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ABSTRACT

This report contains a variety of readings related to different aspects of collective negotiations in public education. Subject areas covered include (1) State labor laws, (2) emerging roles of educators, (3) teacher militancy, (4) impasse resolution, and (5) public policy on teacher strikes. For additional readings on collective negotiations see EA 004 336, Volume I of this study. (Author/JF)

Readings in Public School Collective Bargaining

Volume 2

EDUCATIONAL SERVICE BUREAU, INC.
1835 K Street, N.W., Washington, D. C. 20006

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Introduction

This second volume of readings contains a variety of carefully chosen materials related to different aspects of collective negotiations in public education. These readings are basic for anyone who would profess knowledgeability in educational negotiations.

References in certain chapters to "ENS" denote Educators Negotiating Service, a division of Educational Service Bureau. Most references to dates and locations are left as they originally appeared.

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Samuel Lambert's Report on Negotiations Legislation

This chapter was delivered by Dr. Samuel Lambert, executive director of the National Education Association, before the Advisory Commission on Intergovernmental Relations. This report, along with other data collected by the ACIR, has been compiled in the Commission's report, Labor Management Policies for State and Local Government.

We assume that the National Education Association ("NEA") was invited to appear here today on the ground that our experience has provided us with a certain degree of expertise in regard to those matters which are of concern to the Commission. In order to remain within the spirit of that invitation, it is necessary that we limit our remarks to the problems involved in attempting to develop legislation to regulate the employment relationship between public school teachers and their employing boards of education. We believe, however, that with appropriate modifications the comments made would be applicable in most cases to other categories of public employees as well.

. . . (In). . . the (draft) report, it is stated that "The Commission's study focuses mainly on the responsibilities of state and local governments for labor-management relations in their vast portion of the public sector. The federal role, with but a few exceptions, is not explored." Although the latter reference is primarily to the last of the recommendations set forth. . .(dealing with). . ."Federal Mandating," we propose to begin our statement with a discussion of this point.

Notwithstanding the fact that the NEA and its affiliates are actively engaged at the present time in attempting to secure the enactment of state negotiation statutes, we believe that the most feasible solution to the problems that exist in this area is through the vehicle of federal intervention. Admittedly some states have provided fairly adequate procedures for regulating teacher school board relations, but many have refused to grant teachers even the basic rights other employees in the country have enjoyed for years. Moreover, the structure of the statutes that have been enacted differs markedly, reflecting organizational philosophies, interorganizational rivalries, employer pressures, and political realities. The result is an almost chaotic diversity among various parts of the country, which argues strongly for a uniform system of federal regulation. Accordingly, the NEA has developed a federal negotiation statute for public school teachers. This statute, which has been introduced into the Senate by Senator Lee Metcalf[1] and which will shortly be introduced into the House of Representatives, is discussed. . . (in the draft). . .report.

The position of the NEA in regard to most of the (alternative) recommendations set forth in...the report is reflected in the proposed federal negotiation statute, and we would urge the adoption of the same substantive principles in any negotiation legislation that is enacted at the state level. It is obviously not possible within the confines of this presentation to consider each of these principles in detail or to explore fully all of the subsidiary points which are relevant to them. We would like, therefore, to focus upon certain fundamental considerations which we believe largely will determine the effectiveness of any system of teacher-school board negotiation, whether conducted pursuant to federal or state mandate. Relating these considerations to... the report, we will be addressing ourselves in general terms to (alternative) recommendations ...(dealing with the strike, legislation for special occupational categories, the rights of supervisory personnel, statutory definition of negotiable and non-negotiable terms and conditions of public employment, type and structure of state administrative agency and flexible statutory requirements)...although not in the stated order.

Before considering the above matters, several preliminary comments are necessary. First, we do not propose to spend time debating the reasons why teachers should be guaranteed legislatively the right to form, join and participate in the activities of employee organizations of their own choosing or the importance of establishing orderly statutory procedures for regulating the employment relationship between teachers and boards of education. The evidence on these points is overwhelming and is as well known to you as it is to us.

In addition, we shall assume for present purposes that the statute will require a school board to deal with the teachers' organizational representative as distinguished from "permissive" legislation which merely authorizes a school board to engage in negotiation if it chooses to do so. We consider the latter to be a process of voluntary agreement similar to the non-statutory methods which have been used in the past on an ad hoc school district by school district basis.

Finally, as the report points out...the NEA does not utilize the phrase "collective bargaining", but prefers the designation "professional negotiation". Since there may be some confusion as to the significance of this difference in terminology, it is important at the outset to define rather precisely what we mean by professional negotiation. Traditionally, most school boards have listened to the presentations and proposals of teacher organizations and some even have been willing systematically to meet with such organizations and discuss possible changes in salaries, fringe benefits, and personnel policies. Professional negotiation means something quite different. It contemplates the same kind of give-and-take, exchange of proposals and counter-proposals, and action by mutual agreement that characterize the marketplace. As a practical matter, it means the substitution of bilateralism for unilateralism in the making of many school managerial decisions and incorporation of such decisions in a written document which is binding upon both parties. In short, we see negotiation as representing a substantial departure from the usual way of doing business in public education.

It is generally accepted that there are basic economic and political differences between public and private employment, and public employees therefore should not simply be brought under the coverage of legislation designed to regulate bargaining in the private sector. They should be covered rather by a separate statute which takes cognizance of and is structured to deal with the many unique aspects of public employment.

We believe that a case can also be made for the separate statutory treatment of teachers. This case rests upon the proposition that teachers, by reason of their education and traditions, have an interest not necessarily shared by other public employees in the quality of the service provided by the enterprise of which they are a part. This distinction, which has meaning for various aspects of the negotiation process, is obscured when teachers and other public employees are treated as equivalents legislatively.

It should also be recognized that legislation of this type, which imposes mutual rights and obligations, does not readily lend itself to self-implementation, and attempts by teachers to function under negotiation statutes have been met, on occasion, with resistance and repressive tactics. While court enforcement is an available avenue of redress, it is often an expensive and time-consuming process, and most commentators would agree that some specific agency should be responsible for administering and enforcing the legislation. They do not agree, however, on whether this responsibility should be vested in some existing agency, such as the department of education, or whether a special agency should be established.

We favor the latter approach. The establishment of a special agency tends to enhance the prestige of its members, thereby increasing their effectiveness. In addition, such an agency can more readily develop the expertise which is necessary in order to properly handle many of the problems that are peculiar to public employee relations.

To this point, we have dealt with the basic statutory approach which in our opinion should be taken. Let us turn now to certain specific aspects of the employer-employee relationship.

Structure of the Negotiating Unit

Although other factors would also be relevant, the crucial element in the determination of the appropriate negotiating unit should be the community of interest among the employees affected by the negotiation. Community of interest is not the same thing as identity of interest, which is virtually impossible to achieve in any collective arrangement of employees. All groups of employees have some conflicts, and the question is whether there is sufficient commonality so that these conflicts can be resolved internally or whether they are so divisive that the group cannot function as a single cohesive unit vis-a-vis the representatives of management. The statute should recognize that this is a question which defies uniform prescription and, wherever possible, should allow for local option in regard to unit determination. If a dispute exists, a judgment should be made by the administering agency upon the basis of the particular factual situation.

There is little dispute regarding the use of community of interest as the keystone factor in determining whether to include guidance counselors, librarians, psychologists, social workers and other so called "peripheral" or "satellite" personnel in a classroom teacher unit. A different situation prevails, however, in regard to whether supervisors - that is, personnel who have the power to hire, fire, transfer, suspend, promote, discipline, and the like, or to effectively recommend such action - should be included in a negotiation unit consisting of employees whom they supervise. Analytically, two categories of supervisors may be distinguished - they are (1) the superintendent of schools and his immediate assistants tants, and (2) first-line supervisors, such as principals, vice-principals, department heads, etc.

The statutory posture of the first category may be disposed of summarily. The superintendent and assistant superintendents invariably function as the representatives of management in the day-to-day operation of the schools and, therefore, should be statutorily excluded. First-line supervisors, however, present a considerably more vexing problem.

The doctrinaire answer of the American Federation of Teachers is that first-line supervisors should always be excluded and, if the statute gives such persons the right to participate in negotiation at all, it should require that they form their own negotiating unit. The answer is based upon the theory of class consciousness - that supervisors are, by hypothesis, in conflict with the rank-and-file employees whom they supervise. The doctrinaire answer of some of our affiliates, on the other hand, is that first-line supervisors should always be included with non-supervisory employees in a single negotiating unit. This answer is predicated upon the assumption that supervisors and rank-and-file employees are invariably bound together by the so-called "unity of the profession."

Neither group is on defensible ground when it seeks to have its position categorically incorporated into a statute. In point of fact, both all-inclusive negotiating units and units excluding supervisors have functioned to the satisfaction of management, first-line supervision, and rank-and-file teachers in different school districts. What counts is factual reality, not theory or assumption. What has been the local practice in teacher-school board relations? Along what lines have local teacher organizations been structured? How much conflict in fact exists between supervisors and those whom they supervise over those matters which are pertinent to the negotiation process? In short, the statute should not close the door on any arrangement which might be effective and mutually acceptable, and should provide for the application of the same pragmatic community of interest test.

Type of Recognition

It seems to us clear beyond serious argument that the majority organization should have the exclusive right to negotiate on behalf of all employees in the negotiating unit. The Committee on Public Employee Relations established by New York's Governor Rockefeller to recommend appropriate legislation advanced

several persuasive arguments:

> We find a number of advantages in the use of the principle of recognizing a majority organization as exclusive representative for all employees in the unit. There are advantages in the elimination of the possibility that the executives of an agency will play one group of employees or one employee organization off against another. There are advantages in discouraging the "splitting off" of functional groups in the employee organization in order to "go it on their own." There are advantages in simplifying and systematizing the administration of employee and personnel relations. There are advantages in an organization's ability to serve all the employees in the unit.[2]

Although the exclusivity principle is sometimes resisted on the ground that it is undemocratic in a public enterprise, this is a canard. In the political arena, for example, the senator, congressman, or other official selected by the majority represents all members of the particular voting district. While minority groups retain certain rights (e.g., to protest, criticize, and campaign for replacement of the majority), there is only one representive from each district. Similarly, there should be only one representative for each negotiating unit.

Scope of Negotiation

As far as the statutory definition of the subject matter in respect to which the parties should be required to negotiate is concerned, many school boards would limit the obligation to negotiate to salaries and other economic aspects of employment. Attempts have been made to justify this economic emphasis on the following grounds:

1. The suggestion is made that teachers are concerned more about economic than non-economic matters. We deny this and can cite numerous instances in which teachers have rejected attractive economic offers in favor of of non-economic improvements in the educational system.

2. Alternatively it is argued that teachers are best equipped to make a contribution to decision-making on economic matters. We view this premise as totally invalid. On the contrary, by background and training, school board members probably are better able to make informed judgments on economic matters than they are in regard to matters of educational policy, whereas it is in this latter area that teachers, with their special knowledge and competence as educators, can make the their most valuable contribution.

3. The legalistic argument is sometimes advanced that school boards are charged, as public representatives, with the responsibility for determining educational policies and, therefore, may not engage in negotiation regarding these matters. This is patently defective, since school boards also are charged with the financial management of the school system, and it would be no less a delegation of responsibility to negotiate about economic matters.

Some state legislatures have described the scope of negotiation in such traditional collective bargaining terms as "wages, hours and other conditions of employment," but this has not provided a trouble-free solution. Serious disputes have developed under this type of definition over the negotiability of teacher proposals regarding educational programs and services. Whereas school boards have resisted many of these demands on the grounds of non-negotiability, teacher organizations generally have contended that they do, in fact, come within the meaning of the phrase "conditions of employment." While there has been some suggestion that the inevitable confrontation might be avoided if there were a specific statutory enumeration of the negotiable subjects, this would introduce an undesirable and possibly unworkable inflexibility.

It is our position that private sector definitions are unduly restrictive when applied to teacher-school board negotiation. We believe that a teacher, having committed himself to a career of socially valuable service and having invested years in preparation (and perhaps years of postgraduate study after original hire), has a special identification with the standards of his "practice" and the quality of the service provided to his "clientele." As a result of this identification, teachers characteristically seek to participate in decision-making in respect to teaching methods, curriculum content, educational facilities and other matters designed to change the nature or improve the quality of the educational service being given to the children, and they see negotiation as the vehicle for such participation. Accordingly, we propose that a broad and somewhat open-ended definition of scope of negotiation be adopted - to wit, that a school board be obligated to negotiate in regard to "the terms and conditions of professional service and other matters of mutual concern."

The foregoing should be correctly understood. We do not contend that teachers should have the right to participate in decision-making in respect to educational programs and services simply because they seek it, but rather because it is socially desirable for them to do so. Their special knowledge and competence as educators should, when blended with the "lay" perspective of the school board, produce better policy decisions.

Negotiation Impasse

For purposes of negotiation, an impasse may be defined as a disagreement between the parties so serious that further conversations between them appear fruitless. In order to resolve such disputes, the statute should provide for a two-step procedure of third-party intervention.

The first step should be mediation. A mediator is an unbiased outsider who is sent in to assist the parties in reaching a peaceful settlement of their dispute. It is not the function of the mediator to make an agreement for the parties, but by bringing to the negotiating table a fresh, clinical view of the areas of disagreement, he can often be an effective catalyst in moving a negotiation to toward settlement, particularly where the parties are inexperienced.

If there has not been a settlement within a specified number of days after the appointment of the mediator, the statute should provide for fact-finding. Whereas mediation is an informal, largely catalytical process, fact-finding is more structured, contemplating the presentation of oral testimony, the submission of documentary evidence, and many of the other attributes of a judicial proceeding. The recommendations for settlement made by the fact-finder should not be binding upon either party.

Although fact-finding has demonstrated its utility in teacher-school board negotiation, the process by no means provides a wholly satisfactory solution to the problem of negotiation impasse. The risks of fact-finding are much greater for the teacher organization than they are for the school board, since the organization, as a practical matter, must accept the recommendations of the fact-finder unless it is prepared to violate the ever-present strike prohibition. The school board, on the other hand, may reject the recommendations, comfortable in the knowledge that it can ultimately act unilaterally without effective challenge by the teacher organization. Two alternative methods have been suggested most frequently to correct this inequity.

One method, which is to provide for binding arbitration of negotiation impasse, we oppose for several reasons. In the first place, binding arbitration is in conflict with the basic notion that the terms and conditions of employment should be determined jointly by the school board and the teachers directly affected. It scarcely warrants extended discussion to demonstrate that, in general, imposed solutions are not likely to be embraced by the parties with the same enthusiasm as solutions mutually arrived at. A second factor militating against binding arbitration is that it is likely to retard the give-and-take inherent in the negotiation process. Why should the parties make a sincere effort to compromise during negotiation when, by doing so, they may prejudice their respective positions if and when they find themselves before an arbitrator? In addition, the use of arbitration simply shifts the authoritative decision-making power from one level of government to some other public or quasi-public agency which has no responsibility for the quality of service provided by the enterprise involved and no responsibility to the public that is served by that enterprise. Finally, since many school boards do not have the authority to determine the extent of their own budget, the notion of "binding" decisions on items that involve the expenditure of funds is somewhat incongruent.

The second suggested alternative is to legalize the strike. This appears to us to be a far more fruitful approach, and we would like briefly to address ourselves to it.

Strikes

Although there are those who advocate a virtually unlimited right to strike, we propose legalization only under certain specified circumstances. In the first place, we would relax the prohibition solely for strikes by an organization recognized as the teachers' negotiating representative, and then only in the context of a negotiation impasse. This limitation is premised upon the assumption that the remaining parts of the negotiation statute would provide adequate administrative and/or judicial procedures for resolving problems relating to other aspects of the teacher-school board relationship.

A commonly advanced suggestion within this framework is to legalize the strike where it can be shown that the school board did not make a good faith effort to avoid it or acted in such a manner as actually to provoke it. We would go further and not quite so far. We concede that if the strike presents a clear and present danger to the public health or safety, it should be enjoined regardless of other factors, including the culpability of the parties. If, on the other hand, the strike does not present such a danger, then subject to the one exception noted below, it should be permitted to continue and the events which preceded or provoked it should be irrelevant. Because of the public policy in favor of peaceful resolution of negotiation disputes, we would impose the additional restriction that a strike also could be enjoined if the teacher organization had failed to utilize fully the available statutory impasse machinery.

Although the question of whether a particular strike is enjoinable should be left largely to the court's discretion, we think that certain statutorily prescribed procedural guidelines should be set forth. First, no injunction should issue except pursuant to findings of fact made by a court on the basis of evidence elicited at a hearing. Second, the evidence must establish that the strike presents a clear and present danger to the public health or safety or that the teacher organization has failed to fully utilize the available statutory impasse machinery. In either case, the injunction should be no broader than necessary. In the former situation, it should prohibit only those activities that constitute the demonstrated threat to the community's health or safety. In the latter case, it should specify the delinquencies of the teacher organization and should remain operative only until those delinquencies had been corrected.

Rather than increasing the number of teacher strikes, the proposed framework should encourage the parties to avoid impasse, and, thus, reduce the incident of such strikes. The element of doubt as to whether and/or when an injunction would ultimately issue if the teacher struck after fact-finding would

make the fact-finding as risky for the school board as for the teacher organization, and they both should be motivated to resolve their problems through negotiation. Moreover, if fact-finding should occur, both parties would be under severe pressure to accept the recommendations.

