnibus bill approach, noting that such legislation would better contribute to the smooth functioning of labor-management relations in the public sector. ACIR, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENTS 103-04 (1969). Additionally, there would seem to be some merit on principles of fairness in not passing piecemeal legislation covering some employees but not others.

30. See *Hearings*, *supra* note 2, at 132-34.

31. *Id.*

32. *Id.*

In deciding the appropriateness of a bargaining unit, it is necessary initially to determine the scope and composition of the unit. The most commonly applied criterion is the community of interest standard employed in the private sector under the NLRA.³³ There is, however, a discernible trend in state public sector legislation toward developing criteria designed to limit or avoid the establishment of fragmented bargaining units,³⁴ with implications relating to scope as well as composition of such units.

With respect to scope, it often is argued that in order to avoid numerous or fragmented bargaining units, *inclusion* of employees in the largest possible group should be emphasized along managerial hierarchies such as, for example, school *systems* rather than schools, and college systems rather than specific institutions. Some states have codified this concept by designating specific classes of employees as appropriate units,³⁵ an approach which undoubtedly contributes to the economic and administrative efficiency of operating a system of collective bargaining. Although the clear majority of states, accepting the argument that size is not necessarily determinative of quality of representation and that an ad hoc approach is preferable, continue to determine unit questions through the application of the traditional community of interest standard, the results under the two approaches often are similar.

Determinations of the composition of the appropriate unit also are made by emphasizing the similarities of employee categories. Difficulties have arisen in determining whether "satellite" employees³⁶ and part-time employees should be included within a larger group or have separate representation. The developing applications of the various state statutes indicate that both such employee categories generally are made part of the larger unit.³⁷

33. *Sheffield Corp.*, 134 N.L.R.B. No. 122, 49 L.R.R.M. 1265 (1961); *Continental Baking Co.* 99 N.L.R.B. No. 123, 30 L.R.R.M. 1119 (1952). For an example of application of the standard in the public sector, see *City of Warren*, 61 L.R.R.M. 1206, 1207 (Mich. LMB 1966).

34. Pennsylvania law, for example, provides that in determining the appropriateness of a unit, the labor board shall take into consideration, but shall not be limited to, identifiable communities of interest and the effects of over-fragmentization. PA. STAT. ANN. tit. 43 § 1101.604 (Cum. Supp. 1973-74). Kansas has a similar provision. KAN. STAT. ANN. § 75-4327 (c) (Supp. 1972).

35. See, e.g., HAWAII REV. STAT. § 89-6 (Supp. 1971).

36. In the education area, for example, this would include employees such as librarians, counselors, school social workers, and school nurses.

37. For a decision on satellite employees, see *In re School Dist. of Mount Vernon*, 1 N.Y. PERB ¶ 1-347 (1968), cited in D. WOLLETT & R. CHANIN, *THE LAW AND*

In conjunction with determinations of which employees should be *included* in a particular bargaining unit, it is necessary to decide whether certain categories of employees should be *excluded* from the unit because of possible conflicting interests or loyalties. The private sector concept of excluding all supervisors from the bargaining unit has not met with uniform acceptance in public sector legislation. It has been argued that there are certain categories of supervisors, such as school department heads, principals, and curriculum coordinators, who traditionally have worked in concert with other employees and should be included with them in a bargaining unit. The artificial segregation of such personnel arguably may result in the creation of an adversary relationship with a detrimental effect upon the educational atmosphere of the institution. Although public sector legislation generally has excluded supervisors from bargaining units containing nonsupervisory employees, several states have recognized the vitality of the argument against exclusion by distinguishing nominal supervisors, such as school department heads, from true supervisors, such as school superintendents, and excluding only the latter category from rank-and-file bargaining units.³⁸ In addition, the states have differed in their treatment of certain classifications of employees, such as school principals. Michigan excludes principals from rank-and-file units but permits them to form their own bargaining units; Pennsylvania, although permitting the establishment of separate units for principals, grants such units only the right to consult and not the right to bargain.³⁹

An important question corollary to the selection of an appropriate representative is whether representation should extend to all employees within the bargaining unit or be restricted to union members. The con-

PRACTICE OF TEACHER NEGOTIATIONS 2:28 n.5 (1970). For decisions on part-time workers, see Reese Pub. School Dist., 1969 L. Op. 253, CCH LAB. L. REP. ¶ 49,994.84 (Mich. LMB).

38. For an analysis of this issue, see 40 U. CHI. L. REV. 442 (1973).

39. For a discussion of the Michigan law on this issue, see *Hillsdale Community Schools v. Michigan Labor Med. Bd.*, 24 Mich. App. 36, 179 N.W.2d 661 (1970); *School Dist. of the City of Dearborn v. Labor Med. Bd.*, 22 Mich. App. 222, 177 N.W.2d 196 (1970). In a Florida case, *Orr v. Thorp*, 308 F. Supp. 1369 (S.D. Fla. 1969), the court held that a state act prohibiting *membership* of administrative and supervisory school personnel in unions that represented teachers violated the equal protection and freedom of association guarantees of the Constitution. The decision raises questions as to whether inclusion of supervisory members might result in domination of a rank-and-file union, which presently would constitute an unfair labor practice in many states. Pennsylvania law permits first-level supervisors to form their own unit and to meet and discuss. PA. STAT. ANN. tit. 43, § 1101.704 (Cum. Supp. 1973-74).

cept of exclusive representation under the NLRA, requiring that all employees within the unit accept representation by the union selected by the majority, has had wide acceptance in public sector legislation.⁴⁰ Notwithstanding its appeal to democratic principles, proportional representation has been rejected by all states except California,⁴¹ presumably because of the belief that nonexclusive representation does not promote effective collective bargaining.

Statutory provisions establishing the obligation to negotiate must define the nature and extent of the obligation, as well as the subjects of bargaining. With respect to the nature of the obligation to bargain, labor legislation should attempt to reconcile the interest of the parties in freedom to contract with the public interest in peaceful resolution of labor disputes. If the duty to bargain is not compulsory, the problem of sham bargaining could well arise. This dilemma is resolved under the NLRA by the requirement that employers and unions bargain in *good faith* with respect to "wages, hours and other conditions of employment", there is, however, no mandate that concessions must be given or an agreement reached.⁴² Although several states have legislation requiring the parties merely to "meet and confer,"⁴³ the majority of states have

40. *E.g.*, PA. STAT. ANN. tit. 43, § 1101.606 (Cum. Supp. 1973-74).

41. CAL. EDUC. CODE § 13085 (West Supp. 1972). Minnesota recently changed its statute to provide for exclusive rather than proportional representation. MINN. STAT. ANN. § 179.65 (Supp. 1972). It is significant to note that one state court has held that exclusive representation violates an employee's right to refrain from joining a union. *Dade County Classroom Teachers' Ass'n v. Ryan*, 225 So. 2d 903 (Fla. 1969). For an exposition of the exclusivity concept and its implications in the public sector, see Note, *The Privilege of Exclusive Recognition and Minority Union Rights in Public Employment*, 55 CORNELL L. REV. 1004 (1970). Manifestations of the suggested implications recently have surfaced in Wisconsin, where it has been held that minority unions may not address school boards in a representative capacity during public meetings on issues which were being negotiated by the majority union. *Board of School Dir. v. Wisconsin Emp. Rel. Comm.*, 42 Wis. 2d 637, 168 N.W.2d 92 (1969). On a different but related issue, the rights of individuals to present grievances to their employers are retained by all statutes and modeled after section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1970), which also provides that the union has a right to be present and that no settlement shall be inconsistent with the terms of the collective bargaining agreement. See, *e.g.*, MICH. COMP. LAWS ANN. § 423.26 (1967).

42. 29 U.S.C. § 158(d) (1970).

