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## **Collective Bargaining in Public Libraries: Preserving Management Prerogatives**

### **ABSTRACT**

Drawing mostly from the history of public sector collective bargaining in Ohio, laws and chronology are examined for insight into the importance of management rights and prerogatives. Special attention is given to dispute resolution and the respective rights of management and labor in it, since the existence of a dispute is likely to reveal an issue where one or the other party may acquire previously undefined authority.

### **INTRODUCTION**

Collective bargaining, or its absence, has been governed for years in Ohio by the Ferguson Act. The Ferguson Act was enacted in 1943 in direct response to numerous crippling strikes in the private sector following World War II. The law was sweeping and unambiguous. All strikes in the public sector were outlawed. The stated penalties for striking public employees were severe; the act provided for termination of employment for failure to end illegal strikes. It further provided that illegal strikers could not receive increased compensation for one year following an illegal strike and included probation for a like period.

The law held firm and intact for many years, but in the 1960s and early 1970s public employees in Ohio, as in many other states, began to organize and seek representation at the bargaining table. In 1975, deciding on a case referred to as the Dayton Classroom Teachers Association *v.* Dayton Board of Education, the Ohio Supreme Court held that public employees could meet and negotiate binding collective bargaining agreements with employers. The court also held, however, that

employees have no constitutional right to require their employers to bargain collectively.

In the following years, collective bargaining spread unimpeded to most of the public sector employment throughout Ohio. Public libraries, however, seemed not to have been affected. Perhaps the wealth bestowed upon many public libraries by the intangible personal property tax (imposed on stocks and investments) induced satisfaction or complacency among library employees. Staff associations, in their roles as social organizers and combined with benign advocacy, may have participated sufficiently in organizations' governance. The exception was the Public Library of Youngstown and Mahoning County, an association library under Ohio laws, which had a collective bargaining agreement for years under the jurisdiction of the National Labor Relations Board, since a state labor relations authority had not existed until the recently enacted Ohio Public Employees Collective Bargaining Act.

The first drafts of the Ohio Public Employees Collective Bargaining Act (the act), Chapter 4117 of the *Ohio Revised Code*, were considered in 1971, a year after the neighboring state of Pennsylvania passed its collective bargaining bill. After a 1973 senate defeat and vetoes in 1975 and 1977 by then Governor James Rhodes, Governor Richard Celeste signed the bill into law on July 6, 1983. The act became effective on April 1, 1984.

Ohio became the thirty-ninth state to pass a public sector labor law. One might have expected Ohio to be among the first group of states to do this because of its extensive labor history in the private sector with steelworkers, autoworkers, and the Teamsters. By the time Ohio had passed a public sector labor law, the legislature was essentially catching up with history. Collective bargaining in the public sector in fact had been established for years. Among other accomplishments, the act created a regulatory body in the form of the State Employment Relations Board (SERB). SERB was accorded authority to make rules for executing the act, which has not been a small task in light of the large amount of public sector collective bargaining that preceded its existence.

The point here is not to list and summarize the act in Ohio but to draw from it as a source for discussing bargaining procedures including dispute resolution and subjects of bargaining in public libraries. A discussion of dispute resolution procedures leads inevitably to a consideration of strikes in the public sector—who can and who cannot strike—and the inclusion of public libraries among those employers where strikes are permitted.

## **DISPUTE RESOLUTION PROCEDURES**

Bargaining typically is initiated by a notice of at least sixty days prior to expiration of an existing contract or the date termination or modification of an existing contract is to be effective. Initial negotia-

tions must be conducted for a minimum of ninety days, according to the Ohio Act, before dispute resolution procedures apply.

The parties can mutually agree upon dispute resolution procedures, which would supersede the procedures mandated by the act; that is, provided the procedures negotiated lead to final resolution and not merely to mediation. If the parties cannot agree to a dispute resolution procedure, the one specified in the act will apply. Objectionable to the employer in most state mandated impasse procedures is the inclusion of fact-finding following mediation.