It should be recognized that no legislation can provide an absolute guarantee against teacher strikes. If teachers feel sufficiently aggrieved and have no effective forum in which to air those grievances, experience indicates they will strike regardless of the personal risks involved. The primary emphasis, therefore, in any negotiation statute should be the development of constructive personnel policies and meaningful procedures for preventing and resolving disputes. If this is done, the possibility of such strikes will be minimized substantially.

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[1]S. 1951, 91st Cong., 1st Sess. (1969).

[2]Governor's Committee on Public Employee Relations, Final Report, March 31, 1966, p.29.

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Bargaining Rights in the Public Sector

The material in this chapter was presented to the Advisory Commission on Intergovernmental Relations by Morris Slavney, chairman of the Wisconsin Employment Relations Commission, and is reprinted here because of its quality and its comprehensive coverage of the topic. The paper originally appeared in ACIR's report, Labor-Management Policies for State and Local Government.

I recommend the adoption of legislation which would require local governments and agencies of the state to recognize the right of employees to freely join or not to join labor organizations of their own choosing and their right to be represented for the purposes of collective bargaining. If a particular state desires to authorize union security agreements, such condition affecting the right not to join could be reflected in the "rights" section of the statute. The three labor relations statutes administered by our agency, covering private, municipal, and state employees, all include a provision with respect to the "right to refrain." This provision appears not to have imposed any significant obstacle to collective bargaining in our state (Wisconsin).

While compulsory union membership strengthens the union, it does provide those employees who were compelled to join a meaningful voice in collective bargaining matters.

I favor legislation which would require public employers to bargain in good faith with the representative of the majority of employees in an appropriate collective bargaining unit.

I disagree with those who oppose such a concept that such a requirement amounts to a surrender or delegation of the sovereign authority of the employer. While collective bargaining in the public sector in the areas where legislative approval is required has an effect on the decision-making authority and responsibility of the legislative body, so does the activity of those appearing for or against legislation generally, in public hearings and in other activity directed towards influencing the individual legislators. Collective bargaining does not require that either party give in to the demands of the other. All that is required is an effort to reach an agreement through good faith conferences and negotiations. The fact that a public employer may be persuaded, whether it likes it or not, to accept the proposals of the bargaining representative does not necessarily mean an abdication of the so-called power of sovereignty. As long as the representatives of the employer do not abdicate their responsibilities as agents of the employer, I see no forfeiture or abandonment of sovereignty.

A statute which does not require good faith bargaining but merely licenses same is almost as bad as having no statute at all. As your report discloses, many strikes have occurred throughout the nation because various city fathers have refused to bargain with or acknowledge organizations which represent a majority of employees in what normally would be an appropriate collective bargaining unit, and any legislation which would permit, rather than require, good faith bargaining, would not eliminate such unfortunate situations.

I further recommend that representation be exclusive or not at all, that is to say, an employer should have no duty to bargain unless a particular organization has demonstrated, in some way or other, that it represents a majority of employees in what would normally be an appropriate collective bargaining unit. Recognition granted to various organizations as representing their membership would create a chaotic situation and would frustrate the opportunity for a peaceful labor relations climate in public employment in that particular jurisdiction.

I would not recommend that contemplated legislation attempt to enumerate those conditions of employment which are either mandatory or permissive subjects of bargaining. I would also be skeptical in making such a recommendation for specific legislation covering either police, firemen or teachers, or any other single class of employees. I would rather see the agency which administers the particular law determine, on a case-to-case basis, on what conditions of employment bargaining is required, permitted or prohibited. I take this view because concepts of management rights are continually changing and are more or less dependent upon local conditions. In the early years of the administration of the Wisconsin municipal employee bargaining statute, we heard many representatives of school boards indicate that they would never bargain on matters such as the school calendar, size of class, and choice of books, etc. Their attitude has changed in recent years. School boards and other municipal employers as well as our state employer, have found that when they have engaged in bargaining in these areas which are permissive rather than required, they have been able to "buy off" certain other demands which are more meaningful to the employer than are matters on which they were not required to bargain.

Strikes in Public Employment

The public employee laws in Wisconsin, as well as in other states, prohibit strikes. The mere fact that the law prohibits strikes does not prevent them, nor does the fact that severe penalties for strike action as set forth in the statute have any effective deterrent on strike activity. The municipal labor law in Wisconsin merely contains a statement prohibiting strikes, and relief must be sought in the courts of the state. Local judges may issue restraining orders and may impose fines or imprisonment if their orders are not obeyed in a contempt proceeding pursuant to the Wisconsin statutes. The state employee bargaining law, while permitting employees to seek relief in state courts, also provides that a strike is a prohibited practice, subject to the jurisdiction of a complaint proceeding before our agency. During the two and one-half years of the effectiveness of the state bargaining law, we have had one strike in state employment which lasted for less than a day, and which was terminated upon strenuous mediation by our agency. Parenthetically, the union involved advised us of the strike activity, rather than the employer.

I have found that judges are reluctant to issue injunctive relief, especially in labor relations matters, and in Wisconsin, elected officials representing municipalities, who must make decisions in this matter, have been reluctant to seek or authorize court action to restrain strike activity.

Our agency has been actively administering the municipal bargaining law for approximately eight years, and during this period we have experienced 26 strikes. In only four strike situations was there any action initiated to restrain the strike activity through court proceedings. The Wisconsin League of Municipalities has been favoring legislation which would require our agency to seek court action, rather than placing the burden for such activity on local officials. Our Commission has opposed this approach for the simple reason that, if the responsibility for bargaining in good faith means anything and a strike occurs, the local officials should at least shoulder the responsibility of seeking a restraining order. If the statute were to relieve them of this responsibility, they could avoid their obligation to see that the conditions which might create a strike situation did occur in the first place. With respect to whether there should be no right to strike, a limited right to strike, or no restriction on the right to strike, I would like to see experimentation in this area of legislation. I had hoped that Pennsylvania would have adopted the recommendations of the Pennsylvania Study Committee in that regard.

I don't believe any statute should be silent with respect to strikes in public employment. Silence on this matter is not golden, but will only tarnish effective administration of the statute and its consequences.

It has been suggested that strikes be permitted in certain non-essential areas and prohibited where the employment affects the health, safety and welfare of the community. A garbage strike in Wisconsin during the winter months and in a community where probably the majority of households have garbage disposal units in their kitchen sinks would create no significant problem. However, a similar strike in Miami Beach during the same month may cause all the vacationers to retreat to Wisconsin to enjoy our winter sports.

A word with respect to public utilities. The gas and electrical services furnished to the citizens of my community are furnished by a privately-owned utility which has had its share of strikes. Significantly, service was not greatly interrupted and was provided for by supervisory personnel during work stoppage. Let's surmise that the city took over this utility. Would any greater crises occur just because the operation employs public employees? Wisconsin has on its books a no-strike law governing privately-owned public utilities, which provides for compulsory mediation and arbitration. This law was declared unconstitutional by the U.S. Supreme Court in 1951, as it pertains to utilities which are engaged in interstate commerce, and most of them are. Since that court decision, we have had no more serious difficulty in labor disputes involving privately owned public utilities in our state. Many of the utilities and unions have voluntarily entered into agreements which provide for final and binding arbitration if the parties are unable to reach an agreement in their collective bargaining. However, we know of no instance where such procedure has been utilized, since neither management nor the union desires to have a third party make their agreement. The unions and managements recognize their responsibilities and their obligations to the public, and have attempted strenuously to avoid strike action. Of course, this does not mean that strikes have not occurred.

Generally, public employee organizations and their membership no more want to strike than the employers do. In my experience the vast majority of public employee organizations in our state recognize their responsibilities, and strikes have not occurred as a matter of whimsy.

There have been suggestions that, where strikes are prohibited, there should be some other means of reaching an agreement through procedures such as final and binding arbitration. I personally am opposed to final and binding arbitration on interest disputes, that is to say, over wages and conditions of employment, when the parties are unable to reach a satisfactory agreement through good faith bargaining. Every procedure that is added to the collective bargaining process weakens the procedure immediately preceeding.

In Wisconsin, where the parties are unable to reach an agreement by themselves, there is mediation provided both parties agree. Following mediation there is a fact-finding procedure which is not final and binding, but which furnishes recommendations for the resolution of the dispute. We have seen situations where one or both of the parties feel that they cannot get together without mediation. There is a reluctance to significantly move toward a settlement during negotiations without mediation. Likewise, if there is a feeling by either or both of the parties that they desire to proceed to fact-finding, the parties will be reluctant to put their best foot forward in mediation so as not to prejudice their positions when they become involved before the fact-finder, and thus if the statute provides for final and binding arbitration there certainly will be a natural reluctance of the parties to present their best offer in any of the impasse procedures preceding the arbitration because of the anticipated impact of their known positions.

Further, with respect to the limited right to strike, that is, permitting certain employees to have the right and denying other employees such right, our experience has indicated that in the more sophisticated communities, and certainly in state employment, there is a relationship in salaries between various types of employees, as well as in certain conditions of employment, and although certain classifications of employees may not be permitted to strike, they may lend moral and actual support to employees who may be permitted to strike, knowing full well that the gains resulting from such strike activity will have some relationship to the salaries and conditions of employment affecting those employees who are not permitted to strike.

I would recommend alternative "A" set forth in the preliminary report, that is, to establish a single uniform statute governing

public employees both on the state and local level, especially if a state agency is to administer the statute. Thus, having the same law apply to both state and local employees under such an administration of the statute would, among other things, avoid criticism that the state was applying standards which were different for local employees as opposed to state employees.

While I concede that there are certain areas of difference in local and state employment and operation, I feel there should be no distinctions in the "rights" of public employees in labor relations, whether they be employed by the state or on a local level. I have noted this difference in Wisconsin, where, although there is no statutory requirement that the state bargain on mandatory issues, there has been a form of bargaining with a committee of the legislation on salaries of state employees. This process is not similar to the process of bargaining on salaries of local units of government where normally there is only on legislative body, where in our state there are two legislative bodies to deal with.

In addition, members of local legislative bodies, whether they be city councils or a school board, are much more directly affected by the negotiations than are members of a state legislature. There are some legislators in our state who come from districts where there are very few state employees employed. However, this factor in itself should not make for separate laws because the problem still would exist if there existed a separate law governing state employees. The reasons we have two laws in Wisconsin is because our public employee bargaining statutes have been in the form of an experiment. Our first statute was adopted in 1959, governing labor relations in municipal employment, but this version merely expressed certain employee rights and provided for the protection of these rights by statute only. It contained no machinery for the implementation of the rights and obligations therein.

It was not until 1961 that our agency was designated to administer the statute when the statute was enlarged to include election and complaint and impasse procedures of mediation and fact-finding. It took quite some time, that is, until 1967, for the proponents for labor legislation in state employment to persuade our legislature to adopt a collective bargaining law governing state employees. That law, too, seems to be in an experimental state, for presently there is a special committee appointed by the Governor to examine the statute for the purpose of making recommendations with regard to same. The present statute does not provide that salaries are mandatory subjects of bargaining. It is my feeling that said committee will recommend enlarging the scope of bargaining to include, among other things, salaries.

Special Occupational Categories

Our public employee statutes do not contain any special treatment for teachers, firemen, social workers, utility workers, sanitation workers or any special class of employees, except that law enforcement officers are not presently granted the rights granted to other employees, although they have the right to proceed to fact-finding in matters of collective bargaining impasses. My present feeling is that there should be no distinction with respect to the type of employment, except I agree with the concept that there should be no strikes in vital areas, and perhaps the statute should contain some distinction in that area. The fact that school boards have separate legislation, budgets and special authority has created no insurmountable problems as a result of being covered in our general public employee law. True, there are certain problems which exist in negotiations involving school boards; however, such matters are considered when they arise in bargaining.

Rights of Supervisory Personnel

Our municipal labor law does not specifically make any distinction with respect to supervisory and confidential employees. They are excluded under the state employee law. However, our agency administratively has excluded those municipal employees from bargaining units. I personally would exclude these categories of employees from the protection and coverage of the statute, since there is a definite need for supervisory and managerial identification and function in public employment. The question often arises of who would represent the public in carrying out the managerial and supervisory function, if supervisors and managerial employees were permitted to be aligned with rank and file employees in collective bargaining. The difficulty has arisen as a result of the fact that many supervisory employees have been long-time members of public employee organizations. This is especially true in the organizations affiliated with the American Federation of State, County and Municipal Employees and affiliates of the National Education Association.

Many of the individuals who are now holding high supervisory and managerial positions may very well have been employees who were instrumental in creating the local organization in the first place. By decision our agency has permitted supervisory and managerial employees to maintain their membership in employee organizations; however, they are not permitted to hold office or to take an active role with respect to matters relating to collective bargaining.

In my opinion the supervisory and managerial functions should outweigh whatever similar relationship might exist between the supervisor and those he supervises. I cannot imagine any grievance procedure being very meaningful if the supervisor who is involved in the resolution of grievances is an active member or holding office in the union which is processing a grievance on behalf of rank and file employees. In private labor relations supervisory personnel are excluded from coverage and/or membership generally in employee organizations, primarily because of the opportunity of the employer, through said supervisors, to dominate the affairs of the union and

thus destroy its effectiveness as a true representative of the employees.

On the other hand, to permit employees and supervisors to be aligned against the public employer is probably a more undesirable situation than would exist in the situation where an employee organization is dominated by the employer. If supervisory and managerial employees are permitted to align with their employees in collective bargaining in the same employee organizations, you have a situation akin to absentee management, and then the question arises: Who is representing the citizen stockholders of the community in the operation of the local governmental employer?

We have initially determined that the mere fact that a classification is identified as a supervisory position does not necessarily make it so. We have adopted standards similar to those determined by the National Labor Relations Board in making such determinations.

We have given some thought to the possibility of permitting supervisory employees to be covered by the statute but limiting their membership to organizations which are affiliated only with other supervisory organizations as well as local teacher associations, police and fire employee organizations in our state have opposed this concept because it would remove many supervisory personnel from their membership roles and dues paying obligations. On the other hand, the Wisconsin teachers' union favors this type of an approach, because it has very few, if any, principals or school administrators in its organizations. I have made a suggestion to police and fire groups in our state that perhaps they should consider amending the statute to grant the authority to the employee organization, provided the supervisory personnel consent, to bargain for supervisory personnel on salaries and fringe benefits only. This type of an approach would grant supervisory personnel some form of bargaining and would not necessarily conflict with their function as supervisors.

Negotiable vs. Nonnegotiable

Our municipal labor law contains no enumeration of matters which are or which are not subject to collective bargaining. Our present state employee law does. The latter statute indicates that the mandatory subjects of bargaining are limited to the matters which are in the discretionary authority of the various department heads. There are specifically enumerated matters, including salaries, on which the state employer is not required to bargain.

The statutory enumeration of matters relating to mandatory and permissive subjects of bargaining has caused obstacles to arise in collective bargaining in our state employment. In those situations the state representatives have found that when they have been instructed not to bargain on various permissive subjects, they have lost the opportunity to "buy off" certain mandatory bargaining items proposed by the employee organizations. I recommend that no distinction be set forth in the statute with respect to subject matters of bargaining; ...(but)...that the statute contain a general management rights clause.

With respect to the conflict between a collective bargaining agreement and merit procedures, such conflict can never be completely resolved by statute, since the conflict will remain in the minds of those who still believe that collective bargaining in public employment will, in the long run, destroy civil service. There must be accommodations to resolve the conflict through collective bargaining.

Type Agency

I certainly agree that appropriate machinery should be established to implement and administer any type of labor relations statute. Our experience in Wisconsin demonstrates that when there was no machinery established in the 1959 version of our municipal labor relations statute, it was almost meaningless.

I recommend the establishment of a separate individual quasi-judicial agency. An agency attached to the executive branch of the unit of government tends to create an impression that the agency is employer dominated. An indication of such an attitude exists with respect to various personnel boards established by civil service in our state where such personnel boards are attached to various bureaus of personnel, either on the state or local government levels. For example, one of the criticisms of the Milwaukee City Service Commission, which is not a full time agency, was the fact that the city director of personnel was the secretary of this agency. In Wisconsin we have not separated in any manner the administrative or regulatory enforcement responsibilities from mediation and fact-finding activities. As a matter of fact, our professional staff engages in all types of activities, e.g., representation matters, complaint cases, mediation cases, final and binding arbitration, and fact-finding investigations, but I must make it clear that in our complaint case procedure we do not make investigations of charges or issue complaints. The complaints are filed by the parties, and we act as a quasi-judicial agency in determining the merits of the matter. We take no part in the prosecution. If our orders are not sustained, we utilize the services of our Department of Justice to seek enforcement in the courts of the state.

I am positive that if we processed unfair labor practice cases, either in the private or public sector similar to the procedure utilized by the National Labor Relations Board, we would not be as acceptable as we are in our mediation and arbitration function. One must also remember that our agency has been in business since 1939, and it has taken a number of years to create an atmosphere where both labor and management have accepted our agency and its staff in those voluntary procedures available to them.