43. See, *e.g.*, ALA. CODE tit. 37, § 450(3); CAL. EDUC. CODE § 13085 (West Supp. 1973); CAL. GOV'T CODE §§ 3505, 3530 (West Supp. 1973); IDAHO CODE § 33-1272 (Supp. 1973); ORE. REV. STAT. §§ 342.440, 342.710 (1971). Governor Reagan of California recently vetoed a bill which would have given public employees "bargaining" rather than "conferring" rights. *Chronicle of Higher Education*, Oct. 23, 1973, at 2. For an illustration of a state statute patterned after the NLRA, see MICH. COMP. LAWS ANN. § 423.215

followed the NLRA and imposed a requirement of "good faith" bargaining. Moreover, experience indicates that meet and confer statutes⁴⁴ are soon modified by legislation or decision and that there is little practical distinction between the two standards.⁴⁵

It is also necessary that legislation prescribe the items which are to be the subjects of the bargaining process.⁴⁶ In the private sector, "wages, hours and other conditions of employment" are *mandatory* subjects upon which the parties must bargain until either impasse or an agreement is reached.⁴⁷ Over the years the term "conditions of employment" has been broadly interpreted to include most matters affecting employees. Whether a similar trend is desirable or inevitable in the public sector is a matter of debate and of choice. Proponents of a broad scope of collective bargaining argue that in the public sector, economic and policy questions are often intermingled and indiscernible, and that narrow limitations on the scope of bargaining inhibit, if not prohibit, employees, especially professionals, from making valuable contributions to the formulation of institutional policies. A social worker, for example, arguing that the needs of his clients require that caseloads be reduced, may seek to bargain for such a change. The employer could respond that such a decision is a matter of policy reserved for its judgment. It is indeed possible that the question of caseloads could be interpreted as a bargainable economic matter, a nonbargainable management policy question, or both. A New York decision suggested that public management should be able unilaterally to make decisions involving budgetary matters but that, as is required in the private sector, it must bargain as to the *impact*

(1967). Even though the NLRA approach is followed, it has been suggested that significant variations can be established by making negotiations permissive rather than mandatory or by imposing the duty to bargain on the employer but not the union. See *Hearings, supra* note 2, at 132-34.

44. Pure meet and confer statutes usually encounter stiff union resistance on the ground that such statutes preclude employees from negotiating as equals, instead reducing them to "collectively begging." For model "meet and confer" and "negotiations" statutes prepared by ACIR and designed to protect the interests of public employers, see TASK FORCE, *supra* note 1, at 222-30.

45. Since "unions in the public sector have pressed for the same type of demands and with the same vigor under both models," the distinction has become blurred. At present, only Alabama, California, and Missouri have "pure" meet and confer statutes. Edwards, *The Emerging Duty To Bargain in the Public Sector*, 71 MICH. L. REV. 885, 896 (1973).

46. For a thorough review of this subject, see Edwards, *supra* note 45, at 908-27

47. 29 U.S.C. § 158(d) (1970) See also *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

of such decisions upon employees.⁴⁸ The scope of the bargaining obligation in New York was further expanded by a recent decision interpreting that state's statute as requiring that a public employer bargain over *all* mandatory subjects "except in cases where some other applicable statutory provision *explicitly* and *definitively* prohibits the public employer from making an agreement as to a particular term or condition of employment."⁴⁹

Although states such as New York have broadened significantly the scope of the bargaining obligation, others have taken a step in the opposite direction. For instance, in a Connecticut case a teachers' union sought to bargain over the length of the school day and school calendar. The court ruled that the school board need not bargain over such subjects, holding that "hours" were not a condition of employment under the statute.⁵⁰ Such myopic judicial interpretations illustrate the need for legislative specificity in defining the scope of the bargaining obligation. To neglect this vital issue invites power conflicts in public sector labor relations, with the result that the scope of bargainable subjects will be directly related to the relative bargaining powers of the parties.

The provisions in most state statutes as to the scope of bargainable subjects are patterned after the NLRA's broad and open-ended terminology of "wages, hours and other conditions of employment." Many states, however, perhaps in recognition of perceived differences in bargaining in the public and private sectors, specifically exempt certain subjects from the scope of bargaining. This is accomplished either through a management rights clause or by existing civil service legislation.

Following the example of the federal government under Executive Orders 10988 and 11491, several states have limited the scope of bargaining by enumerating certain management rights or prerogatives which are retained by public employers. Hawaii, for example, provides that

48. City School Dist. of New Rochelle, 4 N.Y. PERB 3704 (1971).

49. Board of Educ. v. Associated Teachers, 30 N.Y.2d 122, 129, 282 N.E.2d 109, 113, 331 N.Y.S.2d 17, 23 (1972) (emphasis supplied).

50. West Hartford Educ. Ass'n v. DeCourcy, 162 Conn. 566, 295 A.2d 526 (1972). Although this case was decided on the basis of the specific wording of the statute, it illustrates how far some courts have gone in narrowing the scope of the bargaining obligation. For an opposite holding under a different and more typical statute, see Joint School Dist. No. 8 v. Wisconsin Emp. Rel. Bd., 37 Wis. 2d 483, 155 N.W.2d 78 (1967).

the public employer retains the right to "(1) direct employees; (2) determine qualification standards for work, (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies."⁵¹ Since such reservations of power do much to limit the scope of bargaining, employee frustration over inability to influence policy or mission decisions may continue and result in smoldering labor unrest. In recognition of this problem, Maine has provided that public employers of teachers shall be required to meet and consult on policy questions, although there is no duty to bargain on such matters.⁵² Similarly, the Montana teacher statute provides: "The matters of negotiation and bargaining for agreement shall not include matters of curriculum, policy of operation, selection of teachers and other personnel, or physical plant of schools or other facilities, however nothing herein shall limit the obligation of employers to meet and confer [on those items]."⁵³

If there is any discernible pattern in this area, it is that there is and will continue to be an expansion of the scope of bargainable subjects, notwithstanding occasional interpretive restrictions. The pressures employees are applying to gain a voice over policy matters may well indicate that such matters involve real needs which should be discussed with the employer. If those subjects are not appropriate for collective bargaining, then a state may seek to quell uncertainty by specific legislation exempting certain management decisions from negotiation. In the alternative, or perhaps concurrently, statutory provisions can institutionalize and guarantee employee input on a meet and confer basis on certain important policy decisions affecting the public interest as well as the interests of employees.

Existing laws, primarily civil service legislation, also serve to limit the scope of bargaining in many states. For instance, the Connecticut statute provides that the manner in which merit examinations are con-

51. HAWAII REV. STAT. § 89-9(d) (Supp. 1971). States having similar provisions include New Hampshire, Kansas, Wisconsin, and Nevada.

52. ME. REV. STAT. ANN. tit. 26, § 965 (Supp. 1972-73).

53. MONT. REV. CODES ANN. § 75-6119 (2d Repl. Vol. 1971). See also MINN. STAT. ANN. § 179.73 (Supp. 1973). For examples of statutes specifying that an employer has no duty to bargain over "mission questions," see VT. STAT. ANN. tit. 3, § 905(b) (1972); WIS. STAT. ANN. § 111.91(2)(a) (Supp. 1973).

ducted and graded and the procedure for the appointment of individuals from lists established by such examinations are not proper subjects of negotiation.⁵⁴ Unions, however, have sought to bargain over the criteria used to evaluate employees, the methods of evaluation, and grievance procedures. A question thus arises as to whether collective bargaining or civil service legislation takes precedence.⁵⁵ In Michigan, upon the failure of the legislature to resolve the conflict, the state supreme court held that those sections of the civil service laws dealing with mandatory subjects of bargaining under the collective bargaining law were superseded *pro tanto* by the latter legislation.⁵⁶ The legislatures of at least eight other states, however, have provided that civil service legislation will take precedence over public sector collective bargaining statutes.⁵⁷ Elsewhere, the question presumably awaits judicial resolution.⁵⁸

Of primary importance in the public sector is the establishment of procedures to resolve labor disputes in order that the government can continue to function smoothly in dispensing its services.⁵⁹ Virtually all state legislation permits and encourages grievance procedures to settle disputes over the terms of existing agreements. There are two types of arbitration: "interest" arbitration, which decides the substantive terms of a new contract and thereby resolves a bargaining impasse, and the more common "grievance" arbitration, which settles disputes over the

54. CONN. GEN. STAT. ANN. § 7-474(g) (1972).

55. For a brief discussion of the issue, see H. WELLINGTON & R. WINTER, JR., *supra* note 6, at 142-45. Uncertainty on this point has the foreseeable consequence of impeding negotiations by making the subjects of bargaining a matter of interpretation by each employer, even though, arguably, no conflict should arise until after a contract is executed. Conflicts with "home rule" provisions can create similar problems of precedence. See Blair, *supra* note 15, at 9-10.