In state mandated impasse procedures, Ohio being a typical example, SERB will appoint a mediator to assist the parties in the process of collective bargaining. The mediator's sole function is to reconcile differences between the parties which may take the form of: (1) settlement of the overall agreement; (2) reduction in the number of overall issues; or (3) narrowing of the differences on the open issues without completely resolving them. The mediator will have only a brief time, fourteen days, within which to work magic. If the mediator reports to the state agency that impasse still exists, a fact-finding panel will be appointed.

Fact-finding is a process that requires the parties at a hearing to present evidence to a neutral fact-finder supporting their respective positions on outstanding issues. Usually the fact-finder must meet with both parties' approval unless the parties cannot agree in which case the state agency would select the panel. In some states, such as New York, the state agency makes the selection without input from the parties (New York Public Employees' Fair Employment Act, 1985a).

During fact-finding, each party provides the fact-finder with statements, probably written, specifying the unresolved issues and the parties' position on each. The panel makes final recommendations as to all unresolved issues. Either party may reject the fact-finder's recommendations. Since the fact-finder's recommendations either will be adopted or, if not, will have set the stage for a strike or interest arbitration, they are not subject to judicial review.

Specific elements of fact-finding facilitate impasse resolution. Fact-finding is a more formal process than either negotiations or mediation because the parties must prepare rational arguments supporting their positions to submit to the fact-finder at a hearing. The strength or weakness of the rationale significantly affects the outcome. Fact-finding is effective because it may have the power of persuading the parties to move from relatively unreasonable positions to the reasonable solutions recommended by the fact-finder. Furthermore, weakness in the parties' positions is exposed through cross-examination, presentation of evidence by the other party, and through inquiry by the fact-finder. Fact-finding also carries the power of the final step before a strike, which is the terminal step in statutory impasse procedures and may impose costs that both parties view as unacceptable.

Voluntary dispute resolution procedures in states where the parties

have the option of agreeing to them are usually preferred. As stated earlier, provided the procedure leads to final resolution, the parties are able to forge a method of resolving impasse that suits each party's individual and collective circumstances. Procedures could include: (1) conventional arbitration of all unsettled issues, in which case the arbitrator is not limited to a choice between the last offers of the parties; (2) arbitration limited to a choice between the last offer of each party as either single package or on each issue submitted; or (3) any other settlement procedures agreed to by the parties. The parties may include the right to strike except those that are involved in safety-related jobs which are usually prohibited from striking.

Methods involving arbitration probably would be rejected in situations where the parties are confident in their abilities to resolve impasse on their own and where arbitrarily imposed solutions are unacceptable. As an example, Cleveland Public Library, Cleveland, Ohio, and District 925, Service Employees International Union, during their negotiations that began in May 1987, mutually agreed not to follow the dispute resolution procedure provided by the Ohio Public Employees Collective Bargaining Act and substituted their own procedure as permitted in Chapter 4117 of the *Ohio Revised Code*.

During negotiations, the parties expressed or implied that neither wanted the delay and cost involved with fact-finding. Furthermore, the library bargaining committee did not want publication of the fact-finder's recommendations resulting from fact-finding. Neither the library nor District 925 wanted to refer the matter of impasse to a SERB appointed mediator, and the Cleveland Public Library in particular did not want to have its economic fate, should economic issues be among those at impasse, determined by a third party.

If the parties had followed the procedure available under the statute, they could have agreed to resolve the economic impasse by means of interest arbitration, and the arbitrator would determine the economic issue or issues presented by the parties. For a publicly supported institution with a fixed budget, the risks connected with interest arbitration outweighed the advantages of following such a procedure.