I see no objection to investing administrative authority to administer a public employee bargaining law in an agency which serves similar functions for a private sector where that agency has been actively administering a private labor law. The mere fact that a private

employee labor relations statute exists in a particular state and that there is an agency designated for the administration of same does not necessarily mean that that particular agency is capable or has the potential of properly administering the public employee bargaining law, for the simple reason that such an agency will find that its activity will be greatly expanded as a result of the enactment of a public employee bargaining statute.

Furthermore, the determination as to whether the statute should create a new agency or vest the authority in an existing agency depends on the similarities or dissimilarities of the private and public employee law.

As to who should make the appointments to the agency, I would comment that the answer depends on the situation in each individual state. We are fortunate in Wisconsin in that reappointments to the Commission have been made based on the individual's record as a commissioner rather than his political affiliation or whether he came out of management or labor. A tripartite type agency does not necessarily create a true neutral agency, because there is quite a bit of pressure which can be exerted on those members who come from management or labor. I recommend an agency headed by a full-time board or commission, manned by a competent professional staff hired in accordance with civil service procedures.

Flexible Statutory Requirements

In my opinion the statute should specify the procedures with regard to dispute settlements, including mediation, voluntary arbitration and fact-finding. I would oppose any provision in the statute which would restrict an employee organization and the public employer from agreeing to their own procedures. The fact that the statute may contain procedures would not necessarily prohibit the parties from adopting their own. As a matter of fact, in Wisconsin where the parties have agreed to their own procedures, our agency will not initiate the statutory procedures.

With respect to the assumption of costs to employment impasse procedures, the mediation of public employee disputes is performed by professional mediators on our staff at no cost to the parties. In some jurisdictions there are ad hoc mediators appointed who are paid by the state, as are fact-finders. In Wisconsin, if arbitration is performed by staff members, there is no charge. If the parties desire arbitration by a private arbitrator the parties assume the cost of such arbitration. Our fact-finders are appointed on an ad hoc basis from a panel of persons who are not staff members. The cost of such fact-findings is borne equally by the parties. When Wisconsin was considering the public employee bargaining legislation, we opposed the assumption of costs of fact-finding proceedings by the state. We felt, and still feel, that providing free fact-finding would encourage fact-finding and tend to discourage less formal dispute procedures. Having to share in the cost of fact-finding impels the parties to reach an agreement in order to avoid costly fact-finding.

Need for Labor Practice Provisions

I wholeheartedly agree that the statute should specifically designate unfair labor practices, representing activity of employers, employees and their organizations. Our state employment bargaining law, in addition to including the usual employer unfair labor practices, such as interference, domination, discrimination and refusal to bargain, also provides, as does our private labor act, that violations of collective bargaining agreements are also unfair labor practices, including the refusal to accept an arbitration award . . . (which the parties previously had agreed would be final and binding). Similarly, in addition to the normal unfair labor practices appearing in the federal act with respect to employee organization, the employee organization's refusal to bargain in good faith constitutes an unfair labor practice, as (does) the violation of a collective bargaining agreement.

Furthermore, strikes, or any concomitant thereof, are also considered unfair labor practices. I would oppose any statutory silence with respect to unfair labor practices. The rules of the game should be made known to the parties before the contest begins. With respect to the processing of unfair labor practices, I recommend our Wisconsin approach, discussed earlier, that the agency take no active part in issuing the complaint or prosecuting it, but that it act purely as a quasi-judicial agency and not act as prosecutor and judge. It should be given subpoena powers and given the authority to issue orders enforceable in the courts.

Dues Check-off

I recommend that the statute permit dues check-off and at the same time set forth conditions with respect thereto, including a provision for an escape period at least annually. I don't agree with the argument that a check-off necessarily perpetuates the majority representative, where the employees have an opportunity to revoke such authorizations. A check-off may be beneficial to the employer in various ways, the primary benefit being that of having some indication of the relative strength of the employee organization. Statutes generally provide an opportunity for employees to authorize employers to make deductions from the employee's wages for other matters, and these deductions should cause no additional inconvenience to the employer.

Inclusion of Union Security Provisions

This is a problem where you can get many arguments pro and con. Wisconsin, in the private employment sector, is not a right-to-work-law state. It permits union security agreements in private employment only after a referendum has been conducted by our agency authorizing same, wherein two-thirds of the employees voting must authorize the parties to enter into such an agreement, and said two-thirds must also constitute at least a majority of the employees in the unit. Authorizations have occurred in 97% of the referendums conducted by us. As the report indicates, our legislature

passed a bill authorizing union security agreements in municipal employment which was vetoed by the Governor. There are renewed efforts in the present session of our legislature seeking the same provision.

It is almost impossible to concede that a public employee bargaining law containing or permitting some form of union security agreement in public employment could be enacted in a right-to-work-law state. I believe the question of the inclusion or exclusion of the authority to enter into such agreements should be left to the individual states, depending uopn the climate therein. If the statute remains silent with respect to the matter, it would appear that such union security agreements would be prohibited, because it is a form of compulsory unionism. There may be a different result if the statute does not contain a specified right to refrain from concerted activity.

Employee Protection

Our public employee statutes do not contain any provisions with regard to internal union affairs, and I don't believe we will ever have such provisions until it is demonstrated there is a need for such provisions in Wisconsin.

Exchange of Public Personnel Data

I would oppose legislation which would require or even permit the agency which administers a sophisticated labor relations statute to provide data to the parties for bargaining purposes. I believe both the employers and the employee organizations should equip themselves to obtain the necessary data and information to carry out their responsibilities in collective bargaining. This is not meant to say that other state agencies who are better equipped to obtain the information could not furnish same. For example, our Department of Administration through its Bureau of Personnel conducts annual surveys of wages paid to various county employees throughout the state. It compiles this information and it is available to the public or anyone requesting the information. If this responsibility were given to the agency administering the labor relations statutes, there exists the opportunity for criticism and harassment with regard to furnishing all information to permit the employee or employee representatives to properly negotiate. Furthermore, many municipalities and school boards are members of existing associations which can provide such information. In addition, employee organizations, especially those affiliated nationally, have the facilities and funds to do likewise.

Regional Cooperation

I concur in the recommendation that local governments and employee organizations effect appropriate arrangements for collective bargaining on a regional basis. However, I believe that the accomplishment of such a goal is a dream which cannot be accomplished by statute. Who is to say that uniform labor conditions and uniform collective bargaining agreements are more desirable that nonuniformity? Employee organizations, in order to attract membership and maintain their majority status, are opposed to uniformity where there exists another organization ... (waiting)... to prove its strength, should the employees involved reject their employee representative. The role of minority organizations in public employment bargaining cannot be minimized.

In private labor relations, where there are two competing unions, the union losing the election in 99 times out of 100 folds its tent and steals away until at least the next opportunity to become competitive in an election. In municipal employment relations a minority organization does not disappear. Its representatives may continue their lobbying activities, appear ... (at) ... hearings on the public budget, utilize the news and editorial columns in newspapers, and are continually reminding the employees that had they selected it as the majority representative, it could have done a better job than the incumbent organization is doing for them.

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Problems and Issues in the Public Sector

This chapter appeared in Labor Management Policies for State and Local Government, a publication of the Advisory Commission on Intergovernmental Relations. The report's full title as it first appeared was "Problems and Issues in Public Employer - Employee Relations".

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The militancy of public employees, while not a new phenomenon, is rapidly increasing in its intensity. The sharp rise in the number and types of public employee unions and associations, the burgeoning membership rolls of these organizations, and the agressive tactics which they employ to achieve their objectives are major indicators of this boldness. In keeping with this mood, public employees increasingly have turned to dealing collectively with employers as the means for improving their wages, hours, and working conditions. The broader, noneconomic significance of determining the terms and conditions of public employment through employer-employee discussions and negotiations has been explained, from the union point of view, by Jerry Wurf, International President of AFSCME:[1]

> Collective bargaining is more than simply an additional holiday, or pay increase, or an improved pension plan, or a grievance procedure. It is, of course, all of these, and their importance can hardly be overestimated. But it is, in its most profound sense, a process.
>
> It is a process which transforms pleading to negotiation. It is a process which permits employees dignity as they participate in the formulation of their terms and conditions of employment. It is a process which embraces the democratic ideal and applies it concretely, specifically, effectively, at the place of work.
>
> Public employees and collective bargaining have engaged in sporadic flirtations with each other for decades. It is no longer a flirtation. It is a marriage. And it will endure.

Most state and local governments, however, have been largely unprepared for, and basically reluctant to face the implications of rising public employee organization. A majority of the states have not enacted comprehensive public employee labor relations statutes and relatively few counties and municipalities have laws or formal policies dealing with employer-employee relations procedures. Professor George W. Taylor has argued that the reluctance of many state and local governments to confront the challenge of organized public employees may be attributed to the growing use of the strike weapon in the public sector.[2] Another reason for this reluctance - especially at the state level - has been the continuing deadlock over whether collective negotiation is compatible with or a threat to governmental sovereignty.[3]

Besides the strike and sovereignty issues, critical differences between the public and private sectors constitute added explanations for the unwillingness or inability of state and local governments to negotiate with their employees. The system of separation of powers and checks and balances in a representative democracy limits and diffuses authority and leadership and this often complicates the identification of a source of final answers to questions arising in the course of employer-employee negotiations. This fragmentation of the public employer's authority makes it difficult to talk of contracts that are contracts or binding agreements that are binding for the public sector. This problem of determining "who is the public employer" is magnified by statutory restrictions upon the immediate employer's authority, particularly those resulting from the role of civil service commissions in establishing public personnel policy and the controls legislative bodies exert over the source and expenditure of funds and over various components of the personnel system. The need for public managers to balance the divergent interests of citizen groups and to guard the relationship between personnel administration and broad policy questions which ultimately must be decided by legislative bodies, establish other basic dissimilarities between public and private employment. John W. Macy, Jr., former Chairman of the U.S. Civil Service Commission, believes that these differences are of transcending significance:[4]

> ...the greatest obstacle to the search for effective solutions in public service labor relations is disagreement on the question of whether government service is essentially different from private employment, so different that the usual labor relations policies have to be modified. In any governmental jurisdiction, unless the parties can agree on an affirmative answer to this question, the road of labor-management relations will be too rocky to travel. The government involved, and the public which supports it, will be too suspicious of unionism to permit it to flourish. Conversely, if the government and its public believes that the union recognizes and accepts the essential differences, then all the problems of equality of status and methods of operation in particular aspects of the relationship have a good chance of resolution. I would not want these views to be misinterpreted as indicating that the role of labor unions in public service is or should be more <u>limited</u> than it is in private employment. Rather, it is a plea for dropping a Maginot Line attitude that measures success in public labor relations only in terms of how nearly it matches private industry practice. I submit that the test of labor's success should not be whether you achieve the <u>forms</u> and <u>techniques</u> of collective bargaining in the private sector, but whether you achieve similar <u>results</u> for the worker, through whatever form of representation is best suited to the public jurisdiction involved.

Regardless of the underlying reasons, the clash of employee militance and employer intransigence has precipitated serious and immediate questions concerning the prerogatives and responsibilities of each party. The two basic statutory approaches with respect to

public employer-employee relations at the state and local levels, collective negotiations and meet and confer, in part reflect different responses in providing answers to these questions. Collective negotiations, after all, supposedly involves bargaining between equals and meet and confer ostensibly involves strong protection of management rights and far fewer rights for labor. As we shall see, however, the real differences between the two approaches are not all this clear. In this portion of the report, the Commission identifies and considers some of the more significant of these critical issues in public employer-employee relations. These are treated under three broad headings. First, within the framework of the "Basic Rights and Responsibilities of Public Employees," the doctrine of sovereignty, the right of public employees to organize, employer recognition of public employee organizations, de facto bargaining, and strikes by public employees are considered. The second section - "Statutory Coverage and Administrative Machinery" - deals with the levels of government and occupational categories covered by state public employee labor relations laws, and with the agencies responsible for administration of these statutes. In the final part - "Procedural Issues in Public Labor-Management Relations" - such topics as representation and unit determination, the scope of bargaining, the merit principle and the merit system, unfair labor practices, budgetary procedures and fiscal administration, union security, compulsory arbitration, and state and federal mandating are probed.

Basic Rights and Responsibilities

Recent years have witnessed a marked rise in the frequency and intensity of the demands made by public employees for recognition of certain "rights," many of which were won long ago by private sector workers. Chief among these are the freedom to organize; to be represented in the determinations of the public employer concerning wages, hours, and working conditions; to present views collectively; to permit one's employee organization to be recognized by the employer; to have such unions and associations participate in meaningful negotiations or discussions, including voicing grievances and executing a written agreement; to have a dues checkoff and such union security provisions as an "agency shop"; and to engage in strikes.

A majority of governmental jurisdictions obviously have refused to recognize some or all of the above employee "rights." At the federal level, not until President Kennedy signed Executive Order No. 10988 on January 17, 1962, did all Federal employees have the right to form or participate in employee organizations, or were federal agencies authorized to recognize employee organizations as exclusive representatives of an appropriate bargaining unit and to negotiate agreements covering employees in the unit. This action represented the first uniform executive branch policy dealing with relationships between agencies and employee organizations. The only previous effort at the national level had been the Lloyd-LaFollette Act of 1912, which protected the right of postal employees to join unions and guaranteed the right of all federal civil service personnel to petition Congress.

Despite the provisions of Executive Order No. 10988, employee organization participation in the determination of federal employment conditions remained at a stage considerably removed from the private sector. The Order in no sense established a bilateral or reciprocal relationship. It was, in effect, a somewhat rudimentary version of "meet and confer" legislation found in five states. When hired, federal employees had to sign an affidavit pledging that they would refrain from striking, and recognition was limited to employee organizations which did not assert the right to strike against the government. Wages and hours continued to be determined unilaterally by Congress and the President. The scope of negotiations was not expanded to include such areas as hiring, promotions, transfers, job assignments, or any other matters which could conflict with unilaterally-imposed agency regulations.[5] As a result, federal employee organizations were confined to discussing with agencies such working conditions as overtime, leves, and shifts. The more substantive aspects of public employment were determined by the government and this strengthened the case of those who argued that lobbying was the best way to get a federal pay hike, better fringe benefits, and the like.

The reactions of organized labor to these limitations upon the bargaining rights of federal employees and to the attitudes of public managers when dealing with unions have been summarized as follows:[6]

> The honest intent of Executive Order 10988 was to drag the management of the federal establishment into the 20th Century, so far as relationships with labor were concerned. The collective experience of unions representing federal employees, however, shows that in far too many cases, management has refused to be dragged - and it still has not lived up to its obligation under the Executive Order, much less to the philosophical ground on which this directive was founded.
>
> The facts of life are that, inside the federal establishment - at the work places in both shops and offices - federal employees still are living under what can best be described as "benevolent despotism," when the goal was to achieve some measure of "industrial democracy," which is the goal of the Labor Management Relations Act under which unions in the private sector operate.

President Nixon's Executive Order 11491 has fallen far short of the sweeping changes in federal labor-management relations policies and practices advocated by organized labor. At best, it gives them only "half a loaf".

On the one hand, the new Order does not expand the scope of negotiations to include "bread and butter" matters. It does not remove the proviso that in order to be recognized, an employee organization must refrain from asserting a right to strike for its membership. It does not establish a bilateral collective bargaining relationship which will culminate in a written agreement that is binding upon both parties. It does not permit official time for organization representatives when they are engaged in negotiations with management. It does not authorize such types of union security as the union shop, agency shop, or maintenance of membership. It does not allow agencies to extend formal or informal recognition to minority organizations.

On the other hand, the Order does prohibit supervisors from participating in the management or representation of a "labor" organization, and it does establish a separate system in which agencies are required to consult with supervisors' associations. It does require organizations to file financial and other reports and to meet certain bonding, trusteeship, and election standards. It does establish a Federal Labor Relations Council - consisting of the Civil Service Commission Chairman, the Secretary of Labor, an official of the Executive Office of the President, and such other officials as the President may designate - to administer the Order. It does set up a Federal Service Impasse Panel consisting of three Presidential appointees to settle negotiation impasses, and authorizes the Federal Mediation and Conciliation Service to help the parties settle disputes. It does provide that the Panel may authorize arbitration or third-party fact finding to break deadlocks. It does accord exclusive recognition to the organization selected in a secret ballot by a majority of the employees in an appropriate unit. It does accord other labor organizations national consultation rights, including the right to comment on and suggest modifications in proposed substantive changes in personnel policies, to confer with management in person in connection with such policies, and to present written views. It does establish procedures for handling grievances and disputes arising over the administration of agreements. Finally, it does require the parties to negotiate "in good faith", and makes formal discussions subject to pertinent laws and regulations, agency policies and procedures, national agreements on those at a higher level in the agency, and provisions of the Order.

The Sovereignty Issue

Even though President Kennedy's Executive Order had some spillover effect in encouraging employee organization in state and local government, the status of employer-employee relations in many jurisdictions at these levels is not much better and is often more confused than those at the federal level. While experience varies widely, it is clear that many states and localities have not been willing to accede to demands made by public employees for full collective negotiating "rights." A major explanation for this reluctance is the view that public and private employment are essentially different and a major argument of those stressing the separation is that government possesses sovereign authority which cannot be surrendered or delegated to others.