56. Civil Service Comm'n v. Wayne County Bd. of Super., 348 Mich. 363, 184 N.W.2d 201 (1971). Similar results for limited categories of employees appear to be mandated by several statutes. See, e.g., CAL. PUB. UTIL. CODE § 70124 (West 1965) (transit workers); CONN. GEN. STAT. ANN. § 7-474(f) (1972) (municipal employees); MASS. GEN. LAWS ANN. ch. 162A § 1-19 (1958) (transit workers).

57. CAL. GOV'T. CODE § 3500 (West 1966), § 3525 (West Supp. 1972); KAN. STAT. ANN. § 75-4330(a) (Supp. 1972); ME. REV. STAT. ANN. tit. 26, § 969 (Supp. 1972-73); MASS. GEN. LAWS ANN. ch. 149, § 178I (1971); PA. STAT. ANN. tit. 43, § 1101.703 (Supp. 1973-74); VT. STAT. ANN. tit. 3, § 904 (Supp. 1973); WASH. REV. CODE ANN. § 41.56.100 (1972); WIS. STAT. ANN. § 111.91(2) (Supp. 1973).

58. For an examination of possible conflicts between civil service and collective bargaining statutes, see Comment, *The Civil Service-Collective Bargaining Conflict in the Public Sector: Attempts at Reconciliation*, 38 U. CHI. L. REV. 826 (1971).

59. See generally SORRY NO GOVERNMENT TODAY UNIONS VS. CITY HALL (R. Walsh ed. 1969).

interpretation of an existing contract.⁶⁰ Although binding grievance arbitration procedures are uniformly part of private sector agreements, the states have approached the subject cautiously.⁶¹ However, it is becoming evident that such provisions are legal and desirable mandatory subjects of bargaining.⁶²

In the area of resolving bargaining impasses, the majority of state laws attempt to induce settlement through mediation and conciliation services and fact-finding procedures. Even though the latter procedures are usually advisory in nature and designed primarily to *persuade* agreement, the release of an agency's findings and recommendations may influence public opinion and result in pressures being brought against the parties to resolve their differences.⁶³

If, after these persuasive procedures are utilized, impasse still exists, the question is then presented how it shall be resolved—by employer fiat, by economic coercion such as a strike, or by institutionalized procedures which culminate in a final and binding decision by a neutral third party. Proponents of binding interest arbitration argue that collective bargaining is desirable, that strikes are undesirable, that the only way to avoid strikes is to provide a substitute, and that the most effective substitute is binding arbitration.⁶⁴ Although most states which have enacted public sector collective bargaining legislation initially have accepted the first two premises of this argument, many of them, after a period

60. For a general discussion of arbitration procedures in the public sector, see Note, *Legality and Propriety of Agreements to Arbitrate Major and Minor Disputes in Public Employment*, 54 CORNELL L. REV. 129 (1968).

61. Early court decisions held that arbitration of grievances by governmental employers was an unlawful delegation of power; however, this judicial attitude began to change in 1951 when a Connecticut court upheld grievance arbitration. *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951). For more recent developments, see Fischbach, *Grievance Arbitration in Public Employee Disciplinary Cases*, 22 LAB. L.J. 780 (1971); Krislov & Peters, *The Arbitration of Grievances in Educational Units in the Late 1960's*, 23 LAB. L.J. 25 (1972).

62. See, e.g., *Oakland County Sheriff's Dept. v. Local 23, AFSCME, BNA Gov't EMPLOYEES REL. REP. No. 227*, at F-1 (Mich. LMB 1968); *Tremblay v. Berlin Police Union*, 108 N.H. 416, 237 A.2d 668 (1968); *City of Warwick v. Warwick Reg. Firemen's Ass'n*, 106 R.I. 109, 256 A.2d 206 (1969). See also Note, *Arbitration and Agency Shops as Mandatory Subjects of Bargaining*, 14 WAYNE L. REV. 1238 (1968).

63. For discussion of these impasse procedures, see Brown, *supra* note 7, at 288-92. For an illustration of a provision for making public the recommendations of fact-finding, see N.D. CENT. CODE § 15-38.1-13 (Repl. Vol. 1971).

64. R. DOHERTY & W. OBERER, *TEACHERS, SCHOOL BOARDS AND COLLECTIVE BARGAINING: A CHANGING OF THE GUARD* 104 (1967).

of experimentation with binding arbitration, have begun to question the validity of the proposition that all strikes by public employees are undesirable.

Interest arbitration may be compulsory or voluntary, as well as advisory or binding.⁶⁵ Contrary to popular belief, the use of *voluntary* interest arbitration is increasing, with Connecticut, Delaware, Maine, New Jersey, New York, Oregon, Hawaii, Pennsylvania, and Vermont all experimenting with it.⁶⁶ Illustrative of the statutory provisions in these states is the Hawaii legislation providing that a public employer shall have the power to set forth "an impasse procedure culminating in a final and binding decision, to be invoked in the event of an impasse over the terms of an initial or renewed agreement."⁶⁷

On the other hand, *compulsory* arbitration, despite its occasional attractiveness to the public, is more rarely used, except in the case of certain critical employees, such as police and firefighters. Thus far, five states have adopted this procedure.⁶⁸ Only Nevada has enacted compulsory interest arbitration legislation of general applicability; however, even under this statute, the governor must, in his discretion, affirmatively direct arbitration prior to the submission of the dispute to fact-finding.⁶⁹

In examining developing statutory patterns regarding impasse procedures, it becomes clear that traditional restraints on the use of economic and other pressures by public employees during a labor dispute are being replaced by innovative procedures designed to provide peaceful and meaningful collective bargaining. Although it is too early to predict whether the bold experiments in compulsory interest arbitration will continue or to reach a determination as to the desirability of utilizing such a method to resolve labor disputes, it should be noted that after several

65. See Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260 (1969).

66. For an excellent exposition of the problems of binding arbitration and a compilation of legal developments in this area, see McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 COLUM. L. REV. 1192 (1972).

67. HAWAII REV. STAT. § 89-11 (Supp. 1971).

68. Compulsory arbitration statutes covering both police and firefighters are found in Michigan, Pennsylvania, and Rhode Island. Statutes in Vermont and Wyoming cover firemen only. See McAvoy, *supra* note 66, at 1194-96. It should be noted that certain subjects, such as economic matters, may be excluded from this procedure. For example, Rhode Island excludes salaries, pensions, and insurance.

69. NEV. REV. STAT. § 288.150 (1971).

years of experience, the Michigan legislature has decided to retain compulsory arbitration for police and firefighters.⁷⁰

It is difficult to discuss strikes in the public sector without evoking emotional responses, and it is on this point that the differences between public and private sector employees and employers are of ultimate importance. Advocates of the right to strike argue that employees in both sectors are equally concerned with working conditions and that public employees should not be denied their full and equal rights of collective bargaining merely because they work for the government. Opponents of the right to strike respond that in addition to total intolerance by the public of a disruption of services, there are differences between public and private sector employment which justify a disparate treatment with respect to the permissible range of economic pressures available to public employees during a labor dispute.⁷¹ It is contended that strikes in the public sector are inappropriate since an economically damaged government will not go out of business as a private employer might;⁷² moreover, financial and legislative constraints may preclude concessions to union demands. Finally, it is maintained that since a public employer, unlike a private employer, is a political entity subject to political pressures, to give public employees, who are voters, the right to strike is to give them an overbalancing quantum of power which, if fully utilized, could take inordinate amounts from the public treasury, thus rearranging government priorities of services and, in a real sense, changing the nature of government.⁷³

70. With the compulsory arbitration statute scheduled to expire June 30, 1972, the legislature acted affirmatively to extend it for an additional three years. MICH. COMP. LAWS ANN. § 423.245 (Supp. 1973-74).

71. For a brief overview of this subject, see Brown, *supra* note 7, at 299-302. See generally Bernstein, *Alternatives to Strikes in Public Labor Relations*, 85 HARV. L. REV. 459 (1971); Rhemus, *Constraints on Local Governments in Employee Bargaining*, 67 MICH. L. REV. 919 (1969); Wellington & Burton, *More on Strikes by Public Employees*, 79 YALE L.J. 441 (1970); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969).