Under the Alternative Dispute Resolution between the library and District 925 (discussed later), the parties could bargain for as long as five months, in contrast to the ninety day period under the statute, prior to either party's having the right to request the Federal Mediation and Conciliation Service to appoint a federal mediator. It is interesting that the parties agreed also that an actual impasse did not have to exist for either party to request a mediator, rather that "the differences of position are so substantial that further negotiations may not produce a satisfactory agreement." "Impasse" suggests deadlock, which may not be present in the situation characterized in the procedure.

## ALTERNATIVE DISPUTE RESOLUTION PROCEDURE

1. The dispute settlement procedure set forth in this agreement shall

govern negotiations conducted between the Employer and the Union and shall be the agreement of the parties hereto and shall supersede the procedures set forth in *Ohio Revised Code* 4117.14 and related sections and regulations.

2. When tentative agreement is reached through negotiations, the tentative agreement shall be reduced to writing and shall be submitted to the Union membership for approval. After approval, the tentative agreement will be submitted for approval to the Employer. Each negotiating team shall urge and recommend approval of the tentative agreement.
3. If either party at any time after midnight (*date*) determines that the differences of position are so substantial that further negotiations may not produce a satisfactory agreement, either party may request the Federal Mediation and Conciliation Services (FMCS) to appoint a federal mediator for the purpose of assisting the parties in reaching an agreement.
4. If after thirty days from the first meeting with a federal mediator the Union believes that negotiations cannot be resolved through the procedure outlined earlier, it may engage in a strike upon ten days written notice to the Employer and to the State Employment Relations Board (Cleveland Public Library District 925. Service Employees International Union, 1987, p. 1).

With due recognition to the time needed to obtain a federal mediator and schedule meetings, thirty days from the first meeting between the parties with a federal mediator must elapse before the union may engage in a strike, and then such a strike must be upon ten days written notice to the library and to SERB. The state mandated dispute resolution, which included fact-finding, and the alternative dispute resolution procedure, described and outlined earlier, include the union's right to strike upon notice to the employer and SERB in the event the parties fail to reach an agreement. Only safety forces in Ohio are not permitted to strike even after exhaustion of bargaining, mediation, and fact-finding. All states are not the same in their positions on whether public employees have the right to strike. In Massachusetts and New York, for example, the law prohibits public employees from striking (Annotated Laws of Massachusetts, 1983; New York Public Employees Fair Employment Act, 1985b). In all states that permit public employees to strike, however, none seems to include librarians among those prohibited as safety forces or otherwise from striking.

While the arguments pro and con regarding the union's right to strike in the public sector are familiar to many, they bear repeating for the benefit of the uninitiated and as a review for the rest:

Pro:

1. Public employees are entitled to the same rights accorded private employees.

2. The right of public employees to engage in collective bargaining is meaningless unless supported by some mechanism for clout such as a strike.
3. Strikes are an effective extension of the collective bargaining process, do not occur frequently enough to justify their prohibition, and generally are not harmful to public health, safety, or welfare.

Con:

Public and private sectors are very different and public sector employees are therefore not entitled to the same rights accorded private sector employees.

1. Public employees provide unique and essential services.
2. Private sector market forces are missing from the public sector.
3. Strikes may damage public health, safety, and welfare.

Once notification has been given that a strike will occur, the public employer is empowered to seek injunctive or court ordered relief. Injunctive relief is unequivocal where the strike is illegal, such as during pendency of the act's settlement procedure or during the term of the collective bargaining agreement in states where such strikes are clearly prohibited by law. Even under circumstances of a legal strike, the employer may seek a restraining order while continuing to bargain, which would usually be assisted by a mediator. Such restraint on the public employees' right to strike would have to be preceded by the finding that a strike may pose clear and present danger to the health or safety of the public.