The "Traditionalist" View: Rooted in the old common law precept that "the King can do no wrong" and in the principle that the individual cannot sue the state without its consent, the doctrine of sovereignty has been used in the twentieth century United States by some public employers to justify their refusal to deal with employee organizations.[7] These "traditionalists" claim that the sovereignty of government precludes the public employer from entering into any commitment under compulsion or, even if agreed to, from respecting such commitments at a later time. (The same argument is not used to justify refusal to honor procurement contracts, however.) Since sovereignty requires public managers to make unilateral determinations rather than to engage in bilateral discussions and negotiations of public employment conditions, they argue that the history and implications of collective bargaining and the union movement in private industry are for the most part irrelevant to the public sector. A statement made by President Franklin D. Roosevelt in 1937 is often quoted today by proponents of this positon:[8]

> The process of collective bargaining as usually understood, cannot be transplanted into the public service. It has its distinct and unsurmountable limitations when applied to public personnel management. The very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employees organizations. The employer is the whole people who speak by means of laws enacted by their representative in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many cases restricted, by laws which establish policies, procedures or rules in personnel matters. Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of government employees.

All earlier and nearly all recent judicial decisions and legal opinions have endorsed this viewpoint. They have held that signing a collective agreement would limit the discretionary authority of the public employer, and that thereby the government would be circumscribing its sovereignty. As a New York Court held in 1943:[9]

> To tolerate or recognize any combination of Civil Service employees of the Government as a labor organization or union is not only incompatible with the spirt of democracy, but inconsistent with every principle upon which our Government is founded. Nothing is more dangerous

to public welfare than to admit that hired servants of the state can dictate to the Government the hours, the wages, and conditions under which they will carry on essential services vital to the welfare, safety, and security of the citizen. To admit as true that Government employees have power to halt or check the functions of Government, unless their demands are satisfied, is to transfer to them all legislative, executive, and judicial power. Nothing would be more ridiculous.

...Much as we all recognize the value and the necessity of collective bargaining in industrial and social life, nonetheless, such bargaining is impossible between the Government and its employees, by reason of the very nature of Government itself.....

Collective bargaining has no place in Government service. The employer is the whole people. It is impossible for administrative officials to bind the Government of the United States or the State of New York by any agreement made between them and representatives of any union.

Under a democratic system of government, sovereignty, of course, ultimately resides with the people. At the same time, the implications of the representational principle have prompted most courts to establish that the terms and conditions of public employment are basically matters suitable for legislative determination. In consequence, allowing administrative agencies to sign labor relations agreements with public employees would constitute an illegal delegation of legislative power.

Some "traditionalists" have asserted that acceptance of a labor relations system where the public employer and employees would meet, confer, and negotiate as equals would lead ultimately to recognition of the employees' right to strike, which in turn would represent an attack upon government and its sovereignty. Even if the right to strike were not recognized, so their argument runs, this system could still lead to binding arbitration of employees disputes and this, too, would challenge the sovereign authority of the public employer.

These conventional interpretations of the sovereignty doctrine have served to bolster public agency unilateralism and to inhibit joint or partially joint determination of the conditions of employment by public employees and public employers. Moreover, in some jurisdictions where employee organizations exist, it has been claimed that such practices as exclusive recognition, the checkoff of union dues, fact-finding, arbitration, and certainly the strike have threatened the governmental unit's sovereign position. To summarize, the orthodox position holds:[10]

> ...that governmental power includes the power, through law, to fix the terms and conditions of government employment, that this power reposes in the sovereign's hand, that this is a unique power which cannot be given or taken away or shared, and that any organized effort to interfere with this power through a process such as collective bargaining is irreconcilable with the ideal of sovereignty and is hence unlawful.

The "Revisionist" Critique: In actual practice, however, the traditional interpretation has been refined in such a way as to make public employer-employee negotiations more compatible with the doctrine of sovereignty. Four counter-arguments to the older theory have facilitated this accommodation. One such argument holds that the sovereign, in effect, admitted that "the King can do no wrong" when government allowed itself to be sued by private individuals through tort or contract claims for redress of alleged injuries. If this concession did not compromise governmental sovereignty, then acceptance by a jurisdiction of certain restrictions upon its discretion in dealing with public employees similarly would not jeopardize it.

Another line of reasoning maintains that when a public employer signs an agreement, rather than surrendering or delegating discretionary powers, it merely has agreed to limit such powers in certain areas for a given period in pursuit of its own proper concern - improving relations with its employees. Futhermore, if absolutely necessary, the public employer could repudiate agreements entered into on a voluntary basis and the affected employees would lack legal recourse.

A third view holds that since some of the contracts which governmental units have signed with private contractors have contained provisions calling for binding arbitration to settle disputes over contract performance, sufficient precedent exists for public employers to enter into labor relations agreements with their own employees.

Another basis on which the orthodox interpretation of sovereignty is challenged relates to the tenet that in a democracy sovereign authority ultimately reposes with the people. Therefore, when the peoples' representatives in federal, state, and local legislative bodies authorize consultation, discussion and negotiations between public employers and their employees, this cannot be considered an abdication of sovereignty.

The "Pragmatic" Synthesis: The strength of the "traditionalist" position in many quarters and the growing acceptance of the "revisionist" view in others indicate that no real consensus now exists concerning the proper relationship between governmental sovereignty and public employer-employee negotiations. This inconclusiveness is in the two basic legislative approaches to public employer-employee relations, collective negotiations or meet and

confer. Each differs in the status accorded the public employer in the negotiation process. In collective negotiation approach, the two parties meet "ostensibly" as equals while in the usual meet and confer approach the employer is accorded a preferred position in the discussional process.

A third approach to the sovereignty issue, which might be labeled as "pragmatic", seems to be emerging from the heat of debate. This view seeks to reconcile the conflict involved in the theoretical and practical applications of this doctrine. Its proponents hold that the sovereign authority of government encompasses the power to engage voluntarily in collective bargaining or discussions as a matter of "enlightened" public personnel policy. According to Wilson R. Hart:[11]

> ...the sovereignty doctrine is a clear and effective bar to any action on the part of government employees to compel the government to enter involuntarily into any type of collective bargaining relationship,...the doctrine does not preclude the enactment of legislation specifically authorizing the government to enter into collective bargaining relationships with its employees.

Right or Privilege?

The "traditionalist" interpretation of the sovereignty doctrine precludes the existence of a fundamental "right" on the part of public employees to organize and to be recognized by their employer. Hence, public employees are exercising a privilege rather than a "right" when they organize for the purpose of negotiating with employing agencies on the terms and conditions of employment. The National Governors' Conference Report explained the difference this way.[12]

> To petition the government is one thing. It is quite another to demand a share in decision-making in the domain of wages and employment, or to insist that decisions must have the consent of employee organizations. Some states have enacted laws that give bargaining rights to employee organizations. This action, however, can be interpreted as a privilege conferred by the legislature on employee organizations, and as such it can conceivably be revoked.

Public employee organizations, however, have been adamant in their opposition to this position. They view the formation of unions and associations in the public service to deal with employers over the terms and conditions of work basically an extension of the constitutional right of citizens to petition the government. These organizations also point to the National Labor Relations Act, which established in the private sector the right of employees to join and form unions of their own choosing and to have such unions represent them in collective bargaining, in support of their contention that this right should be extended to public employment. They also assert that if private employees have certain rights which cannot be granted to public employees, this relegates the public worker to "second-class citizenship" status. In rejecting the "privilege position," the recently published interim report of the Executive Board of the AFL-CIO Maritime Traders Department, composed of various affiliates having an interest in public sector employees, relied basically on this argument:[13]

> As long as public employees must operate in an area where their 'rights' are denied, and their organizational and collective bargaining activities are reduced to the level of 'a privilege' that 'can conceivably be revoked,' they are at the mercy of the employer whose benevolence can be terminated on more than a whim.

On the other hand, the view that public employment is a privilege rather than a right has received generally consistent judicial support. Until quite recently, practically all courts upheld and other authorities sanctioned the legality of prohibitions against employees joining unions as a condition of public employment, for reasons pointed out by Kurt L. Hanslowe:[14]

> To the assertion that this interferes with the constitutional right of freedom of association, government has responded that, there being no constitutional right to government employment, it may insist on non-membership as a condition of such employment because of the governmental right and need to maintain operations without interference and interruption.

Where public employee membership is authorized, the courts have ruled that government employers may restrict the type of organizations to those which are either unaffiliated with the general labor movement or, if affiliated, do not assert the right to strike. In October 1969, however, a three judge Federal Court in the District of Columbia ruled that the nation's postal employees may not be barred from affirming their right to strike or from joining associations or unions that assert this right. The court also overturned the requirement that postal workers sign no strike pledges as a precondition of employment. This landmark First Amendment case obviously will have a significant spillover effect on other workers subjected to similar requirements.

Denial of the right of union affiliation in part has been an outgrowth of the fears of public management that without this safeguard the size and resources of employee organizations would expand greatly and they then could exercise unchecked political and economic power. A stronger union position, so the argument runs, also would increase their proclivity to strike in order to win employer agreement to their demands and this, in turn, would produce hardships for the rest of society.

Emerging Judicial Opinion: Prior to the 1960's nearly all court decisions constituted a variation of the theme that the government as sovereign justifiably may establish such terms and conditions of public employment as it sees fit. Futher, from the viewpoint of the individual employee, public employment is not a constitutional right but simply a privilege, which carries with it implied (or explicit) limitations on the freedom to organize. Oliver Wendell Holmes, when a judge on the Supreme Judicial Court of Massachusetts, enunicated the classic defense of this viewpoint in a decision upholding the firing of a policeman who had violated a ban on soliciting political contributions.[15]

> ...there is nothing in the constitution...to prevent the city from attaching obedience to this rule as a condition to the office of policeman, and making it part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of the contract.....The city may impose any reasonable condition upon the holding office within its control. This condition seems to be reasonable.

On January 17, 1969, the Eighth U.S. Court of Appeals in St. Louis, Missouri, handed down a ruling that could well establish a new judicial precedent on the issue of whether belonging to unions and associations is a right or a privilege for public employees. The case was an appeal from the U.S. District Court in Nebraska brought by the AFSCME on behalf of two employees of the North Platte, Nebraska, street department who alleged that they had been fired as a result of their union membership. The principal issue in Gage v. Woodward was whether in light of their dismissal the appellants had a right of action for damages and injunctive relief under Section 1 of the Civil Rights Act of 1871.[16] This question in turn involved the issue of whether public employees have a constitutional right to belong to a labor union. Based upon decisions in two earlier cases - Thomas v. Collins, 323 U.S. 516 (1945) and McLaughlin v. Tilendis, 398 F. 2d 287 (7th Cir. 1968) - the court held unanimously that the First Amendment right of association, made applicable to the States under the Fourteenth Amendment, protected the right of union membership. In the Tilendis case, which involved a complaint alleging that a non-tenure teacher was fired because of his union membership, the United States Supreme Court had ruled that:

> It is settled that teachers have the right of free association, and unjustified interference with teachers' associational freedom violates the Due Process clause of the Fourteenth Amendment.....Public employment may not be subjected to unreasonable conditions, and the assertion of First Amendment rights by teachers will usually not warrant their dismissal....Unless there is some illegal intent, an individual's right to form and join a union is protected by the First Amendment.

In the Gage case, the Appellate Court concluded:

> No paramount public interest of the state of Nebraska or the city of North Platte warranted limiting the plaintiffs' right to freedom of association. To the contrary, it is the public policy of Nebraska that employment should not be denied on the basis of union membership. The Constitution of the state of Nebraska, Article XV, Section 13, and the laws of Nebraska, Reissue Revised Statutes of 1943, Section 48-217, specifically provide that 'no person shall be denied employment because of membership in or affiliation with....a labor organization.' Neither the Constitution nor the statute is limited by its terms to private employment and, in our view, it is not so limited.

More recently, on February 25, 1969, a federal court in North Carolina ruled that the state's law prohibiting union activities by policemen and firemen was unconstitutional. The court reasoned that this ban abridged the First and Fourteenth Amendment guarantees of freedom of association. At the same time, however, a different state law which prohibited state or local governmental units from doing business with public employee organizations was upheld by the court on grounds that, "There is nothing in the United States Constitution which entitles one to have a contract with another who does not want it." Apparently, the court felt that while individual public employees should be free to join organizations, governmental jurisdictions should be free to choose those with whom they wish to deal.

The Reaction of Public Management: The real significance of the debate over the right or privilege of public employees to join unions or associations lies mainly in the degree to which public management is actually responsive to these employee organizations. As the AFL-CIO Maritime Trades Department has stated:[17]

> The legal right of an employee to join a union can be made effective... only if there also are laws requiring recognition of the union as the employees' representative, and requiring that public officials participate in good-faith collective bargaining with the organization chosen by employees as their representative.

Public employees often distinguish sharply between the membership rights of their employees and the rights of employee organizations to present proposals, to meet and confer, and to negotiate collectively. The fact that the issue of recognition was the cause of one out of four strikes by public employees in 1968, even though strikes of this kind are virtually

unknown in the private sector, highlights both the militancy of public employee organizations and the failure of much of management to grapple with the fact that such groups exist.

The tragedy that occurred in Memphis, Tennessee, in April 1968 in which a strike by garbage collectors for union recognition was exposed to national attention as a result of the assassination of Dr. Martin Luther King, Jr., is instructive of a certain type of traditional management attitude toward public employee organizations. After steadfastly refusing to recognize the garbage collectors' union, the City of Memphis, obviously in response to the pressures of national public opinion after Dr. King's death, reversed its position and signed an agreement with the striking sanitation men. Yet, the city still refuses to recognize or to negotiate with representatives of its policemen and firemen. One critical observer has noted with respect to this situation:[18]

> How a local government, which depended upon those same policemen and firemen to protect its citizens and non-striking employees during the garbage strike, can fail to see the importance of recognizing and bargaining collectively with representatives of its protective services is hard to understand.

De Facto Bargaining: Statutory authorization is not always necessary in order for public employers to negotiate with employee organizations. In some of the states that have not enacted statutes mandating or permitting collective negotiation or meet and confer for either state or local employees, the courts have held that as a precondition for such dealings an express legal authorization must exist, and that the absence of such a grant does not confer authority upon the employer to bargain with public employee organizations. In other states, however, even without an express authorization, public agencies can still negotiate collectively on the terms and conditions of employment, provided no state law prohibits such action.

In 1951, a Connecticut court held that a school board could negotiate with a teachers' association since no law barred such action. Following this decision, more and more counties, cities, and school districts assumed that negotiating with employee unions or associations was within their discretionary authority. This interpretation has been supported by attorneys' general opinions and court decisions in many states, including recent court rulings in Iowa, Illinois, and New Mexico, even though it is contrary to the strict interpretation of the sovereignty doctrine. Mayor Wagner's 1958 executive order authorizing collective negotiations between New York City and its employees, for example, was not declared illegal even though collective bargaining had been previously interpreted as being applicable only to the private sector and bills to extend this coverage has been defeated in the New York State Legislature. De facto bargaining also has been in practice in the City of Philadelphia for over twenty years. The principal explanation for this attitude is ".....that employee organizations and public officials sympathetic to the principle of bilateralism have taken the bull by the horns. They have gone ahead with collective negotiations despite the absence of a statute specifically telling them that they could do so, because they considered it important to act to prevent a complete breakdown in management-employee relations."[19]

Public Employee Strikes

The right of employees to strike is the ultimate question in contemporary public labor-management relations. Although public administration literature has paid some attention to the issue, more often it has been dismissed as moot. A major reason for this cursory treatment is that no governmental jurisdiction in the United States has ever vested its workers with this right, nor have the courts retreated from their stance rooted in common law principles and sanctioned public employee strikes. Further, until recently the public employee has been rather docile, and employers, as well as the general public, often mistakenly equated this passivity with satisfaction.

The Current Scene: Since 1965, however, the situation has changed markedly. Whether public employees should be allowed to strike is no longer an academic question. Instead, and despite the fact that legislative bodies and the courts have maintained their previous posture, the strike has become a real issue. The subject has generated increasingly heated polemics between the direct participants in the collective bargaining arena - labor and management - as well as among others somewhat further removed from the conference table, including attorneys general, legislators, administrators, academicians, and the average citizen.

The growing attention now being given to devising and revising discussion, negotiating, and impasse procedures reflects in part a realization that the public employee has legitimate grievances that should be aired and resolved. Yet, nothing has done more to hasten the development of this procedural machinery that the increasing tendency of public employees to strike in order to obtain redress of their grievances. In resorting to this tactic, the intention of these workers is not to permanently sever their employment. Instead, they view the concerted withholding of labor as a means of exerting collective pressure on the government in order to better the terms and conditions of their employment.[20]

These developments, however, have not been accompanied by any significant legislative or judicial steps to liberalize strike prohibitions in the public sector. None of the meet and confer or collective bargaining statutes permit strikes of any kind; strike bans are found in all of the comprehensive acts. Some observers contend that this fixed posture on the part of legislative bodies and courts reflects a general popular unwillingness to move in the direction of repealing strike bans in the public sector. In fact, it is argued that even in private industry public toleration of strikes is at a low ebb since they:[21]

> ....cause more inconvenience and hardship to the public than to those directly involved, frequently do not expeditiously induce a private agreement, and result in terms of employment which constitute preferred treatment for a few to the disadvantage of the many.
>
> It is ironic that public employees are asserting a right to strike which has never been accorded them at the very time when many doubts have arisen about the advisability of continuing to permit the right to strike in the private sector, where it has been so long established.