72. See generally Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969).

73. For a summary of these views, see Brown, Book Review, 13 WM. & MARY L. REV. 960 (1972). A recent study indicates these fears have not materialized, at least on the economic level. In a recent study for the Brookings Institute on the impact of union influence on governments, David Stanley concludes that most changes have come at the noneconomic, policy levels and that with "few exceptions, municipal union pressures did not result in shocking or even surprising advances," with wage increases for municipal employees being comparable to those in other segments of the

As the debate continues, there have been some interesting statutory developments. Beyond the question of limitations on the right of public employees to strike, legislation in this area should resolve questions of enforcement and of penalties for violation of strike restrictions. The statutes almost universally codify the common law ban on strikes,⁷⁴ but the method of enforcement varies, perhaps in proportion to the degree of intolerance for strikes. For example, in Delaware, Rhode Island, and Washington, strikes are merely declared illegal, with the result that an employer must act affirmatively to obtain an injunction or in utilizing whatever other forms of reprisal are available to it.⁷⁵ In other states, an agency is authorized to issue judicially enforceable cease-and-desist orders against strikes, which by statute are declared to be unfair labor practices.⁷⁶

The issue of penalties, if any, to be imposed upon violators of strike restrictions is directly related to the question of enforcement, that is, whether strike bans should be self-executing or should reserve to the employer some discretion as to *whether* to act and *how* to act. A recent survey of state strike ban penalties indicates that Nevada has attempted to induce compliance with its ban by fining a striking union \$50,000 a day and its officers \$1,000 a day⁷⁷ In Nebraska, a public employee may

economy. D. STANLEY, *MANAGING LOCAL GOVERNMENT UNDER UNION PRESSURE* 74 (1972).

74. See generally Barret, *Governmental Response to Public Unionism and Recognition of Employee Rights: Trends and Alternatives for Resolving Issues*, 51 ORE. L. REV. 113, 124-28 (1971). The United States Supreme Court recently upheld the constitutionality of the strike ban for postal workers. *United Fed. of Postal Clerks v. Blount*, 404 U.S. 802, *aff'g mem.* 325 F Supp. 879 (D.D.C. 1970). There have been many similar holdings at the state level. See, e.g., *Anderson Fed'n of Teachers, Local 519 v. School City of Anderson*, 252 Ind. 558, 251 N.E.2d 15 (1969), *cert. denied*, 399 U.S. 928 (1970).

75. For an illustration of difficulties inherent in using injunctions to force the return of striking employees, see *School Dist. v. Holland Educ. Ass'n*, 380 Mich. 314, 157 N.W.2d 206 (1968), where a court refused to issue an injunction absent a showing of violence, irreparable injury, or breach of the peace, notwithstanding the fact that the strike was in violation of the state statute. See also Comment, *Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector*, 68 MICH. L. REV. 260, 265-69 (1969).

76. Massachusetts and Wisconsin, for example, have such provisions. For a summary of various state approaches to this problem, see Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 910-14 (1969).

77. TASK FORCE, *supra* note 1, at 21. See generally Seidman, *State Legislation on Collective Bargaining by Public Employees*, 22 LAB. L.J. 13, 19-20 (1971); Smith, *supra* note 76, at 910-14.

be imprisoned for striking,⁷⁸ and it is a felony for an employee of the federal government to do so.⁷⁹ Many state statutes provide for discharge and a period of ineligibility for public employment of strike participants.⁸⁰ Significantly, if such penalties are self-executing rather than available to an employer at its discretion, the employer may be forced to discharge all striking employees, even if adequate replacements are unavailable.⁸¹

Some states, apparently having learned that strike prohibitions do not necessarily prevent public employee strikes, have legislated a limited right to strike for certain categories of employees.⁸² For instance Hawaii and Pennsylvania recently have enacted statutes which require employees to exhaust certain impasse procedures and to give notice of an intent to strike before they may "take to the streets." All of the right-to-strike statutes limit the right by providing that an injunction may be obtained upon proof of a clear and present danger to the safety and health of the public.⁸³ Because of the limited experience under such statutes, it is difficult to determine whether granting a limited right to strike will improve labor relations in the public sector. It is clear, however, that bold and innovative experiments diverging from the general statutory pattern of prohibition will prove valuable in the future to states assessing their own position on the question of strike legislation.

78. TASK FORCE, *supra* note 1, at 21.

79. 18 U.S.C. § 1918 (1970).

80. *E.g.*, VA. CODE ANN. § 40.1-55 (Supp. 1973). New York includes the penalty of removing union dues check-off privileges. N.Y. CIV. SERV. LAW § 210(f) (McKinney Supp. 1972).

81. Even under some of the statutes designed to operate automatically, obstacles can arise. For example, it has been held that the state must provide adequate notice before acting. *Goldberg v. City of Cincinnati*, 26 Ohio St. 2d 228, 271 N.E.2d 284 (1971), *rev'g* 23 Ohio App. 2d 97, 261 N.E.2d 184 (1970). Michigan has repealed the portion of its statute which provided for automatic termination of strikers. MICH. COMP. LAWS ANN. § 423.202 (1967). On the related question of the legality of selective reemployment of strikers, there appears to be no definitive case law on the issue whether a government employer may discriminately refuse to rehire some, but not all, striking employees. This problem may be litigated in the near future, since some states have created a procedure for selective bypassing of the automatic termination procedures. *See, e.g.*, VA. CODE ANN. § 40.1-57.1 (Supp. 1973).

82. *See, e.g.*, PA. STAT. ANN. tit. 43, § 217.1 (Supp. 1973) (police and firemen). *See also* HAWAII REV. STAT. § 89-12 (Supp. 1971); MONT. REV. CODES ANN. § 41-2209 (Supp. 1973); VT. STAT. ANN. tit. 16, §§ 1981-2010 (Supp. 1973)

83. *See, e.g.*, HAWAII REV. STAT. § 89-12 (Supp. 1971).

The final major area requiring attention in collective bargaining legislation is treatment of union security arrangements, by which unions seek to become financially and politically secure in their bargaining relationship with employers. While those favoring the utilization of union security devices in the public sector argue that they are needed to stabilize labor-management relations, opponents point to the inherent tendency of power to corrupt and express the fear that a union may become so secure that it need not consider challenges to its majority status from other unions and may underrepresent its members, especially those holding minority views.⁸⁴

Many states authorize voluntary dues check-offs, by which the employer deducts from paychecks the dues of union members. Although technically not a union security device, the check-off significantly enhances the financial and political strength of an incumbent union. The most extreme union security device is the union shop arrangement, which requires employees, as a condition of continued employment, to join the representative union within 30 days of employment. Union shop provisions rarely are negotiated in the public sector. They are expressly prohibited in the 19 states having right-to-work legislation,⁸⁵ and in most other states provisions which guarantee employees the right to refrain from union activities and compel the employer not to discriminate on the basis of union membership generally render union shop arrangements illegal.

Recent efforts of public employee unions have been directed at negotiation of agency shop provisions, which, unlike union shop arrangements, do not require that employees become union members. The agency shop device requires only that employees, as a condition of continued employment, pay a fee representing their "fair share" of the bargaining costs of their exclusive representative. Recent legislation in Hawaii permits the charging of a service fee equivalent to dues, and the Pennsylvania statute provides that a union may bargain for a maintenance of member-

84. See generally H. WELLINGTON & R. WINTER, JR., *supra* note 6, at 93-96; Ward, *Union Security in Teacher Contracts*, 22 LAB. L.J. 157 (1971); Comment, *Impact of the Agency Shop on Labor Relations in the Public Sector*, 55 CORNELL L. REV. 547 (1970).

85. States with right-to-work legislation are Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Kansas, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. For a compilation of the statutes and case law interpretations, see NATIONAL RIGHT TO WORK COMMITTEE, *STATE RIGHT-TO-WORK LAWS* (1972).

ship provision.⁸⁶ The cases are divided on the question whether right-to-work laws prohibit agency shops.⁸⁷ In the absence of such legislation, the validity of an agency shop may depend upon limitation of the fee charged nonmembers to the actual costs of negotiation; otherwise, according to the leading case,⁸⁸ the agency shop is the "practical equivalent" of a union shop and is in violation of statutory prohibitions of employer discrimination on the basis of union "membership."

In the area of union security devices, as in other areas of public employee labor relations, stability and predictability require appropriately drafted legislation. Although the response in a given state will depend upon its resolution of policy conflicts, presently existing statutory examples provide a wealth of experience which can be utilized by a state seeking to assess its legislative needs.