## INTEREST ARBITRATION

In discussing the rationale for an Alternative Dispute Resolution Procedure between Cleveland Public Library and District 925, interest arbitration was characterized as a risky option to resolve economic impasse. In interest arbitration a designated neutral party is used to determine future contract terms which will bind the parties who have been unable to achieve a new agreement through the bargaining process (Elkouri & Elkouri, 1973, pp. 47-50). Interest arbitrators generally possess liberal authority to formulate the actual employment terms which will govern the relationship of parties who have been unable to achieve a voluntary agreement themselves (Overton, 1973, pp. 159-66). Although interest arbitration—also known as final offer settlement, conciliation, or mandatory arbitration—is mandatory for safety forces, anyone covered by the act may agree to such a settlement procedure.

Interest arbitration is conducted by a conciliator who must conduct a hearing as soon as practicable. By a given period of time each party must submit a written report summarizing the unresolved issues, the party's final offer, and the rationale for that position. The conciliator,

in turn, selects, issue-by-issue, the final settlement offer of one of the parties. The conciliator by Ohio law cannot suggest a compromise position.

Interest arbitration carries risks for both parties and generates, of necessity, serious policy considerations. Interest arbitration may delegate policy-making authority illegally to an unelected person or board that is not designated by the statutes to perform a particular function. Boards of Library Trustees for public libraries in Ohio are accorded vast powers to set policy for their respective institutions. Specifically mentioned in the *Ohio Revised Code* 3375.40 is the authority to "appoint and fix" compensation. Economic issues resolved through interest arbitration appear to circumvent the appropriate authority to set compensation and related benefits such as sick leave. Since a conciliator's decisions may impose an untenable economic burden on the library, the subsequent adjustments to spending priorities and probable need to generate additional revenue also may violate equal protection, since the effect would be to shift improperly to a person or board the power to tax.

There are other arguments less esoteric than apparently constitutional issues to be leveled against interest arbitration. From the employer's vantage point, interest arbitration may result in administrative awards of unaffordable wages. From the vantage point of both parties it is a risk to have a third party write the contract who is unfamiliar with the practicalities of the shared situation. Perhaps of greatest significance, however, is that it damages collective bargaining because the parties ultimately fail to bargain. The process does not encourage cooperation; rather it tends to push the parties apart and separates them from their mutual concerns. Only when strikes are prohibited—such as for safety forces, and the state must provide a substitute for resolving impasses—is interest arbitration desirable. States where collective bargaining is permitted in the public sector recognize that there should be no work stoppages of services that may endanger the health and safety of the public.

## MANAGEMENT RIGHTS

Collective bargaining, by its nature, limits management rights. In the place of unimpeded management rights is a contract which restricts both parties in the exercise of their respective rights and obligates both parties to act in responsible ways.

As a subject of bargaining, management rights are regarded as both mandatory and permissive. Typical mandatory subjects of bargaining are wages, hours, other conditions of the contract, and changes in existing provisions of a collective bargaining agreement. Management rights are mandatory to the extent they affect wages, hours, and terms and conditions of employment. Typical permissive subjects of bargaining are the method of recording minutes of bargaining sessions and benefits of retirees. To the extent that there may be areas remaining

where management rights can be exercised at all, they are a permissive subject and are in the category of those for which only the parties may bargain. In many contracts, management rights outside the mandatory subjects would be reserved in all areas of responsibility "except where otherwise provided."

In Ohio, management rights are itemized under the list of permissive subjects included in the act. These are:

1. Determine matters of inherent managerial policy which include, but are not limited to, areas of discretion or policy such as the functions and programs of the employer, standards of services, its overall budget, utilization of technology, and organization structure;
2. direct, supervise, evaluate, or hire employees;
3. maintain and improve the efficiency and effectiveness of governmental operations;
4. determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;
5. suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;
6. determine the adequacy of the work force;
7. determine the overall mission of the employer as a unit of government;
8. effectively manage the work force; and
9. take actions to carry out the mission of the employer as a governmental unit (*Ohio Revised Code*, 1987).