The hesitancy of the general public to sanction the removal of anti-strike legal safeguards has been confirmed by a recent Gallup poll.[22] A January 1969 survey showed that six out of every ten persons questioned in a nationwide representative sample indicated that teachers, policemen, and firemen should be allowed to join unions. But a like proportion believed that they should not be permitted to strike. In response to another question, two out of three persons interviewed asserted that they believed 1969 would be a year characterized by strikes and industrial disputes, a prediction reflecting the previously cited trend data on the incidence of work stoppages in public employment.

These findings do not necessarily suggest what is proper, but only what the public thinks. Many organizational spokesmen contend that strikes by all or some public employees are justifiable. Such groups as teachers, policemen, firemen, sanitation men, social workers, and nurses no longer are hesitant to resort to stoppages, slowdowns, mass resignations, absenteeism, and other disruptive tactics in order to register their grievances and to dramatize what has been described as their "....exasperation with the failure of the public and its political representatives to provide what was construed as elementary justice."[23] George W. Taylor has sought to explain the ways in which popular reaction varies in accordance with the circumstances which engender such drastic actions on the part of public employees:[24]

> .....a qualitative analysis of the strikes which have occurred suggests that a sharp distinction is drawn by the public between strikes as an expression of civil protest against patently unfair treatment and assertion of the right to strike as a regular way of life, that is, as a recognized institutional form for establishing employment terms. Despite the seriousness of the stoppages, the public has been understanding about the withdrawal by nurses of their services. It was believed they had legitimate reasons for their protest.
>
> Public reaction has been entirely different in respect to the year-after-year stoppages by public transit employees who walk off the job in order to improve conditions of employment which, at each settlement, have been enthusiastically declared "the best ever". Use of strikes by school teachers as a form of flash protest is doubtlessly placed in a different category than employing the strike, or its threat, as an integral part of periodic negotiations. In other words, some strikes are deemed to be more intolerable than others.

Contrary to the impressions of some, there appears to be no direct relationship between the number of strikes and the legislative approach to public employee relations. In 1967, New York under its collective bargaining law had 15 strikes, Ohio and Illinois with no basic legislation in this area had 28 and 18, respectively ~~(see Appendix Table C-1 (B))~~. Michigan, on the other hand, with collective bargaining for local jurisdictions, had 34 work stoppages that year, while California with meet and confer had 8. In 1968, Ohio and Illinois again passed the 20 mark and New York joined them. California reached 18, while Michigan soared to 42. Meanwhile states with no general legislation began to enter the lists with Florida having 6; Indiana, 9; Tennessee, 7; and West Virginia, 7.

The Limited Right to Strike: Recent reports by study commissions in Pennsylvania and Colorado have contained recommendations for removal of the strike ban for certain categories of public employees. In its June 1968 report, the Governor's Commission to Revise the Public Employee Law of Pennsylvania (Hickman Commission) recommended that, except for policemen and firemen, the right to strike should be accorded to public employees. This right would be limited by provisions that all collective bargaining procedures - including face-to-face bargaining, utilization of the State Mediation Service, fact-finding by a tribunal of three arbitrators appointed by the Labor Board and publication of its recommendations - must have been exhausted before a strike could be permitted. The strike could not commence or persist if the health, safety, or welfare of the general public was thereby endangered, and unlawful strikes would be subject to court injunctions. Severe penalties in the form of fines, imprisonment, or both of the bargaining agent and/or individual employees would be enforced for violations of an injunction.[25] On the other hand, compulsory arbitration would be utilized to resolve impasses involving policemen and firemen. The Hickman Commission presented this rational in support of these recommendations:[26]

> The collective bargaining process will be strengthened if this qualified right to strike is recognized. It will be some curb on the possible intransigence of an employer; and the limitations on the right to strike will serve notice on the employee that there are limits to the hardship that he can impose.

> We also believe that the limitations on the right to strike which we propose...will appeal to the general public as so much fairer than a general ban on strikes that the public will be less likely to tolerate strikes beyond these boundaries. Strikes can only be effective so long as they have public support. In short, we look upon the limited and carefully defined right to strike as a safety valve that will in fact prevent strikes.

It should be emphasized, however, that these features of the report were not endorsed by either the governor or the legislature. A bill based on the Committee's recommendations was introduced in the legislature and did not include provisions for a limited right to strike.

On December 9, 1968, the Committee on Public Employee Negotiations of the Colorado Legislative Council submitted a report to the General Assembly. Based upon its study, the Committee proposed a bill establishing for the first time procedures to guide collective negotiations between public employers and employees in the state and its political subdivisions. The bill did not contain a blanket ban on work stoppages. Instead, it distinguished between "lawful" and "unlawful" strikes in the public sector. This differentiation was a product of the Committee's conclusion that:[27]

> ....the experience with strike prohibitions in other states indicated that strikes in the public sector cannot effectively be prohibited by legislation. Strikes are a part of the collective bargaining process and if collective bargaining fails, laws against strikes cannot prevent strikes.

The Committee defined "unlawful" strikes by public employees as those that (a) are called in support of or sympathy with issues beyond the control of the negotiating parties, such as secondary boycotts or strikes against a third party, (b) occur during the life of a collective bargaining agreement, or (c) commence prior to the exhaustion of all impasse procedures. Although the Committee did not explicitly define what it considered to be a "lawful" strike, apparently any work stoppage by any group of public employees except policemen and firemen that failed to meet any of the three preceding conditions would fall into this category.

The bill provided that if the bargaining parties could not reach an agreement and if available impasse procedures, including submission of the fact finder's recommendations to an appropriate legislative body, were unsuccessful, then the employee organization representative would be required to file with the state industrial commission a notice of intent to strike twenty days prior to the date of the actual stoppage. The commission then would notify the affected public employer and determine whether the strike would endanger public health or safety. This finding would be transmitted to the governor, the public employer, and the exclusive bargaining agent. The governor then would be empowered to issue an executive order postponing for a forty-day period any strike that presented a danger to public health or safety.

Severe penalties would be imposed on individuals and unions violating the executive order. The industrial commission, for example, could place violating individuals on probation for two years and bar increases in their compensation and benefits for one year. Further, if the employee was in the state classified civil service, charges involving disciplinary action and possible dismissal could be filed with the State Civil Service Commission. Penalties which the Commission could impose on violating labor organizations could include heavy fines and loss of dues checkoff privileges.

Arguments Against the Right to Strike; Old-style proponents of no-strike provisions in public employee labor relations laws believe that work stoppages challenge the sovereignty of government. In a democracy, it is argued, sovereign authority resides with the people and an employee organization striking against a public employer attacks the system of delegated authority that serves as the basis of representative government.

A second line of argument underscores certain basic differences between the public and private sectors. In private enterprise, relative economic power ultimately determines the nature of the bargaining agreement. Criteria for guiding employer decision-making are pertinent to the market place; the company must decide whether it will maximize its profits by opposing employee demands and thereby face the possibility of having production reduced or stopped, or whether it will limit its profits or hike prices by agreeing to employee demands. These economic criteria, according to this line of reasoning, are irrelevant in the public sector where a price tag is not often attached to individual governmental services, where the taxpayer usually is unable to pick and choose between those services he desires or does not desire to pay for. Criteria relating to the scope and cost of public services are more an expression of political power, and decisions concerning priorities to be attached to the allocation of services - "who gets what, when, and how?" - are determined through the electoral process. Because the strike is an economic weapon, then, it is inappropriate in the public sphere where final decisions are determined by the exercise of relative political power. As the Taylor Committee concluded:[28]

> The fact of the matter is that collective bargaining in the private enterprise context is markedly different in many respects from collective regulation in the governmental context. One difference is in the lack of appropriateness of the strike in the public sector....
>
> Careful thought about the matter shows conclusively, we believe, that while the right to strike normally

performs a useful function in the private enterprise sector (where relative economic power is the final determinant in the making of private agreements), it is not compatible with the orderly functioning of our democratic form of representative government (in which relative political power is the final determinant).

A third argument stresses another basic public-private sector difference. Unlike his counterpart in private enterprise, a public employer cannot counter the employees' economic weapon - the strike - with his own economic power - the lockout. It is difficult if not impossible for government to eliminate or to restrict services merely as a means of exerting power over its workers. As the countervailing effect of possible unemployment is eliminated, it is argued that the strike weapon gives employees an unfair advantage over the employer, an advantage not enjoyed by private sector workers.

A fourth view maintains that the consequences of public employee strikes precludes their legalization. In private industry, the people who are adversely affected by a work stoppage are usually only those directly concerned - labor and management. On the other hand, in the public sector a strike against a government employer is in effect a strike against the public as a whole.

Proponents of legislation prohibiting strikes by public employees also assert that due to the indispensibility of virtually all public services, work stoppages can bring government to a virtual standstill. They note that the elaborate public decision-making process whereby jurisdictions assume, retain, or relinquish functions in itself provides a kind of test of "indispensibility" and this test makes irrelevant claims that workers performing similar or like functions - whether in the private or public sectors - should have equal access to the strike weapon. This position, in effect, constitutes a fifth line of "anti-strike" argument and is used against proponents of the limited right to strike. These critics further contend that definitions of "essential" and "nonessential" public services would be difficult to develop and impossible to implement. They point out that: the absence of legal restraints would encourage unions to strike and that, as a practical matter, it is difficult if not impossible to differentiate between strikes that endanger the public health, safety, and welfare, and those that do not. The injunction device, it is pointed out, is only a temporary source of relief as it does not assure agreement or even a coming together at the negotiating table.

A sixth line of argument draws upon experience in private enterprise where strikes occurring in industries providing essential services have been declared illegal. Under the national emergency provisions of the Taft-Hartley Act temporary injunctions have been granted against strikes, such as those by railroad and public unility workers, which the President of the United States and the courts determined would be threats to the national health and safety.[29] Since all government services fall in the "essential" category, they too are essential to health and safety and should not be disrupted by strikes.

Arguments in Favor of the Right to Strike: On the other side of the coin, supporters of the right of public employees to strike contend that the strict interpretation of the sovereignty doctrine clearly has been modified by the government allowing itself to be sued, entering into binding contracts, and agreeing to compulsory arbitration of disputes and grievances. Thus, the traditional view of public employee strikes can be modified in light of modern interpretations of the sovereignty doctrine.

These critics also question the validity of certain alleged basic differences between public and private employment. They argue that only policemen and firemen really perform essential services, and practically all of them concede that these two groups should not be allowed to strike. At the other extreme, such occupational categories as clerks, maintenance men, park attendants, and museum guards are viewed as being generally nonessential in terms of their work stoppages posing potential threats to public health and safety. Therefore it is asserted that these "nonessential" groups should not be prohibited from striking.[30] For occupations in the middle zone - such as transportation, public utility, hospital, and sanitation workers - it is pointed out that since similar or identical services may be performed by public agencies in one city and by private agencies in another, it would be discriminatory to prohibit employees in only those service areas under public ownership from engaging in work stoppages. (It should be noted, however, that some states require compulsory arbitration of strikes by employees of private utilities.)

A third basic position maintains that even though legislative bodies and the courts have not struck down anti-strike provisions, the incidence of strikes by public employees nevertheless has increased at a rapid rate. Some claim that state legislation prohibiting strikes and imposing severe penalties on violators has not only been singularly ineffective in preventing work stoppages, but actually has been responsible for hindering the settlement of some strikes. In many instances, these penalties must be waived as a condition of unions being willing to resume public services. As the New York Times commented during the January 1965 strike against the New York Welfare Department: "The major stumbling block to a settlement has been Mayor Wagner's refusal to guarantee a waiver of legal penalties.... of the state's Condin-Wadlin Act.[31] Another attack on such provisions is rooted in the fact that because of their power position large unions and associations may break these legal provisions with impunity while smaller organizations are often subjected to severe sanctions for failure to obey them. Critics of anti-strike provisions point to a further irony in this situation. In the absence of penalties to deter employees from striking, any outlaw-

ing of strikes becomes an uncertain matter or meaningless. Yet, to impose light penalties upon violators reduces their deterrent effect while as demonstrated by the experience under New York State's former Condin-Wadlin Act, severe penalties often cannot be enforced. The problem, then, is attaining a proper balance, and whether this is possible remains problematic. In light of these factors, it is contended that the most feasible approach would be simply to repeal strike bans in the public sector.

A fourth line of argument holds that removal of strike prohibitions would not necessarily increase the number of strikes in the public sector. Instead, the real effect of razing the legal barriers to strikes by some or all occupational categories would be to force public employers to engage in genuine negotiations with employee organizations. One union spokesman put the case this way:[32]

> Strike prohibitions are not simply ineffectual, though they are undeniable that. What is far more serious, they warp this vital process of genuine collective bargaining among equals. They bring employees to the bargaining table, but as inferiors. Simultaneously they provide false reassurance to management representatives and induce less than genuine negotiations. Ironically, they create the very tensions, exacerbate the very situations, provoke the very strikes they were allegedly formulated to prevent.

The AFSCME's position on the essentiality question is firmly rooted in the principle that successful collective bargaining can only occur among equals:[33]

> This union has said repeatedly that it does not believe in the right to strike merely for the sake of striking. Certain government employees - policemen, firefighters, prison guards, and other similar categories - should not and must not strike. We believe, however, that when management adamantly refuses to negotiate or to meet the legitimate requests of most public employees, those employees have the right to stop work as a last resort toward the end that the action will bring about resolution of the problem for the ultimate good of all concerned, including the public.

Therefore, the lifting of strike bans is viewed as a safety-valve for releasing the pressure to strike generated by the frustrations resulting from employer reluctance to bargain in good faith. Some proponents of this position point to foreign countries where the right to strike has been accorded to public employees - such as Britain, Canada, and Sweden - as exemplifying that protracted breakdowns in public services will not occur.

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[1]Speech by Jerry Wurf, International President, AFSCME, before the 1967 U.S. Conference of Mayors, Honolulu, Hawaii, June 19, 1967.

[2]According to George W. Taylor, "A substantial and long overdue overhaul of public employment relations is underway in numerous states and municipalities despite the persistence of many doubts about the changes being made. In most states and municipalities, however, a staunch adherence to the status quo is being maintained. To a considerable extent, these doubts and this adherence arise because of concern about the serious infringement of strike action upon vital public interest." See his "Impasse Procedures - The Finality Question," speech before the National Conference on Public Employment Relations, New York City, October 15, 1968.

[3]See Kenneth O. Warner and Mary L. Hennessy, Public Management at the Bargaining Table (Chicago: Public Personnel Association, 1967), p. 74, which pointed out that, "In the three levels of government - federal, state and municipal - the least structured and most nebulous condition of employee-management relationships exists in state governments. State legislatures have been relatively active in legislating for employee-management relationships for municipalities and other local governments, but they were slower to legislate for their own state employees. Some observers believe this is because legislatures have not yet resolved the issue of whether collective bargaining impairs the sovereignty of the state itself."

[4]John W. Macy, Jr., "Public Employee Labor Relations in a Changing Society," address at the Joint Conference of the American Federation of Labor Congress of Industrial Organizations and the Canadian Labour Congress, Niagara Falls, Ontario, November 20, 1968, pp. 2-3.

[5]Benjamin Werne, "Unit Report: The Rights of Public Employees," National City-County Services on Management-Labor Relations," November 1967.

[6]Executive Board, Maritime Trades Department, AFL-CIO, Collective Bargaining in the Public Sector: An Interim Report, February 13, 1969, p. 7. (Hereinafter cited as AFL-CIO Maritime Trades Department Interim Report.) The MTD Committee which drafted this report included representatives of various AFL-CIO affiliates having an interest in the public employee sector: AFSCME; IAFF; Textile Workers, Retail Clerks, Communications Workers, Plumbers, Carpenters, Machinists, etc.

[7]For an example of the changes which have occurred in the application of sovereignty doctrine to collective negotiations see: Felix A. Nigro, "The Implications for Public Administration," Public Administration Review, XXVIII, No. 2 (March-April 1968), pp. 137-42, and Kurt L. Hanslowe, The Emerging Law of Labor Relations in Public Employment (Ithaca, New York: New York State School of Industrial and Labor Relations, October 1967), Chapter 2.

[8]Myron Lieberman and Michael H. Moskow, Collective Negotiations for Teachers (Chicago: Rand McNally, 1966), p.4. Quoted in Eric Polisar, "Public Employees and the Right to Strike" paper prepared for delivery before the Public Personnel Association, Ottawa, Canada, May 9, 1967, p. 6.

[9]Railway Mail Ass'n. v. Murphy, 44 N.Y. Supp. (2) 601.

[10]Hanslowe, op. cit., pp. 14-15.

[11]Wilson R. Hart, Collective Bargaining in the Federal Civil Service (New York: Harper & Row, 1961), p. 20.

[12]National Governors' Conference, 1967 Executive Committee, Report of Task Force Report on State and Local Government Labor Relations (Chicago, 1967), p.6.

[13]Executive Board, Maritime Trades Department, op. cit., p. 4.

[14]Hanslowe, op. cit. p. 11.

[15]Ibid.

[16]Section 1, Civil Rights Act of 1871, 42 U.S.C. 1983, provides: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[17]Executive Board, Maritime Trades Department, op. cit., p. 10.