B. Judicial Response

Notwithstanding the absence of enabling legislation, de facto and extra-legal bargaining relationships abound in states with inadequate or nonexistent public sector collective bargaining legislation. In spite of the doubtful legal enforceability of such agreements, public unions and employers continue to negotiate and enter into contracts covering most conditions of employment. For example, in Virginia, a nonstatutory

86. HAWAII REV. STAT. § 89-4(a) (Supp. 1971); PA. STAT. ANN. tit. 43, § 1101.705 (Supp. 1973). Wisconsin recently amended its municipal bargaining law to permit unions to bargain for "fair share agreements" or agency shop clauses. See WIS. STAT. ANN. § 111.70(2) (Supp. 1973).

87. Some right-to-work statutes specifically prohibit agency shop clauses; in other right-to-work states, validity of the devices has rested on interpretation by a court or attorney general. See D WOLLETT & R. CHANIN, *THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS* 3:75-76 (1970). For an illustration of a court upholding an agency shop provision, notwithstanding a right-to-work statute forbidding conditioning employment on union membership, see *Meade Elec. Co. v. Hagberg*, 129 Ind. App. 631, 159 N.E.2d 408 (1959) (The law was later repealed.).

88. *Smigel v. Southgate Community School Dist.*, 388 Mich. 531, 202 N.W.2d 305 (1972). The court found that no attempt had been made "to relate the non-member's economic obligations to actual collective bargaining expenses." 202 N.W.2d at 308. Thus, if that test were met, presumably an agency shop would be permissible. The lower court in *Smigel* held that the validity of an agency shop clause "hinges on the relationship between payment of a sum equivalent to the dues of [the union] and a non-member's proportionate share of the cost of negotiating and administering the contract involved." An amount greater or less would be in violation of the statute. *Smigel v. Southgate Community School Dist.*, 24 Mich. App. 159, 180 N.W.2d 215 (1970).

state, approximately ten agreements have been negotiated between local governments and unions representing employees of large metropolitan school systems and other public institutions.⁸⁹ The continued unregulated development of such extra-legal bargaining relationships may be interpreted by the courts as an implicit mandate to develop a common law of public sector labor relations. Moreover, the pattern of such relationships may, like a mass of weeds, sink its roots deeply and inhibit future legislative action.

1. The Developing Law: Nationally

Wherever legislation defining the collective bargaining obligations of public unions and employers is lacking, it is the judiciary which has been called upon to act. Increasingly, and in a piecemeal fashion, the courts have created a patchwork of recognizable rights of public employees to form and join unions, to obtain recognition for purposes of bargaining, to be free from employer discrimination or interference while engaged in protected activities, and to have labor agreements judicially enforced. As this developing mosaic of rights assumes first form then substance, it would appear that the judicial attitude is changing from one of reluctance to act to one of impatience with legislative inaction. The Florida Supreme Court, for example, recently held that that state's constitution required bargaining legislation in the public sector, and that in the absence of legislative action, the court would formulate bargaining criteria.⁹⁰ The constitutional provision prompting this holding was one guaranteeing employees the right to bargain collectively.⁹¹ Noting the ease with which such a right could be abridged or denied in the absence of statutory guidelines, the court relied upon cases involving judicially ordered reapportionment of school districts to protect other constitution-

89. See COMMONWEALTH OF VIRGINIA, REPORT OF THE COMMISSION TO STUDY THE RIGHTS OF PUBLIC EMPLOYEES TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA 6 (1963) [hereinafter cited as VIRGINIA REPORT]. The significance of these de facto arrangements should not be underestimated, since, notwithstanding their dubious enforceability, they do in fact govern the conduct of the public employer in its relationship with nonunion as well as union employees.

90. *Classroom Teachers Ass'n v. Legislature of the State of Fla.*, 269 So. 2d 684 (Fla. 1972).

91. FLA. CONST. art. I, § 6 provides: "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike."

ally guaranteed rights in finding authority for judicially established bargaining procedures.⁹²

It appears settled that the right of public employees to organize unions for purposes of collective bargaining is protected from public employer interference by the first amendment to the United States Constitution.⁹³ Although the right to organize carries with it a prohibition of employer discrimination against employees engaging in protected union activities, arguments that the constitutional right to organize implies a right to bargain have thus far been rejected.⁹⁴ Recognition of a constitutional right to bargain would, in effect, entail judicially mandated collective bargaining absent enabling legislation. A strong argument can be made, however, that the right to organize often is rendered nugatory in the absence of a right to bargain. Thus, it may be only a matter of time until a court, attempting to fashion a remedy for employer interference with the organizational rights of employees, finds that the only way in which to remove the ill effects of the employer's actions is to order it to bargain with its employees.⁹⁵

92. 269 So. 2d at 687. The court, however, refused to issue a mandamus, stating that it assumed the legislature would act within a reasonable time and that therefore a court order would be premature. *Id.* at 688.

93. *AFSCME v Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Melton v. City of Atlanta*, 324 F Supp. 315 (N.D. Ga. 1971); *County of Butler v. Service Employees Int'l Union*, 306 F Supp. 1080 (W.D. Pa. 1969); *Atkins v. City of Charlotte*, 296 F Supp. 1068 (W.D.N.C. 1969).

94. In *Beauboeuf v. Delgado College*, 428 F.2d 470 (5th Cir. 1970), a union was denied an injunction to force an employer to negotiate. Similarly, in *Indianapolis Educ. Ass'n v. Lewallen*, 72 L.R.R.M. 2071 (7th Cir. 1969), it was held that although there is a constitutional right to form a union, there is no constitutional duty to bargain collectively with an *exclusive* bargaining agent. See also *Fire Fighters, Local 794 v. City of Newport News*, 339 F Supp. 13 (E.D. Va. 1972); *United Fed'n of Postal Clerks v. Blount*, 325 F Supp. 879, 883 (D.D.C. 1971).

95. This was the thrust of an argument made by the Richmond Education Association in a recent Virginia case. See Brief in Opposition to the Defendants' Motions at 11-16, *Richmond Educ. Ass'n v. Crockford*, 55 F.R.D. 362 (E.D. Va. 1972). Overruling a motion to dismiss, the court tacitly found that a public employer's refusal to meet with the union may have a "chilling effect" on first amendment rights. The court suggested that "the grant of approval to organize and associate without the corresponding grant of recognition may well be an empty and meaningless gesture." *Id.* at 3116-17. However, even a union victory on this point could be hollow if no "good faith" obligations were concurrently imposed, that is, if the employer merely "recognized" the union and occasionally discussed matters with it. For example, in *Hanover Township Fed'n of Teachers v. Hanover Community School Corp.*, 318 F Supp. 757 (N.D. Ind. 1970), the court found that it had no jurisdiction over an action brought by teachers contending that the school board had not bargained in "good faith" with their union. The position that the appropriate remedy is not com-

Aside from constitutional arguments, however, it traditionally has been held that a public employer may not bargain with its employees without express authorizing legislation. The conceptual and legal bases used to support this position increasingly appear to be largely makeshift arguments to forestall bargaining. For example, the argument that bargaining interferes with the sovereignty of a state ignores the experience of other states and fails to recognize that the state bargains every day for contractual services and supplies.⁹⁶ Another argument often stressed is that to bargain with a union would be an illegal delegation of power equivalent to an abdication of responsibility and would install the union as a fourth branch of government with the power to close down the public employer. The persuasiveness of this argument is diminished by the experience of other states and the fact that under *all* collective bargaining statutes no agreement or even concessions to employee demands are required.⁹⁷ Finally, arguments that bargaining and public service are incompatible because of the special nature of government employers are outmoded and probably better left to the bargaining agenda.

Recent decisions on the implied authority of a public employer to bargain with its employees or their representative⁹⁸ indicate that the courts have begun to reject the traditional arguments.⁹⁹ For example,

pulsory bargaining but rather "good faith procedural communications" was taken in *New Jersey Turnpike Authority v. AFSCME*, 83 N.J. Super. 389, 397, 200 A.2d 134, 139 (1964).

96. See *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947).

97. The NLRA, for example, imposes an obligation to bargain but specifically states that "such obligation does not compel either party to agree to a proposal or require the making of a concession" 29 U.S.C. § 158(d) (1970). For an illustration of the traditional argument, see *City of Fort Smith v. Council 38, AFSCME*, 245 Ark. 409, 433 S.W.2d 153 (1968). See also *Board of Educ. v. Scottsdale Educ. Ass'n*, 17 Ariz. App. 504, 498 P.2d 578 (1972).