The presence of detail in the act outlining management rights suggests that omissions may be deliberate and intended to be restrictive. Whether that is true or not, management must establish rights to create rules, policies, and practices in areas not mentioned by the act and in situations arising during the life of the contract not anticipated by the act or the bargained contract. Practically, management must assume responsibility in those areas anyway because it will be held accountable for resolving the problems such situations may generate. To that end, as an addendum to management rights, the following language not found in Ohio's Act would ensure management's ability to be responsive:

The exercise of the foregoing rights, and the adoption of reasonable policies, rules, and practices in furtherance thereof, shall be limited only by the specific terms of this Agreement and pertinent statutes, and then only to the extent such specific terms hereof are in conformance with the Constitution and laws of the State and of the United States (Cleveland Public Library and District 925, Service Employees International Union, 1987, p. 4)

The exercise of management rights, even those seemingly protected by laws and a collective bargaining agreement, evolves reluctantly. Acting in the interest of the institution it safeguards, management's good intentions may be thwarted by the legitimate rights of its employees.

Management's responsibility to act—for example, against drug



abuse in the workplace and its right to create policy that establishes a drug free environment—must be weighed against employees' right to privacy. The possession, use, and sale of drugs on library premises clearly are criminal acts. Employers have a right and responsibility to halt criminal activity. To protect the rights of all employees to work in a hassle-free environment, the employer has a right and responsibility to eliminate unruly behavior that accompanies illegal drug abuse. Furthermore, employees whose skills are impaired by the presence of drugs can pose a health and safety threat to themselves, fellow employees, and the public. Everyone who is prudent and reasonable should recognize the management's right to prohibit possession, use, and sale of illegal drugs in the workplace.

For the sake of argument, imagine an employer that believes that efforts to deter drug use are more effective when detection and therapy are available during the early stages of drug use. Such a judgment could be made for purely humanitarian reasons, totally lacking in nefarious motives, and because there is an interest in identifying and correcting individuals' drug abuse before it is manifested in significant performance shortcomings. Since employees have no right to possess, sell, or use illegal drugs in any environment, including the workplace, and employers have a legitimate right to prohibit employees' possession, sale, and use of illegal drugs, the employer may have sound reasons to conclude that drug testing is an effective means to therapeutic intervention.

The implementation of drug testing would inspire opposition from labor advocates and representatives on the grounds that it violates employees' rights to privacy and perpetuates discrimination against the handicapped and Title VII discrimination. Furthermore, they would argue from the employer's standpoint that it invites wrongful discharge suits. All of that may be true, one argues, but management rights are stifled if such a clearly pernicious problem as drug abuse cannot be addressed by the rightful party which is management.

The National Labor Relations Board (NLRB) recently issued a complaint against an employer that unilaterally implemented a drug testing program (National Labor Relations Board, 1987). State labor relations agencies are likely to fashion similar decisions in their respective jurisdictions. In fact, a regulatory agency, such as the NLRB or a state board, could require, in a unionized workplace, that the parties should meet and bargain in good faith on the subjects of drug testing or employee assistance programs (EAP). Because the consideration of these policies and practices would constitute the change in a condition of employment and the subsequent modification or deletion of an existing provision of the collective bargaining agreement, it becomes a mandatory subject of bargaining, and adhering to a claim of management rights on the subject of unilateral implementation would be futile. The parties must bargain.

Employee and management cooperation can be difficult to achieve. In many workplaces, joint employee and management committees provide the method by which employers effectively solicit employees' concerns and, where it is appropriate, include them in the decision-making. It is typical that negotiated agreements contain specific provision for committees to work on subjects of health and safety and position classification. Some contracts provide for the formation of a general committee with sweeping responsibilities limited only by an understanding that contract interpretation and pending grievances are forbidden subjects. These committees can be productive vehicles for solving problems and addressing contentious issues before they become problems. They may generate a cooperative approach to shared concerns, assuming their processes do not deteriorate into institutionalized value bashing, and successfully ameliorate the traditional adversarial relationship between employees and management in the public library.

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