[18]Arvid Anderson, "Public Collective Bargaining and Social Change," remarks before the Labor Law Section of the American Bar Association, Philadelphia, Pennsylvania, August 6, 1968, p. 2.

[19]Nigro, op. cit., p. 139.

[20]Hanslowe, op. cit., p. 29.

[21]George W. Taylor, "Public Employment: Strikes or Procedures?" Industrial and Labor Relations Review, (July 1967), p. 623.

[22]New York Times, January 12, 1969.

[23]Taylor, "Public Employment: Strikes or Procedures?" p. 629.

[24]Ibid.

[25]State of Pennsylvania, Report and Recommendations of the Governor's Commission to Revise the Public Employee Law of Pennsylvania, pp. 4-5.

[26]Ibid, pp. 13-14.

[27]State of Colorado, Colorado Legislative Council, Public Employee Negotiations: Report to the General Assembly, Research Publication No. 142, December 1968, p. XIX.

[28]State of New York, Governor's Committee on Public Employee Relations: Final Report (Albany: March 31, 1966), pp. 18-19.

[29]Hanslowe, op. cit. p. 30.

[30]As the Hickman Commission stated in support of its recommendation for a limited right to strike for Pennsylvania public employees: "The period that a strike can be permitted will vary from situation to situation. A strike of gardeners in a public park could be tolerated longer than a strike of garbage collectors. And a garbage strike might be permissible for a few days but not indefinitely, and for longer in one community than another, or in one season than another." State of Pennsylvania, op. cit. p. 13.

[31]New York Times, January 19, 1965, cited by Polisar, op. cit. p. 15.

[32]Jerry Wurf, address before the 1967 United States Conference of Mayors, p. 16.

[33]Jerry Wurf, "Unions Enter City Hall: Union Responsibilities," Public Management, XICIII, No. 9 (September 1966), p. 249.

4

Collective Bargaining and Public Employees

This chapter on collective bargaining in the public sector was prepared by the research department of the American Federation of State, County and Municipal Employees.

There is a growing consensus that public employee unionism is here to stay. Most fair minded people, both in and out of government, agree that collective bargaining rights for public employees is necessary. This ground swell of opinion was capped by the National Governors' Conference in their comprehensive study of the problems involved in public employee-management relations. The study, "Report of the Task Force on State and Local Government Labor Relations," made in cooperation with the Public Personnel Association, flatly stated that there must be collective bargaining in the public service.

One statement perhaps best summarizes the views expressed in the report. "The problems, both theoretical and practical, raised by the introduction of collective bargaining in the domain of public service are numerous and complex, and a legislative body may be tempted to avoid dealing with the subject. Most authorities, however, are convinced that if the public employee is granted by legislation the right to share in the making of decisions that affect wages and working conditions, he will be more responsive to the agency's task and will be better able to exchange with management ideas and information on operation. This, it is agreed, will make government more effective."

It is important to thoroughly understand that this demand for collective bargaining rights is an acutely felt need by public employees themselves to participate in the decision making process. Unions and collective bargaining serve as the vehicle through which bilateral decisions will be made. Generally, the press of this country has grasped the meaning of this "new militancy" of public employees. In 1968 alone, several national magazines and newspapers editorially supported collective bargaining for public employees:

Business Week, February 17, 1968 - "Public employee unionism is here to stay; the country must learn to live with it." Earlier, the same article stated "the aim should be to reinforce bargaining rather than to outlaw all strikes by public employees in a way that can only result in widespread law-breaking and discrediting of the laws themselves."

Life, March 1, 1968 - "Only a minority of the laws admit what should be obvious - that in this day employees, public or private, have a right to voice in the terms of their employment. The great need in the public sector is for laws that would guarantee the right of collective bargaining. . . ."

Time, March 1, 1968 - "Until now, most government thinking and effort have been directed at prohibiting strikes and punishing the unions that violate the bans. Since it is now clear that his negative stance only makes matters worse, new efforts must be mounted on the positive side. First, the right of the growing millions of public employees to organize and bargain collectively must be recognized. Second, urgent and continuing work should be undertaken to develop bargaining procedures and machinery aimed at preventing strikes, rather than banning them and punishing strikers." The editorial concluded: "Whatever new laws are enacted, the public will have to accept the principle that government employees should have a right to participate in the determination of their working conditions - in other words, to collective bargaining."

The primary task is to develop a system that will make harmonious labor relations and efficient public administration compatible. This can be done through well thought out comprehensive collective bargaining legislation. We firmly believe that such collective bargaining legislation should incorporate the subject matter discussed in the pages that follow.

1. Collective bargaining legislation should apply to all public employees in the state. It should include state, county and municipal employees.

The "Report of the Task Force on State and Local Government Labor Relations" (Governors' Report) advocates a single law as do three recent Governors' Study Commissions: Illinois, New Jersey and Pennsylvania. The former personnel director of the City of Cincinnati, W. D. Hiesel, stated in his book, Questions and Answers on Public Employee Negotiations,". . . the methods of determining recognition, the principle of exclusive recognition, the development of a written agreement, and the uses of mediation, fact-finding, and arbitration are all the same, regardless of the services rendered by the union members. It is therefore our conclusion that the basic law can be the same, and that, when necessary, special sections be added applicable to specific groups."

2. The law should expressly provide for the rights of employees to organize and join a union of their own choice, free from interference, restraint or coercion.

We shall later discuss a mechanism to enforce these rights.

3. The law should provide for unit determinations by an agency other than the employer.

The question of determining which occupational categories shall be joined together or which departmental bodies may be put in the same bargaining unit or which geographical operations may be combined for purposes of recognition is frequently complex. Most laws use the term "community of interest" as the guiding factor. Occasionally laws may attempt to set forth detailed criteria for unit composition. These problems are largely administrative and are best handled by the agency responsible for administering the law. The employer should not be permitted to determine unit composition. The temptation to gerrymander units and therefore defeat a union, or determine which union shall represent employees, may prove too great for some employers. The administrative agency must have the confidence of all parties involved. Here too the Governors' Report recommends that "it is

essential that administrative machinery be provided at the state level to decide on questions of representation."

4. Legislation should clearly provide exclusive representation for majority unions.

Exclusive recognition gives the union the right and responsibility to represent all employees in the unit without regard to membership. Collective bargaining simply does not work where unions are recognized to represent their members only. This kind of dual representation can become an administrative monster for management, and more importantly it weakens the capacity of unions to effectively represent employees. Eight of the states with public employee collective bargaining legislation require exclusive recognition. The Governors' Report also supports this view by stating:

> "From the employer's viewpoint, the members-only and the proportional representation plans might complicate the bargaining process. These concepts often engender rivalries which could lead to conflict and instability. From the employees' viewpoint, these alternatives could have the advantage of providing additional organizational choice; but this added freedom of choice is often offset by the relative weakness of the rival organizations that result as compared to an organization with powers of exclusive representation."

5. The law should provide for genuine collective bargaining, not some lesser form of representation rights, such as the right to discuss or consult.

Without the right to bargain, you do not have bilateral decision making. The right to consult is merely a disguise for the same old unilateral determinations. The Governors' Report addresses itself to the mechanics of making the collective bargaining process work. As President Wurf has stated, collective bargaining ". . .is a process which transforms pleading to negotiation. It is a process which permits employees dignity as they participate in the formulation of their terms and conditions of employment. It is a process which embraces the democratic ideal and applies it concretely, specifically, effectively, at the place of work."

There must be an obligation to bargain in good faith on the part of both parties. The obligation to bargain in good faith does not compel either party to agree to any proposal.

Bargaining responsibility must be fixed clearly. Since most labor relations problems are administrative, the bargaining responsibility should be seated with the chief executive. To leave this question open is to assure buck-passing which will do considerable damage to the collective bargaining process. The chief executive should be expressly permitted to delegate authority, but the ultimate responsibility would be his. This provision is extremely important, because the courts have often found acts of public officials to be invalid on the grounds that such acts constituted an illegal delegation of authority.

6. Legislation should expressly authorize dues checkoff for the exclusive representative.

Twenty-one states have checkoff laws. Checkoff is being done in virtually all other states. Additionally, most large cities have agreed to checkoff.

Further, we believe that checkoff should be limited to the exclusive representative. Recognition of a minority union through dues deduction is unwise.

7. Legislation should expressly authorize agreements to provide final and binding arbitration.

Almost universally, contracts in the private sector provide for final and binding arbitration by a neutral third party as the terminal step in the grievance procedure. Legal questions have arisen as to the power of public employers to agree to final and binding arbitration of grievances in the absence of express authority. Therefore, legislation should expressly authorize the parties to agree to such arbitration.

Almost 300 AFSCME agreements provide for final and binding arbitration as the terminal step of the grievance procedure. These contracts are in effect in more than one-half of the states.

8. Legislation should provide dispute resolution machinery.

Most people would agree that legislation should contain some mechanism to resolve impasses resulting from contract negotiations. We prefer the legislation should strongly encourage negotiating parties to devise procedures of their own for settling disputes. Such procedures should include the availability of mediation and fact-finding, but very definitely should not include compulsory arbitration.

Experience with compulsory arbitration, both in this country and in other democratic nations, conclusively proved that it simply does not work. Its advocates claim it is an effective substitute for the strike. Australia has outlawed the strike and substituted compulsory arbitration. Yet Australia witnesses the same proportion of man hours lost due to strikes as does the United States, where the strike is legal (in the private sector). Several Canadian provinces have also had unsatisfactory experiences with compulsory arbitration.

Further, compulsory arbitration weakens the collective bargaining process in that the weaker party tends to go through the motions of bargaining but puts its real reliance on compulsory arbitration. With compulsory arbitration as the terminal step in the bargaining process, there is little pressure on the parties, especially the weaker party, to recede from extreme positions.

Mediation is a useful device and assists in achieving agreement. On rare occasions when mediation fails, fact-finding should be available to the parties. We favor fact-finding with public disclosure - that is, public disclosure after the parties have had a reasonable opportunity to examine the fact-finder's report and reevaluate their positions. Then, if no agreement is forthcoming, public disclosure should be made.

We could envision certain rare occasions when the parties themselves would choose to voluntarily submit a limited number of specific, unresolved issues to voluntary arbitration. This avenue toward resolving an impasse, however, must be voluntary and should be used on rare occasion. Basically, we believe the parties themselves must be relied on to settle their differences in a good faith manner.

9. A collective bargaining law should be administered by a tripartite board.

In the private sector, government, in the form of the NLRB, acts as the neutral party between management and labor. Government, however, obviously is not a neutral party in public service. Government should not be expected to act as a neutral in the resolution of disputes between itself and labor. Further, even the attitudes of the parties toward the neutral must affect the direction and spirit of employee-employer relationship. This tripartite administration of a law would, we think, result in a greater acceptability of the law's impartial administration by all parties concerned, the public, management and labor.

Thus far, New York City is the only jurisdiction which has experimented with such a tripartite system. Under this law, management selects two people and the unions representing city employees select two representatives. These four people, who serve at the pleasure of the party who selects them, select three neutral members of the board. The chairman, who is one of the neutrals, serves as a full time administrator.

Individuals selected for dispute resolution are chosen by these aforementioned seven people who make up the administrative board. At least one management and one union representative must approve each of the individuals used for dispute resolution.

10. Legislation should prohibit certain activities by both parties which are known as unfair labor practices.

The following activities may be considered to be unfair labor practices:

Unfair Labor Practices by Employers.

Interfering with, restraining or coercing employees in the exercise of their rights of self-organization or non-organization.

Encouraging or discouraging membership in an employee organization by discrimination in regard to hire, tenure, promotions or other conditions of employment.

Disciplining or otherwise discriminating against any person because he has filed a charge of unfair practice or has given testimony under the statute.

Controlling or dominating an employee organization or contributing financial or other support to it, provided that an employing agency shall not be prohibited from permitting employees to confer with it during working hours without loss of time or pay.

Refusing to negotiate in good faith with a certified employee organization.

Unfair Labor Practices by Unions.

Interfering with, restraining or coercing employees in the exercise of their rights of self-organization or non-organization.

Inducing the employing agency or its representative to commit any unfair labor practice.

Refusing to negotiate in good faith with the employing agency.

11. Legislation should expressly provide for broad scope collective bargaining.

As under the National Labor Relations Act, legislation must permit the parties a free hand to solve all questions relating to wages, hours, and working conditions. To do less would be an empty gesture. Severe problems concerning employer-employee relations in the public sector will not be solved by state legislatures granting the right of collective bargaining on the one hand and then virtually withdrawing it on the other by severely limiting its scope. Broad scope collective bargaining simply means that the parties are not prohibited by law from negotiating on various aspects of the employment relationship. It does not mean that management must agree to all union demands, or for that matter, vice versa. In fact, the Governors' Report states that there is general agreement ". . . that a management that wishes to limit areas of bargaining should attempt to obtain this by negotiating a strong management rights clause . . . Moreover, a strong and experienced management should be able to protect itself at the bargaining table without jeopardizing the principle of collective bargaining."

All too often public employees may not engage in genuine collective bargaining on vital subjects such as wages and certain policy matters. In too many jurisdictions civil service rules take precedence over collective bargaining. Such prohibitions so restrict collective bargaining ". . . as to nullify the values of the process," according to the Governors'

Report. Civil service or merit systems have come to encompass many aspects of employee relations and personnel management not related to the merit principle, which principle these systems were designed to protect. We have no argument with the merit principle, but we do want to have a voice in its implementation and in matters which are now unilaterally determined by civil service commissions.

12. Legislation should provide definite mechanisms for coordinating the budget procedure with collective bargaining.

Wages should, of course, be bargainable. Further, we need assurance that the wage agreement will actually be effectuated. The simplest way to accomplish this is to require the budget making authority to comply with the agreement. Otherwise, two level bargaining will result. Surface bargaining will take place with the employer at the same time that lobbying activities will be carried on with the legislature. This will destroy the effectiveness of public management in the bargaining process. In order to be effective at the bargaining table, the public employer must have authority.

Because of the legislature's reluctance to release control of the budget, the public employer is generally not given much authority. As an alternative, an approach such as that used by the Connecticut law is acceptable. Here, the public employer must submit the agreement for ratification by the budget making authority within two weeks. The legislative body is presumed to have ratified the contract if it fails to act within 30 days. If it rejects the contract the parties go back into bargaining. The Governors' Report says only that "it is therefore essential when state legislatures impose the conditions of collective bargaining to provide local governments at the same time with sufficient fiscal authority to meet their obligations under collective bargaining."

While most legislation is silent on this matter, problems are generally worked out in advance. We do think, however, that legislation should adequately cover this very important area.

13. Legislation should expressly authorize the courts to enforce collective bargaining agreements.

In the private sector it is taken for granted that contracts reached between the parties are enforceable in the courts. If they were not, our entire system of labor-management relations would have broken down years ago. In public employment, however, we have witnessed the attempts by public management to evade their contractual obligations under the theory of sovereignity. This theory goes back to the divine right of kings and the common law tradition under which he was the true sovereign. Today, governments, under this theory, may attempt to exempt themselves from lawsuits on the basis that they are sovereign. For the most part, this has been abandoned except by the minority of governments who attempt to use it to counter efforts of unionization and collective bargaining by their employees. Certainly in commercial contracts, governments no longer use this defense.

Minnesota law requires the collective bargaining agreement to be ratified by resolution or ordinance. The attorney general of the state ruled that since resolutions and ordinances are repealable, contracts embodied in them cannot be binding and therefore are unenforceable. Even grievance procedures are not mandatory upon the public employer.

14. Collective bargaining legislation should expressly authorize the parties to negotiate agreements providing for union security.

AFSCME has some form of union security provisions in about 40% of its agreements. These union security agreements exist in more than a score of states. Various forms of union security agreements have been upheld by either attorney general's opinions or the courts in several states including Washington and New Hampshire, and by the Michigan Labor Mediation Board. Vermont law specifically allows union security agreements.

Only through membership in the union can employees participate democratically in determining direction, policies and procedures that the union will follow. It fixes an employee's rights and responsibilities.

15. Legislation should not prohibit public employee strikes.

Legislation that prohibits strikes may make strikes illegal, but it does not successfully stop strikes. Strikes by public employees are now explicitly banned by statute, court decision or attorney general opinion in 35 states. They are held to be illegal according to common law in almost all other states. Despite these prohibitions, the number of public employee strikes grow yearly. These prohibitions prove to be ineffective in the face of employee frustrations that have no reasonable foreseeable relief. As a matter of fact, the most stringent anti-strike legislation is generally the least effective in stopping strikes. Legislation must recognize that strikes can be prevented by creating mechanisms by which the parties can successfully resolve their differences. Even under the best conditions, occasional strikes may take place. According to Arvid Anderson, chairman of the New York City Board of the Office of Collective Bargaining, "the only absolute guarantee against strikes is a police state." Further, the automatic penalties against strikes contained in some legislation are simply not workable.

The Pennsylvania Governor's Commission Report recognized these points in recommending (except for police and firemen) that a limited right to strike be recognized for public employees.* In what must be considered a landmark statement the Report said, ". . .where collective bargaining procedures have been exhausted and public health, safety or welfare is not endangered, it is inequitable and unwise to prohibit strikes." The Report further

ventured, "the collective bargaining process will be strengthened if this qualified right to strike is recognized. It will be some curb on the possible intransigence of an employer . . " The Report further stated, "In short, we look upon the limited and carefully defined right to strike as a safety valve that will in fact prevent strikes." The Report also recommended the abolishment of mandatory no-strike penalties.