98. For an excellent review of this area of the law, see Dole, *State and Local Public Employee Collective Bargaining in the Absence of Explicit Legislative Authorization*, 54 IOWA L. REV. 539 (1969).

99. Very often, there is little strain involved in implying authority to bargain from the express authority of a public employer. For example, if a school board is authorized to supervise the school system and to enter into individual contracts with its faculty members, it is not unreasonable to imply authority to enter into a group contract. Decisions adopting this view include *Chicago Div. of Ill. Educ. Ass'n v. Board of Educ.*, 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966); *Local 611, IBEW v. Town of Farmington*, 405 P.2d 233 (N.M. 1965). But see *Board of Educ. v. Scottsdale Educ. Ass'n*, 17 Ariz. App. 504, 498 P.2d 578 (1972).

Another imaginative and effective method of imparting legal enforceability to negotiated agreements is to incorporate them by reference into the individual employment agreements.

courts in Indiana, Iowa, and Illinois have held that although a public employer has *no duty* to bargain, it *may* do so on the basis of implied authority.¹⁰⁰ Although the courts thus have recognized, in the absence of legislation, rights of public employees to organize, to be free from employer interference while engaged in protected activities, and to bargain if the employer chooses to do so, the establishment of definitive statutory guidelines nevertheless would appear to be a preferable approach. The experience of Virginia with nebulous and changing judicial policies illustrates the need for legislative action.

2. *The Developing Law in Virginia*

Virginia law on public sector labor relations has evolved somewhat similarly to that of other nonstatutory states, although perhaps more slowly. From the mid-1930's through the 1960's, judicial decisions, attorney general opinions, and legislation generally prohibited public employee unions, or at least collective bargaining by them. Apparently, it was believed that the negotiation of labor agreements might compromise the public employer's constitutional mandate to run the government. In 1935, the Supreme Court of Appeals of Virginia upheld a city manager's regulation against unionization, ruling that firefighters could not form or join unions.¹⁰¹ Twenty years later, in another case involving firefighters, a lower court reaffirmed the power of a local government to promulgate rules barring unionization, holding that the state's right-to-work law was inapplicable to city or state employees.¹⁰²

Virginia's right-to-work statute was enacted in 1946 and guarantees

100. See *East Chicago Teachers Union, Local 511 v. Board of Trustees*, — Ind. App. —, 287 N.E.2d 891 (1972); *Local 4, Gary Teachers Union v. School City of Gary*, — Ind. App. —, 284 N.E.2d 108 (1972); *Cook County Police Ass'n v. City of Harvey*, 8 Ill. App. 3d 147, 289 N.E.2d 226 (1972); *Chicago Div. of Ill. Educ. Ass'n v. Board of Educ.*, 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966); *State Bd. of Regents v. United Packing House Food & Allied Workers*, 175 N.W.2d 110 (Iowa 1970). Although an implied authority to bargain was found in each of these cases, only in *Chicago Div. of Ill. Educ. Ass'n v. Board of Educ.*, 76 Ill. App. 2d 456, 222 N.E.2d 243 (1972), was it held that the public employer could treat the union as the exclusive bargaining representative for all employees within the unit. The same arguments used for implied authority to bargain may be made for implying authorization for a public employer to enter into agreements calling for binding grievance arbitration in the absence of enabling legislation. Cf. *Youngstown Educ. Ass'n v. Board of Educ.*, 36 Ohio App. 2d 35, — N.E.2d — (1973).

101. *Carter v. Thompson*, 164 Va. 312, 180 S.E. 410 (1935).

102. *Verhaagen v. Reeder* [Ct. of L. & Ch., Norfolk, Va., (1955) (unreported)], *appeal refused*, 198 Va. lxxix (1956), *cert. demed.*, 353 U.S. 974. The case is cited in 1969-70 VA. ATT'Y GEN. OP. 159.

employees the right to work regardless of union or nonunion affiliation.¹⁰³ During the same legislative session, the Senate passed Resolution Number 12, which in essence stated that it was contrary to Virginia's public policy for a public employer to recognize or negotiate with a labor union as a representative of state employees and for public employees to form organizations *affiliated with any labor union* to discuss conditions of employment or to claim the right to strike.¹⁰⁴

Some of these older approaches to public employee unionization have been displaced in recent years. Prior to modern Virginia cases on the matter, Virginia's Attorney General, aware of the developing federal court decisions upholding the constitutional right to associate and thus to form unions, advised that public employees in Virginia had such rights.¹⁰⁵ In addition, he stated that although a state agency *might* have implied authority to negotiate with a union representing the agency's employees, he was advising against such negotiations in light of the 1946 Senate resolution and because implied authority to negotiate was not then a widely accepted principle of law.¹⁰⁶ In a subsequent opinion, however, he ruled that although any agreement reached through collective bargaining would be of "doubtful enforceability," a school board could discuss working conditions with any group of employees and embody the results of such discussions in resolutions.¹⁰⁷

The courts have further defined the nature of bargaining rights of Virginia public employees in three recent cases. In *Carroll v. City of Norfolk*,¹⁰⁸ a federal district court held that a local ordinance forbidding a firefighters' organization to affiliate with a labor union was unconstitutional because it denied employees the right to associate. In a subsequent case involving firefighters and police,¹⁰⁹ it was held that absent a legislative mandate from Congress or the General Assembly, a municipal employer does not have a *duty* to bargain with its employees' union.¹¹⁰

103. VA. CODE ANN. § 40.1-58 *et. seq.* (Supp. 1973).

104. S.J. Res. 12, Va. Gen. Assembly (1946). In 1969, this resolution was held to be merely a statement of policy without the force of law. *Fire Fighters, Local 794 v. City of Newport News*, 307 F Supp. 1113 (E.D. Va. 1969).

105. 1969-70 VA. ATT'Y GEN. OP. 158.

106. *Id.*

107. 1969-70 VA. ATT'Y GEN. OP. 231, 232. It is interesting to note that the Attorney General also ruled that the Virginia Freedom of Information Act is applicable to such discussions and thus that they must be open to the public. *Id.*

108. Civil Action No. 524-70-N (E.D. Va., Apr. 20, 1971).

109. *Fire Fighters, Local 794 v. City of Newport News*, 339 F Supp. 13 (1972).

110. *Id.* at 17

However, the court noted, as follows, that a public employer could, if it desired, meet and confer with its employees to discuss conditions of employment: "We hasten to point out that public employees are not precluded from sitting down at a table with representatives of the city and discussing matters concerning the employment relationship."¹¹¹ Finally, it has been held¹¹² that a school board's refusal to deal with an employee representative could have such a "chilling effect upon plaintiffs' fundamental rights to associate and bargain collectively" that the right to organize "without the corresponding grant of recognition may well be an empty and meaningless gesture on the part of the School Board."¹¹³

Although it appears that the Virginia cases permit a public employer to bargain with its employees if it desires to do so, the question remains whether any agreement reached by the parties would be enforceable. As noted earlier, the trend of recent cases in other jurisdictions without enabling legislation suggests that courts will enforce negotiated agreements if it can be found that the public employer had implied authority to bargain with the representative of its employees. Several Virginia cases appear to signify the existence of such implied authority in public employers. In *McKenzie v. Charlottesville & A. Ry.*,¹¹⁴ the Supreme Court of Appeals of Virginia held that since a municipal corporation had the explicit power to contract, it had the implied authority to negotiate an arbitration provision, as long as it retained the power to make binding unilateral decisions. A similar result was reached in *Howard v. School Board of Alleghany County*,¹¹⁵ in which it was held that a general statutory authorization to a school board included the implied authority to negotiate on matters only incidentally related to the school board's express powers. The admonition of the State Attorney General in 1970 regarding the "doubtful enforceability" of negotiated agreements may merit reexamination in light of changing attitudes.¹¹⁶

111. *Id.*

112. *Richmond Educ. Ass'n v. Crockford*, 55 F.R.D. 362 (E.D. Va. 1972).

113. *Id.* at 364. After the court denied a motion to dismiss, the parties agreed to drop the suit.

114. 110 Va. 70, 65 S.E. 503 (1909).

115. 203 Va. 55, 122 S.E.2d 891 (1961). An arguably competing principle can be drawn from cases in which statutes in apparent derogation of the sovereignty of the state are strictly construed. *See, e.g., Wilson v. State Highway Comm'r*, 174 Va. 82, 4 S.E.2d 746 (1939).