On occasion, the best designed dispute settling machinery may breakdown during contract negotiations. We then face the rare impasse that is immune to conciliation, mediation, fact-finding with disclosure, cooling off periods and other sophisticated tools. In the final analysis, these disputes can be resolved either through compulsory arbitration or the strike. In a free society compulsory arbitration is abhorrent. The right to withhold one's labor rather than work for unilaterally determined conditions of employment that are unacceptable must be protected. It is the only democratically acceptable device providing a final opportunity for the correction of inequities.

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*See ENS, September 1, 1970 (Complete Text)

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Emerging Roles of Educators

This chapter is taken from an address by Natt B. Burbank, assistant dean, School of Education, Lehigh University, Bethlehem, Pennsylvania. It was presented to the American Association of School Administrators at their convention in Atlantic City, New Jersey.

First, let us look at what has happened to the roles and relationships among teachers, administrators, and board members. I shall refresh your memory briefly as to the rapid evolution which has taken place in recent years. The second and final segment of my remarks will set forth some of the responsibilities which face these three groups.

Turn back with me to contemplate the condition of teachers during the Great Depression. They were economically desperate and professionally shamed as a result of the grinding oppression of those years. The chronic boat-rockers were joined by many conscientious, cooperative classroom men and women in determination to band together in self-protection. The teachers' union gained a foothold in communities where it could never have caught on in pre-Depression years. Education associations began to assume a more aggressive posture toward the school district authorities. Though far less positive and powerful than today's attitude, this new approach began to move teachers out of the submissiveness of the Twenties. They had yet to learn how to apply their developing muscle, but they were on their way.

The early stirrings of these trends were stopped short by World War II. The demands of the conflict produced a new, if temporary, set of values. Many issues which had been considered important in peacetime were overshadowed by the wartime needs of the nation. Everyone shelved his personal concerns and gave his best to the stupendous task facing the country. In this vein, most teachers naturally put aside thoughts of aggressive action toward their employers, and went to war or did their utmost to help at home.

It was another story when the shooting ended and citizen-soldiers began to come home. Millions of Americans, including countless thousands of teachers, had traveled over the globe on military duties. Their previously quiet lives had been given a new orientation. The monolithic power of the military services had bred or confirmed in them a dislike for authoritarian control. If they hadn't been able to talk back on wartime duty, they could, and did, now that they were civilians again.

At this point the soaring post-war birthrate began to compound the problems facing schools. As the new waves of babies approached school age, the need for more classrooms skyrocketed. Few buildings had been built during the war years. Accumulated obsolescence and the oncoming surge of enrollments put liens on large chunks of school funds, leaving less for salaries.

As the national economy heated up under the pressure of demand for all kinds of goods which had been in short supply, the euphoria of prosperity spread over the land. The pent-up resistance of teachers to their genteel poverty burst out in a surge of action to better themselves. More and more men moved into the teaching profession. Having families to support, they felt the financial pinch far more than the previously typical single woman. These men added a new dimension of urgency to the demand for better pay.

Still further enhancing the stirrings of teacher militancy in the Fifties was the need for more teachers. There were not enough professionals to man the new classrooms required for increasing enrollments. School systems inaugurated the unheard-of practice of positive recruitment of teachers. Administrators went to universities and colleges to woo senior students. Former teachers were enticed back to the classroom by the thousands. And still mountainous shortages of teachers continued to stagger the nation.

The combined effect of all of these pressures put the teachers in the driver's seat for the first time. No longer were they on their knees to the school board and superintendent. They could go or stay, as they saw fit. Always there were better positions beckoning elsewhere if they were dissatisfied where they were. This was heady stuff for professional people who had traditionally accepted the role of passive workers in an establishment-dominated organization.

Competition between the old-line teacher association and the union escalated in the Sixties as prosperity grew and the demand for teachers was intensified. The union had improved its image substantially by battling for teachers during the Depression. It was still considered somewhat below the dignity of a professional to join the union. This aversion abated, however, as the boom years moved on. Definite if unacknowledged competition for the support of teachers created a divisive atmosphere in many schools. Thus was enhanced the teachers' feeling of growing power. Now they had more choices that were theirs to make. Less and less did they feel themselves at the mercy of the administrator and board.

Teachers forgot the good which superintendents had done for them, the efforts to provide better classroom salaries and conditions. No longer remembered were the friendly, personal relationships of other days. It became fashionable to denigrate administrators as a group and individually. Rumors of unpopular actions in the central office cropped up by the dozens and gained rapid credence, whether or not there was a shred of evidence to substantiate them. Conversely, any sign of support for the superintendent earned one a disagreeable epithet denoting sycophancy.

Militant teacher leaders in both union and association ranks surged to the front with dramatic platforms for battle. There was no room for moderates, those who retained a sense of balance. Either they went along or they kept quiet. Differences in stance between education association and union dwindled until at times there seemed to be little to choose between them.

And so have the teachers of America come, in an amazingly short span of years, from self-denying docility to a posture of exciting, intoxicating power. Scattering local mergers of union and teacher association portend what

many think to be inevitable, a combination of the two into a nationwide power block with breath-taking potential for good or ill.

Now what of the school boards? What has happened to them in the years since the Depression, when their power was at zenith? Because of their authoritarian background and the oversupply of teachers in those troubled days, there was no one to say them nay. Lucky were the teachers who could find jobs. Few dared utter even mild protest at the grinding which they were taking from boards who were forced to cut and cut and cut. Some districts carried out these drastic economies regretfully, some brutally. One board president retorted to a mild teacher protest, "Go ahead and quit; we can replace every one of you tomorrow for less money than we are paying you." Most boards, of course, were more humane in effecting what they held to be necessary reductions. But the hard fact was obvious, that they were indeed in the saddle and that few dared tc yap at their stirrups.

From this lofty pinnacle of power in the schools they consulted nobody, except possibly the community power structure which doled out pennies to run the schools. Few even thought of inviting teachers to discuss policies or practices. It never occured to teachers to attend board meetings. In fact, nobody went there except the occasionally red-necked citizen who was either so angry or so stupid that he did not care what happened.

So school boards laid down the law to one and all. The only teachers who resisted them were die-hard trouble-makers. Short shrift was made of these without benefit of charges or public hearing. A letter or oral message told them that their employment would be terminated in June. Thus ended the irritating protest of some ne'er do-well who had been so unwise as to question the quiet but supreme power.

This is not to say that those who sat on school boards were bad people. They were not. They were conscientious citizens who took their responsibilities seriously. They acted in accordance with the mores of the day. This was the way things were done.

And like so many others, then and now, they were reluctant to change. They failed to sense the new trends that were developing. For example, in the late Forties one old man who had served many years on his board reacted typically. His superintendent had proposed that a group of representative citizens be invited to study the building needs of the district. Said the old gentleman, looking over the top of his glasses, "My dear Mr. Superintendent, would you have us abdicate?"

This conservatism has survived even into these roistering years. Not more than three years ago, I sat beside such a moss-back at a school board conferenoe. The speaker was presenting a reasonable point of view about negotiations. He said, "School boards are going to have to sit down and discuss policies with teachers." Under his breath my dinner companion growled, "The hell we will!"

It is fortunate that such stubborn blindness is becoming more and more rare. Many boards are realizing the need for honest communication between teachers and the board. The National School Boards Association has set a fine example by devoting great effort to a study of this problem. Some state board groups have also adopted statesmanlike positions on it.

Yet there is still abroad in the land too much school board resistance to reality. Refusal to recognize what is happening is accentuating the problems of the schools. Many a district has had more trouble than it needed to, because of the unwillingness of its board to join in sincere discussion with teachers. The resultant hard-nosed confrontation is well nigh destroying some school systems.

Thus we see the second element of the current educational scene, the school boards, coming down to this juncture too often with an unyielding and uncommunicative attitude toward the first group, the teachers. It is not the toughness that disturbs; it is the failure of both sides to enter into real conversation with each other. Toughness is to be expected, and perhaps welcomed. Lack of communication can be a disaster.

The third leg of the triangle, of course, is the chief school administrator. What has befallen him since the Thirties? Many in this audience can remember when he was one of the most respected public figures in the community. After a period of breaking into a position, his word was law, both with the teachers and with the board. He knew all of his teachers personally, and often called them by their first names. Sporadic efforts by brash young men teachers to form a union were quickly stifled by a shake of the superintendent's head. The PTA kept the parents reasonably well in check. The top school man related well to the handful of silent people who controlled the town. True, there were problems, and he worried about them, but the shape of things was stable. There was no thought that the structure of school power might be shaken or even destroyed. The continuation of the superintendent's employment depended largely on how well he did his professional job.

From what now appears in retrospect to have been an idyllic scene, look where he is now. He is separated from his teachers by an ever-widening gap. To them, he is a rascal by definition. His school system is so large that he doesn't even know some of the teachers. His relationships with them are limited by the new protocol. Friendliness is likely to be misinterpreted as unwarranted pressure. An invisible but nonetheless real wall has been thrown up between administrator and teachers.

The role of the school chief in professional negotiations is undefined. Admonitions of well meaning senior citizens like myself, urging dual responsibility to board and teachers, are becoming increasingly unrealistic. The superintendent is being forced toward the monolithic posture of being the board's man. As the chief he is sometimes read out of the

local teacher association. Even if still a member, he is not welcome at meetings. In some states and cities, administrators as a group are either withdrawing or being bounced from the teacher organizations.

This polarization puts the thoughtful school leader in a dilemma. What is he to do at the negotiation table and how does his activity there affect his educational leadership? If he is to sit across the table from the teachers and do battle with them as the board's representative, will he still be able to deliver as an inspirational figure in the educational deliberations of the system? Many doubt that he can do both successfully. So is he to be withdrawn from the bruising conflict of the bargaining table, and made a mere spectator, in order to preserve his ability to exercise much needed expertise in improving the teaching-learning process? And then will anyone listen to him?

Whatever the resolution of this dilemma may be, the superintendent today is under fire from all sides - teachers, the public and even sometimes the board. He is the loneliest man in the public schools today. Let him make a mistake in judgment and he may well be surrounded by the wolves, attacking him on all sides and waiting for a chance to go for his jugular. The result is the hamstringing, if not the destruction, of the one figure who holds the potential for leading all parties toward better education for all children.

Responsibilities of the Groups

Here we end the trilogy in which the changing roles and relationships among teachers, administrators, and board members have been brought down through the years to this point in time. It is logical now to consider the third phase of our topic, the responsibilities of the three groups. I shall be blunt but, I hope, rational in my proposals. It is no time for pious platitudes.

First, thank heaven that the teachers have thrown off their submissiveness. They are standing tall, as well they should. No more will they tolerate the autocratic put-down which was perpetrated on them for so long. I believe, however, that they need to take heed lest they over-react. They tend, for instance, to assume that the board can do anything, raise any amount of money, if it will just muster the courage to act. This is usually not the case. School finance no longer rests only on local action. There isn't all that much money available for local taxation anymore. Few indeed are the districts that do not depend in large measure on state and/or federal support. It is not simply a matter of the school board pulling up their socks and raising taxes!

Teachers must become better informed on money matters. Certainly they will continue to beat on their boards for more and more funds, and they should. Such action is often necessary to combat complacency in the board room. But that is not enough. They must also learn the facts of life about school finance and, most importantly, join the boards in aggressive search for the needed dollars.

A second characteristic of teacher militancy is the universal drive for salaries, often to the exclusion of any other objective. I am sure that pay deserves top priority, but the drive must include other conditions of work which have a more direct effect on the work of pupil and teacher in the classroom. Among these are personnel policies (such as selection, promotion, and retirement of teachers) class size, and materials and facilities for instruction.

The single-minded pursuit of salary improvement is too often accompanied by an unwillingness to change methods of instruction. The slow rate of osmosis of research findings through the wall of conservatism into the classroom is deplorable. There is a real danger that narrow self-interest will prevent teacher from remembering the interests of the child.

A third and final observation is that teacher organizations are often driving for the dominating power of decision in school matters. This must not be! The school is a public enterprise, and citizen interest is paramount. Teachers should play a large part in developing policy but should not hold overwhelming power.

To the school board I also offer three warnings for the good of public education. The right of teachers to organize and to exert political force must be recognized. There is every reason why this is imperative in the interests of better schools. Who better than the teachers can work to improve the schools? Blind refusal to enter into wholehearted negotiations has done incalculable harm to many schools. Many intemperate actions of teachers have been triggered by closed-mindedness on the part of boards.

I am not suggesting that they should bow supinely to teacher demands. I am pleading for honest and rational debate. Board members should recognize and be tolerant toward the occasional immaturity of teacher groups. Remember, this is a new ball game for them, too. They too have much to learn. Why not more forward together, learning by mutual study?

It is also necessary for school governing bodies to acquire know-how in negotiations. They cannot say "Hell, no!" Their own demands, based upon the needs of the schools, ought to be advanced with vigor. They might well go after better professional service, a more rational method of salary determination, or some other equally needed change. They need to learn how to give and take, and hold down emotions as they meet teachers in contention.

Lastly, boards must face up to the fact that large new dimensions of school finance must be devised. Political action is inevitable and even desirable, with school boards, teachers, and administrators working together at all levels of government. Imagine what results could be gained, for instance, if state school board associations and state teacher organizations would stop opposing each other in the halls of the legislature and join forces for the good of the children.

I come finally to the responsibilities which I see for the school administrator today and tomorrow. His overriding challenge is to rediscover his professional identity. Can he serve well both school board and teachers? Probably not, in many places today. For those who believe that this cleavage will never happen where they work, I have real news! They had better believe it will, and get ready for it, rather than think it won't and then be overwhelmed by it. Perhaps the solution will be a professionally trained negotiator, either in the employ of the schools or hired from outside. It is worth studying.

The school man also needs urgently to drive for broader concepts of communication throughout the community. The traditional press, radio, TV, publications, and so on, are not enough. The people are not being reached. The flow must run <u>both</u> ways, not only out but in. It may be that the Berkeley plan of keeping one citizen on every block fully informed on schools will do it. Certainly everyone, administrator, teacher, board, and citizens, will need to play a part.

My third admonition (professors are chronic advice-givers!) to superintendents is to come out of the seclusion of the independent school district and mix it up with every element of government which exists at the local level. You can't go it alone any longer. Even where schools are completely self-governing, there is need for informal interaction with city, town, and county. Take the school board and teachers with you. Let them share the spotlight. They can do some things you can't. Thus comes true community leadership.

In conclusion, I hope it is obvious that I have been pleading for joint action by all three of us. The frightening alternative may be the destruction of public education. Other forces are waiting in the wings for us to decide whether we are going to consolidate our efforts or continue to battle each other. They are ready and eager to take over the job of teaching children. We can fight among ourselves while the house burns down around us, or we can come out fighting, shoulder to shoulder, for better schools. Differences of opinion, approach, and posture can and should be maintained. The most important task is to join forces on fundamental issues for the improvement of education for all children.

6

What Makes the Teachers So Militant?

This chapter first appeared on the opinion page of the Albany, New York, Knickerbocker News, and was written by executive editor Robert G. Fichenberg.

In Delmar, a gray-haired woman teacher with more than 20 years' experience and close to retirement carries a picket sign for the first time in her life. In Ballston Spa, 155 of the school district's 175 teachers form a phalanx of protest around the school and force it to close. In Niagara Falls, a 60 year-old woman history teacher appears on the verge of tears as she says "I never thought I'd ever be doing this" and marches in a faculty picket line. In Shrub Oak, a lush Westchester County suburban community, the school district's 425 teachers refuse to teach.

Why? What's going on with the teachers here in Metroland and across the state? What are the situations and issues that have brought so many teachers, young and old, conservative and liberal, to the point where they have been willing to pass the point of no return and go on strike, breaking the law and risking jail or fines, to enforce their demands?

A leader of the Bethlehem Teachers Association, which called (last week's) brief strike, says:

"The major issue in our situation is not pay - although pay is always a factor - but our rights. When you strike for a right, rather than for money, the possible penalties don't bother you. The right that we're fighting for - here in Bethlehem and elsewhere - is the right to be treated by the board of education as an equal partner. The board's traditional paternalistic attitude, in which the board fostered sort of a father-child relationship with the faculty, simply cannot be tolerated any longer. We teachers want to be treated by the board as equal partners in the educational planning process and in formulating educational policy."

Asked for a specific example, the Bethlehem teacher said:

"The middle school program is a perfect example. This program was established last year and the teachers were very enthusiatic over it. It was a stimulating program and it give us a chance to do a better job with the children. We enjoyed it, the children enjoyed it and it was a satisfying educational experience. But when we returned to school last week, we found that during the summer the program had been changed. The music and art segments, for instance, had been cut 20% and some of the flexibility had been eliminated - all of this without any consultation with the teachers.

What we are saying now is that this won't do. We want a piece of the action, to use the vernacular. We want the opportunity to discuss such situations as this with the board - as equal partners - and to say "Look, this kind of change will hurt the program" or "This change would help the program." After all, we are the professionals in this field and we should have some say."