116. In 1973 the Virginia right-to-work law was made applicable to public employees. VA. CODE ANN. § 40.1-58.1 (Supp. 1973) This provision incorporates section

C. Political Response

Nationally, the growing political interest in public employee labor legislation is reflected in the increasing number of statutes being enacted by state legislatures.¹¹⁷ Beyond actual enactments, evidence of political activity can be observed in various other forms. For example, although the legislature in New Mexico recently rejected a public employee collective bargaining bill, the state's attorney general, in apparent response to state needs, ruled that state agencies could enter into consultative or other nonformal relationships with employee organizations.¹¹⁸ As mentioned earlier, political interest in legislation has also taken on a national dimension, with Congress holding hearings on the need for a federal response.¹¹⁹ Thus far, opponents of federal legislation have argued that since there is insufficient state experience and because of the divergent state approaches to the question, it would be premature for the federal government to intervene at this time.¹²⁰ The counterargument, of course, is that unless and until the states enact comprehensive statutes, the needs of public employees are not being met, and that federal legislation could fill this void.

40.1-66, which provides that "nothing herein contained shall be construed to prevent or make illegal the peaceful and orderly solicitation and persuasion by union members of others to join a union. " *Id.* § 40.1-66 (Supp. 1973). This development certainly gives tacit statutory approval to the already constitutionally protected right to form unions; whether it also protects full union *membership* rights, which implicitly include the right to bargain, is left for advocates in the area. A claim that a right-to-work provision gave rise to a legislative duty to enact enabling legislation was accepted by the court in *Classroom Teachers Ass'n v. Legislature of the State of Fla.*, 269 So. 2d 684 (Fla. 1972). There, however, the source of the right to bargain was a state constitution.

117. Statutes recently have been enacted in Minnesota, Kansas, Montana, Idaho, and Oklahoma. *Hearings, supra* note 2, at 79-80.

118. The state personnel board then established guidelines for negotiating agreements. A diluted form of legislative response has taken place in South Carolina, where the legislature has provided grievance procedures for public employees. *Id.* In 1973 Virginia enacted similar legislation. VA. CODE ANN. § 15.1-7.1 (Supp. 1973) (effective June 30, 1974).

119. See notes 22-26 *supra* & accompanying text.

120. See, e.g., *Hearings, supra* note 2, at 281-87 (statement of Secretary of Labor Hodgson). The constitutional basis for assertion of federal jurisdiction is found in *Maryland v. Wirtz*, 392 U.S. 183 (1968), which upheld the application of the Fair Labor Standards Act to certain categories of public employees as a legitimate exercise of congressional power under the commerce clause of the Constitution. Other examples of federal regulation of labor relations involving state employees can be found in Title VII of the Civil Rights Act of 1964, The Economic Stabilization Act of 1970, and the Occupational Safety and Health Act of 1970.

Political activity in Virginia has been typical of that elsewhere. Although the growing pressures have not yet culminated in bargaining legislation, there are indications that legislation may soon be forthcoming. Beginning in the late 1960's, collective bargaining bills for separate categories of employees, such as firefighters, police, and teachers, were introduced into various committees of the General Assembly but were not acted upon. In 1972, although several bills again were introduced but never reported out of committee, political pressures were increasing, and a Task Force was created to study the "rights of public employees."¹²¹ In 1973, after defeat in committee of a "teachers' bargaining bill," public employees joined together to form a coalition to press for omnibus legislation which would encompass all their interests. Their combined pressure, added to developing legal rights and the presence of increasing extra-legal bargaining arrangements, may be sufficient to persuade the General Assembly that the time has arrived for Virginia to enact comprehensive collective bargaining legislation. Indeed, the Virginia Municipal League and the Virginia Association of Counties have warned that Virginia cities and counties "can ignore the winds of change only at their risk."¹²²

III. LEGISLATIVE OPPORTUNITIES

A. *The Need for Policy Decisions*

The time has arrived when decisions regarding public sector labor relations must be made. State governments must recognize that public employee unions are organizing, growing, and negotiating, and thus must be dealt with. The choice is between regulating the growth of public employee unionism or allowing it to grow where and as it can, unchecked by any restraining forces. Almost twenty years ago, a report by the

121. H.J. Res. 122, Va. Gen. Assembly (1972). After one year of study, the Task Force made eight recommendations, including the need for the state to institutionalize grievance procedures, to include public employees under the right-to-work statute, and, if comprehensive collective bargaining legislation were deemed desirable, to make it uniformly applicable to all public employees, both state and local. See VIRGINIA REPORT, *supra* note 89. The first two of these recommendations have already been enacted into law.

122. BNA GOV'T EMPLOYEE REL. REP. No. 422, at B-5 (1971). Perhaps indicative of these "winds of change" was the recent union election conducted by the NLRB among faculty members at Randolph-Macon College, Ashland, Va. Although as a private college it was within the statutory jurisdiction of the NLRB, the fact that the Board asserted its jurisdiction indicates that attitudes toward unionism are changing. (The union was defeated by a vote of 38 to 28.).

American Bar Association stated that "a government which imposes upon private employers certain obligations in dealing with their employees, may not in good faith refuse to deal with its own public servants on a reasonably similar basis modified, of course, to meet the exigencies of public service."¹²³

Collective bargaining legislation for the public sector should respond fairly to the legitimate demands of public employee unions without compromising the public's interest in obtaining governmental services. Moreover, because of differences between public and private employers, legislators should strive to meet any unique needs of the parties rather than merely attempting to transplant private sector labor law concepts on a wholesale basis into the public sector. It thus is appropriate at this point to note several of the characteristics which differentiate public employment from private employment.¹²⁴

The most salient difference between the public and private sectors is reflected in the limitations of power placed upon the public employer by legislative, financial, political, and market constraints, most of which are not subject to the employer's control.¹²⁵ For example, certain existing laws, such as those dealing with the rights of civil service employees, may limit the scope of bargaining by placing constraints on subjects for negotiation and on management's authority to commit itself financially. Natural market differences, including the service motivation of government as opposed to the profit motive operative in the private sector, make the public employer less able to pass on higher costs to its "customers," instead causing a reallocation of existing resources. In addition, the public employer is less responsive to economic pressures by the union, since a government cannot go out of business. Because of these and other differences, such as the extreme vulnerability of public employers to political pressures, a strong argument can be made that government should not be regarded as "just another industry"¹²⁶ Nevertheless, it has been suggested that "certain difficulties in developing viable systems of labor relations stem from an almost slavish adherence to the notion that the public and private sectors cannot be treated alike."¹²⁷

123. Edwards, *supra* note 45, at 885.

124. See generally Smith, *supra* note 76.

125. For a brief overview of these problems, see Brown, *Professors and Unions: The Faculty Senate: An Effective Alternative to Collective Bargaining In Higher Education?*, 12 WM. & MARY L. REV. 252, 299-302 (1970).

126. See generally Brown, Book Review, 13 WM. & MARY L. REV. 960 (1972).

127. Edwards, *supra* note 45, at 886-87.

B. *Essentials of Public Sector Labor Legislation*

Careful and thoughtful analysis of the alternative statutory approaches to the problems of labor relations in the public sector is of course the initial step in drafting appropriate legislation. Drawing upon the statutory experience of other states, avoiding their mistakes, and starting with their achievements as a basis for legislation are luxuries available to a state in the formative stage of developing public sector legislation. The options are many and the opportunities are great, but regardless of the eventual form of the statute, certain essential substantive elements should be included.

The statute should, of course, recognize the right of public employees to join or refuse to join a union. Omnibus legislation, covering all public employee groups, has the advantage over selective legislation of avoiding repeated demands for legislation by a plethora of employee groups. Comprehensive legislation also provides efficient and fair treatment of all employees, especially if administration of the act is placed in the hands of a single agency. Experience indicates that in the often controversial field of public employee labor relations, the best way to resolve representation and unfair labor practice issues is through the use of an independent agency established solely for the purpose of interpreting and enforcing the provisions of the statute. To be effective, the agency should be empowered to regulate the conduct of the employer *and* the union, with enforcement powers similar to those available to the NLRB.¹²⁸

With respect to representation questions, statutory guidelines should be established which limit the scope of the bargaining unit to the particular employing agency (for example, a particular state college), unless it can be shown that the bargaining unit should be larger because of the employer's peculiar hierarchical structure (for example, the New York system of state colleges).¹²⁹ The representation criteria should be sufficiently broad to permit the inclusion of similar groups within a bargaining unit but specific enough to distinguish truly diverse groups.¹³⁰ If specified categories of employees are designated by statute to be an appropriate unit, the classification should create only a presumption, which could be overcome by proof of sufficient dissimilarities of interests.¹³¹

128. For a discussion of this subject, see Edwards, *supra* note 45, at 886-87.

129. *Id.* at 903-08.

130. Within such a framework and to facilitate a more efficient system, it is not inconsistent to require the administering agency to determine *the most*, rather than *an*, appropriate bargaining unit.

131. This procedure would permit special categories of employees such as profes-

For example, although the teaching and maintenance staffs of a school might both be classified as "educational personnel," it arguably would be inappropriate for both to be included within the same bargaining unit. Finally, the statute should specify whether supervisors are to be excluded from units of rank-and-file employees. If they are excluded, a decision must be made whether to permit them to form a separate unit to negotiate or meet and consult. An attractive solution would be inclusion of a flexible statutory provision which, taking into consideration some of the unique aspects and special needs of various public employee groups, would permit supervisor participation where appropriate.¹³²

The private sector concepts of exclusive representation and secret ballot elections have withstood the test of time and should be adopted into public sector legislation. However, consideration should be given to protecting the rights of minority unions to speak freely in open forums on substantive issues being considered by the government. Similarly, the right of individuals to take grievances directly to their employer should be implemented. Problems can be avoided if election guidelines are established so that representation elections can occur only "in season," that is, only during a fixed time period preceding the date on which the public employer must submit its budget requests. Such a provision would diminish the unneeded extra pressure of an unreasonable deadline during negotiations and avoid representation contests while budgets are being submitted.¹³³

All labor legislation is conceived on the premise that labor disputes are best resolved through the process of peaceful negotiation. To effectuate this policy, a statute should impose upon the parties the obligation to bargain in good faith and should define clearly the subjects of negotiation. In the private sector, experience has shown that unless a statute establishes unambiguous limitations on the bargaining obligation, litigation is constantly necessary to determine whether a matter is a subject of negotiation, with the trend being toward a continuous increase in the number of mandatory subjects of bargaining. Management rights clauses may be an appropriate method of establishing the boundaries of

sions, not otherwise covered by a statute, to prove that they require separate treatment.

¹³² The treatment of school principals and department heads, police sergeants, head nurses, and other supervisors is an inevitable and recurring problem in public sector labor relations and should be dealt with as specifically as possible by legislation.

¹³³ For a discussion of this problem, see H. WELLINGTON & R. WINTER, JR., *supra* note 6, at 88-89. For an illustrative statute, see WIS. STAT. ANN. § 111.70 (Supp. 1972).

negotiation if they are carefully drafted and take into account unique characteristics of public sector employment. For example, public employees frequently desire to make recommendations regarding the "mission" of their government employer. It is submitted that the enlightened approach is to recognize that public employees have a legitimate interest in their employer's mission and that, as is the case in several states, a union should be permitted to "consult" with the employer on such matters.¹³⁴ Indeed, this small safety valve could go far toward creating a smoother-functioning bargaining process.

Finally, statutory constraints on bargaining, such as civil service and tenure laws, should be amended to avoid potential conflicts regarding bargaining subjects and overlapping grievance procedures. In addition, there is no evidence that a government would be affected adversely by permitting a collective bargaining law to supersede inconsistent provisions in other laws, such as the so-called "sunshine laws," which require that all meetings of state agencies be open to the public. The preferable position, and the view of many courts, is that "meaningful collective bargaining would be destroyed if full publicity were accorded at each step of the negotiations."¹³⁵

It is critical that the legislature consider carefully the types of impasse procedures to be established by a collective bargaining statute. Generally, such procedures should be flexible and include at least mediation and a fact-finding procedure. Since it is in the state's interest to avoid impasse disputes in public sector labor relations, it would seem appropriate that costs of these procedures be borne by the state rather than by the parties. Moreover, questions as to what constitutes an "impasse" should be covered specifically by statute and not left to subsequent determination by a court or agency. Because the term "impasse," like "good faith," is not susceptible of precise definition, the statute should artificially determine that impasse exists at some given point prior to the budget submission deadline.¹³⁶

134. Under Minnesota's new bargaining law, employees may "negotiate" over terms and conditions of employment and "meet and confer" over other items. MINN. STAT. ANN. § 179.65 (Supp. 1973). See also ME. REV. STAT. ANN. tit. 26, § 965 (Supp. 1972). For a statute which excludes such subjects from discussion, see ORE. REV. STAT. § 342.440 to .480 (1971).

135. *Bassett v. Braddock*, 262 So. 2d 425, 426 (Fla. 1972). In Virginia, an opinion by the Attorney General advises that the state's sunshine law requires open sessions. 1969-70 VA. ATT'Y GEN. OP. 232.

136. Of course, upon the request of the parties, mediators and fact-finders could be made available before that time.

Many experiments have been made with statutory schemes designed to encourage the resolution of labor disputes. For instance, the results of fact-finding procedures, which normally are advisory only, could become more persuasive upon the parties if the recommendations were released to the public, with a resulting development of political pressures on the parties. Another innovative and attractive impasse procedure, the "choice of procedure" provision,¹³⁷ permits a state agency to choose from among a number of post-impasse procedures (including fact-finding, mediation, and binding arbitration) the one which is best tailored to the dispute. This flexible procedure has the advantage of building uncertainty into the post-impasse stage, thus making it difficult for the parties to estimate the consequences of their failing to agree.

Binding *interest* arbitration is a final dispute settlement procedure which should receive consideration. It should be viewed as an alternative to public employee strikes, which, as the newspapers reflect, still occur notwithstanding their prohibition.¹³⁸ Experimentation by the states with binding interest arbitration appears to be bearing fruitful results.¹³⁹ To make the procedure more acceptable to various groups, many jurisdictions have placed restrictions on its use, such as limiting it to disputes involving certain "critical" employees, excluding from its coverage certain subjects such as salaries and wages, and making it voluntary, with an agency or the parties retaining some discretion over when it should be invoked. It has been argued that the specter of binding arbitration would cause meaningful bargaining to cease and "positioning" for the arbitrator's award to begin; however, techniques are being developed to diminish such a result. For example, "selective last offer" arbitration holds each party to his final offer on each issue and allows the arbitrator to decide each question on an all-or-nothing basis.¹⁴⁰

In the absence or upon the failure of final dispute settlement procedures, the possibility of strikes is real and should be dealt with forthrightly in legislation. It must be decided, as a matter of public policy, whether public employee strikes should be expressly permitted or prohibited. If they are to be unlawful, realistic penalties and enforcement

137. For a discussion of this procedure and its use, see H. WELLINGTON & R. WINTER, JR., *supra* note 6, at 185-86.

138. See Brown, *supra* note 7, at 310-12.

139. See generally McAvoy, *supra* note 66.

140. See Garber, *Compulsory Arbitration in the Public Sector*, 26 *ARB. J.* (n.s.) 226 (1971); H. WELLINGTON & R. WINTER, JR., *supra* note 6, at 180. See also McAvoy, *supra* note 66.

procedures must be designed to satisfy the needs of the state and its citizens while, at the same time, allowing the public employer some flexibility in negotiating with the representative of its employees and in being able to retain a necessary work force. If strikes are permitted, restrictive provisions are available to protect the public interest. In Pennsylvania, for example, a limited right to strike is terminated upon a showing of a clear and present danger to the community. Further protection can be provided by withholding the right to strike from certain "critical" employees.¹⁴¹

IV CONCLUSION

The growing needs of public sector labor relations as well as the emerging patterns of response to those needs are apparent. As more public employees organize and demand the right to bargain collectively, the need for comprehensive state or federal legislation increases. Observation of the statutory responses in most states, the need in others for judicial development of rights of public employees, and the political climate generally suggests that the time for unregulated, extra-legal growth of bargaining relationships is past. By drawing upon the experience of other states with various alternatives, states with inadequate or nonexistent public sector collective bargaining legislation can maximize the legislative opportunity with which they are faced.

141. "Critical" employees most often include such categories as police, firefighters, and mental hospital and prison guards.