Another Bethlehem teacher, a veteran in the system, says the crisis is the result of "an accumulation of years of frustration, highpointed by the Taylor Law, which encouraged rising expectations". He explained:

"The Taylor Law suggested that the teachers have a right to put forward their views, to bargain with the school board as equals, to air their views and to have these views given serious consideration. The Taylor Law has changed the relationship between teachers and school boards. The teachers took this law seriously; some school boards have not. This was the climax of the situation.

The Bethlehem teacher continued:

"Our faculty never questioned the fact that the board has the final say. What we're saying is that the board should take the Taylor Law seriously and sit down with us and discuss problems before the final decisions are made. This is not just a Bethlehem problem; it's statewide. It was compounded when school districts across the state began to vote down school budgets one after another. At the same time, we teachers began to become concerned over problems on school and college campuses and recognized the need to meet the problem by making some changes in the educational process. This would cost money.

"We tried to get across our ideas. At the same time, the public was saying "No. No more money." Administrators, with one eye on the school board and the other on budget vote, went along with arbitrary budget cuts. Finally the teachers decided that the only way they could be heard would be through drastic action. We had to impress the board and the public with the urgency of the problem. To accomplish this, we had to make an end around the administrators who were, in effect, blocking our access."

A Ballston Spa teacher who has been active in the faculty action which resulted in last week's brief strike, also blames the Taylor Law, but on a different basis:

"The law," he says, "does not give equal status to both sides. The school board holds all the trump cards. For instance, when negotiations between teachers and the board reach an impasse, the law provides that a legislative hearing be held. But who conducts the hearing? The school board, which acts as judge and jury, as well as the employer. But beyond that, there's a long history in school systems of situations in which administrators have long since abandoned the classrooms and lost contact with the students, but continue to decide what is best for those students, with the voice of the teacher rarely heard. This isn't the way it works in other professions, in medicine, for instance, where a hospital's chief of medicine is chosen by his peers. What we want, in short, is professional autonomy."

All of the dozen or so teachers interviewed - most of them active in the affairs of their faculty associations - indicated they were deeply distressed over the idea of going on strike, particularly since this involved breaking the (Taylor) law.

A Bethlehem social studies teacher said:

"This was a rough decision. I'll tell you that I didn't sleep very well because of it. But I'd say this: The law has inadequacies. If a present law is in conflict with a higher law - human rights, for instance - then the law must be tested. One way is through legislation; the other is through the courts. The legislative route seems almost hopeless. This left the courts. This is the way we chose to test the law. It's part of our tradition. It involves risks, to be sure. But everything worthwhile involves some risk."

On their feelings about school boards, a junior high school English teacher seemed to sum up the teachers' general feeling when he said:

"Individually, the school board members are decent, honorable, dedicated people. They're trying to do a good job. But they've been operating for years under a system in which they were the masters and we were the servants, with no say. It's just a different ball game now. We're equals. The Taylor Law says so. That's what this is all about."

Symbolic Action in South

The whole period of non-violent social protest, particularly for civil rights, was not lost on teachers, many of whom participated in marches in the south. But, if there was any single symbolic action that impressed them with the efficacy of direct action, regardless of the consequences, it was in 1964, when the Reverend Eugene Carson Blake, then head of the Presbyterian Church of the U.S.A. and onetime Albany pastor, accompanied by Mrs. Malcolm Peabody, white-haired mother of the then governor of Massachusetts and wife of the retired Episcopal bishop of Central New York, went South to register their protest against inequality - and were arrested and jailed.

According to many leading educators, the lesson of this event deeply impressed many teachers, indicating to them that large numbers of Americans had come to accept direct action as an appropriate means for for challenging the status quo - if the cause were just. All that remained was to translate teacher demands into social imperatives. The stage was set.

In resorting to a militancy which includes striking, even if it means breaking a law, the teachers appear to be following a national pattern in which an increasing number of individuals and groups which by definition and image normally have not been associated with lawbreaking or violence have resorted to often illegal power-play tactics.

This list of examples is long, includes many famous names and familiar organizations. For instance, Orval Faubus and Ross Barnett, when they were the governors of Arkansas and Mississippi, respectively, defied the U.S. Supreme Court's 1954 school desegregation decision and subsequent federal court compliance orders, which were - and are - the law of the land. More recently, Alabama's George C. Wallace (before and since he has been governor), Louisiana's Gov. John J. McKeithen and Florida's Claude Kirk not only defied this law but have urged their fellow citizens to do likewise. An ironic twist here is that all these present and ex-governors are strict "law and order" men when it comes to issues which coincide with their own views and political purposes.

Although a 1963 U.S. Supreme Court ruling prohibits prayers of any kind in public schools, on the constitutional grounds of separation of church and state, many school boards are deliberately defying this ruling - breaking the law, if you will - by scheduling prayers in classrooms.

New York City's Mayor John V. Lindsay, who believes that laws should be applied equally, frequently has paid a heavy price in popularity for these views when he has carried them into practice. When he went to court and had the transit workers' union chief, the late Mike Quill jailed for calling a strike in defiance of the law, the mayor was painted as the villain. Likewise, he was pilloried by all sides when he obtained a similar court order jailing teachers' union president Albert Shanker for leading an equally illegal teachers' strike.

When New York City sanitation workers struck in defiance of the Taylor Law and garbage piled up in the city's streets in putrid heaps, threatening the health and safety of the 8 million residents of the nation's largest city, the mayor asked Governor Rockefeller to send in the National Guard. The governor not only refused, but obtained the release of sanitation workers union president John DeLury from jail (where he had been sent on a contempt order), and undercut the mayor and the Taylor Law by bargaining separately with Mr. DeLury and giving him a contract, thereby putting additional labor support in the bank for his present reelection campaign.

Many doctors have, in effect, "struck" by refusing to accept patients under the Medicare or Medicaid programs. The federal postal workers, historically among the most docile and law-abiding of civil servants, struck in defiance of federal no-strike laws, frustrated by years of congressional inaction on their pay raise requests and inspired, no doubt, by the example of the air traffic controllers, who obtained quick remedial action only after a series of slowdowns and "sick-ins".

And although it's illegal to cheat on your income tax return, drive your car over prescribed legal limits or hunt deer out of season, how many citizens who consider themselves law abiding commit these and similar transgressions (with their family's knowledge) while condemning breaches of "law and order" by others?

None of this excuses the teachers' decision to strike, but it provides background and historical context.

The factors that resulted in this month's teacher strikes across the state and nation

have been evolutionary as well as revolutionary. Nearly three years ago, James Cass, education editor of the Saturday Review, and Max Birnbaum, director of the Boston University Human Relations Laboratory, co-authored an article, "What Makes Teachers Militant," which remains one of the clearest analyses of what is happening to our teachers and their relationship to our schools and communities.

The teachers are only the latest groups, Messrs. Cass and Birnbaum, wrote, to learn "that it is not the justice of the individual demands that wins increased salaries and higher status from society, but the economic and political power of organized groups." So departing from their traditional image as individualistic professionals and non-joiners, they organized, for what the late Senator Everett Mc. Dirksen called "more clout".

Moreover, teachers in recent years have become increasingly more alienated from their administrators and communities. Many factors contributed. One is what many teachers consider their communities' ambivalent attitude toward them - paying respect to teachers in rhetoric, as on Teacher Recognition Day, but refusing adequate financial support for schools for either salaries or facilities, and regarding them primarily as professional servants and babysitters.

A major factor in teacher alienation, according to the Saturday Review article, has been the growing impersonality of the school as it has become larger and more highly structured. "As enrollments swelled in the postwar years," the authors note, "education took on more and more of the features of a "mass production process". (Example, Bethlehem Central High, which has grown from a relatively modest plant to a huge interconnected complex).

In addition, many dedicated teachers have been "turned off" by what they consider the increasing, and sometimes unrealistic, demands that have been made on schools. As writers Cass and Birnbaum point out, "Americans have always looked to education as the ultimate corrective for social ills or the means of meeting society's needs. Two of three generations ago, for instance, the schools were assigned the task of Americanizing our immigrant fathers, and, at a somewhat later date, were asked to develop a pool of skilled manpower through vocational education."

More recently they have been charged with an ever-widening variety of assignment, from producing a generation of scientists and engineers to meet the challenge of the Russians' Sputnik satellite program to teaching the evils of alchol and drugs and exploring the intricacies of sex education. The schools - and faculties - are breaking under the load.

Messrs. Cass and Birnbaum could have been writing about several well-known Metroland schools when they reported, "In the suburbs, with a high level of education among parents, it is no longer enough to shepherd the children of the middle class through high school and into college. The revolution of rising expectations functions in many contexts, and increasing numbers of parents demand that their children be prepared to compete for admission to the most selective institutions." Does this sound familiar out there in Bethlehem, Niskayuna, Ballston Spa, Colonie Central and points in between?

Finally, education, in the view of many professional observers like writers Cass and Birnbaum, is attracting a new breed of teachers. "Better educated than in the past, they are less "dedicated" and more pragmatic than their predecessors. They have a surer sense of their own professional competence; consequently they resent assignment to non-professional duties and have less patience with traditional inadequacies of time, facilities and administrative support. At home with the new etiquette of social protest and faced with the growing impersonality of the educational environment, today's teachers are responding in predictable ways."

In short, old loyalties are crumbling and new allegiances are emerging. Lacking the old devotion to school and community and "threatened by new demands on schools for which neither experience nor training have prepared them" (according to writers Cass and Birnbaum), today's teachers are turning inward for support and security. Instead of looking to their principal or the community for this support, they are turning to their own teachers' association, their own union.

Perhaps, as education writer Peter Schrag has put it in a current magazine article, we are coming to the end of "the impossible dream" - a century-and-a-half period during which Americans expected their schools to guarantee success and happiness to every boy and girl willing to go the route and win a diploma, and to provide the solutions to just about everything - proverty, racism, injustice, ignorance, drug addiction, immorality.

Somehow, it just hasn't worked out that way. Perhaps the goals were unrealistic. Perhaps we haven't been willing to match our goals with sufficient money. Perhaps we have expected more of our teachers and schools than we have demanded of ourselves. And when the schools and teachers buckled under the strain, we placed the sole blame on them.

In any event, it is, as one Bethlehem teacher expressed it, "a new ball game", not only in education, but in our society. Some of the stresses and strains have been building up and erupting in other segments of our society finally have broken into the open in our school systems.

And that's what the present teacher militancy - if that's the correct term - is all about.

7

New Jersey Teachers Look at Militancy

This chapter, consisting of a five-part series of articles by the New Jersey Education Association, examines the causes, direction and goals of teacher militancy from the teachers' point of view.

I

Once, American teachers submissively did what they were told and gratefully took whatever salary they were offered. Not so today. Now they aggressively assert their rights and seek a voice in the terms and conditions of their employment. The public asks: Why the difference?

Times have changed. Employer-employee relationships have changed. Large numbers of male breadwinners entered teaching. Inevitably, education has changed - and the public school teacher, too.

But the biggest single reason for the new aggressiveness is that teachers have organized to act in their own behalf.

"Until quite recently, many teachers considered themselves above the business of negotiations and organized action," says Mrs. Frances Carnochan of Trenton, president of the New Jersey Education Association. "As a result, teachers have been underpaid, humbled, and ignored."

Teachers are not isolated from the rest of society. Garbagemen organized; garbagemen began earning higher salaries than teachers. Bus drivers acted collectively; bus drivers began earning higher salaries than teachers.

"Teachers finally learned that dedication and professionalism availed them little in the marketplace or at the councils of power," Mrs. Carnochan says. "To remain quiet was to remain powerless and underpaid. Today's teachers have come to believe that the professional rights they claim can be exercised only through joint action.

"Some people confuse dedication with timidity. Quite the reverse is so. To be truly professional, the teacher must speak out for the things he believes in."

What today's teachers seek is improved schools and a stronger teaching profession. To reach these goals, the typical teacher negotiating package asks such benefits as:

- Smaller classes to permit more individual attention to students.

- Sufficient books and other instructional materials to increase the teacher's effectiveness.

- Salaries competitive with those paid in similar professional fields.

- Creation of an Instructional Council to give teacher associations a role in improving school offerings and educational quality.

- Guarantees of academic freedom to let teachers explore controversial issues relevant to topics they are teaching.

- Fair dismissal procedures to protect teachers from political pressures and administrative whim.

"Teachers believe that, in the long run, nothing will advance the cause of education more than their efforts to strengthen teaching," says the NJEA President.

Even if the teacher-supply crisis has subsided in some fields, numbers alone will not insure teacher quality, Mrs. Carnochan cautions. "Able candidates may be attracted initially, but they will not stay in teaching if their fate is to be ignored, underpaid, or browbeaten.

"Poor working conditions, inadequate fringe benefits, and low wages weaken the teaching profession. Improvements will bring more talented people into education and keep them there. Everyone - school boards, teachers, students, and parents - will then benefit."

II

The "Magna Carta" for teachers in New Jersey is the Public Employment Relations Act which, for the first time, guaranteed negotiating rights for public employees. But some school boards try to bypass the spirit of the law and - like 13th Century Englishmen - teachers find they sometimes must fight for their legally-granted rights.

The act - known as Chapter 303 of the Laws of 1968 - requires public employers such as school boards to "negotiate in good faith in respect to the terms and conditions of employment" with representatives of employee organizations.

When the two parties are unable to reach agreement through negotiations, the act requires the State to provide mediation - an attempt to bring the two parties to voluntary agreement. If mediation fails, the law provides for a fact-finder to take testimony, assess the positions of the two parties, and recommend a settlement.

The effect of this act was to establish a new relationship between public employees and their employers, says Walter J. O'Brien, director of development for the New Jersey Education Association. "Where public boards previously could deal with their employees entirely as they pleased, now they are required to discuss matters of mutual concern cooperatively. When negotiations fail to produce agreement, the third party can help bring a reasonable resolution."

Many school boards are perfectly willing to negotiate with their teachers in good faith and, if necessary, accept mediation and fact-finding, O'Brien says. These districts escape conflict. However, others comply with the law grudgingly or not at all. In these districts, impasses often develop.

"In a few districts," says O'Brien, "the school board insists that teachers hold their tongues and do as they are told. This attitude is a holdover from the 19th Century, when most teachers lacked much formal education, and many were temporary workers planning

an early move to other work."

Under those conditions, the school board developed the entire curriculum, made all the instructional decisions, and adopted elaborate rules to keep teachers under close scrutiny. Teachers, for example, were required to submit detailed lesson plans to show what and how they were going to teach each day.

In this century, says O'Brien, the situation has changed drastically. Teachers now undergo more college training, hold higher degrees, and meet higher standards than any who have gone before.

"Today's teacher is fully qualified to make decisions on curriculum, to plan his own lessons, and to decide how to organize the school day.

"Who knows more about instruction than the instructors? Who can better recommend textbooks than the person who must teach from them? Who better knows the educational needs of the students than the teacher who works with them each day?

"Today's teacher wants to be a partner in decisions that affect the conditions under which he must teach and his students learn. He refuses to remain silent when change is needed to improve education. Chapter 303 gives him this voice."

III

Two things frustrate teacher negotiators in New Jersey. One is that some school boards do not always act in "good faith". The other is that, in an impasse, the powers are stacked against the employee.

Negotiations between employer and employee have developed as a series of give-and-take exchanges. The party representing the employee group submits proposals, presents evidence, argues for change and improvements. The party representing the employer reacts with counter-arguments and counter-proposals, to which the employees react, and so on. With good faith, an agreement acceptable to both sides is eventually reached.

"The key to harmonious negotiations is good faith - something required by state law," says Jack Bertolino, director of field service for the New Jersey Education Association. "However, good faith cannot be legislated. Attitude comes from within.

"Good faith," says Bertolino, "means keeping an open mind, objectively weighing the evidence, submitting reasonable counter-proposals, and seeking a decision in the best interests of the school system. Because negotiations, by their nature, must be confidential, good faith also means respecting the privacy of the conference table."

With more than two years of experience under the Public Employment Relations Act of 1968, teachers have identified these symptoms of bad faith:

1. Secret collusion among local school boards to set limits on benefits yet to be negotiated.

2. Public dissemination by the school board of the teachers' unwhittled original proposals - usually accompanied by an estimate of the total cost of the entire package and its theoretical effect on the tax rate.

3. Demands for changes in the recognized bargaining unit while negotiations are in progress.

4. Stalling by board negotiators until after the school budget is adopted.

5. Suggestions from the school board or public officials that teachers give up existing benefits.

"From this beginning," Bertolino says, "a school board sometimes refuses to negotiate in good faith, ignores state mediation, and rejects the recommendations of the fact-finder."

After fact-finding, New Jersey law provides no further machinery for settling an impasse. The employee has nowhere to turn.

State law provides no penalty against public employers who disregard the provisions of the 1968 act. The employer can show bad faith and can intimidate employee negotiators with impunity, Bertolino reports.

But there are penalties available to the employer to use against employees who retaliate. The employer can automatically get a court order prohibiting a work stoppage, regardless of the blame or merits in the case.

"The courts have been placed on the side of the school boards and against the teachers," says the NJEA Director. "This creates an imbalance in the negotiating process. If work halts, the employee is always wrong and is the only party ever punished - even if the employer invited the problem.

"In a few cases, teachers believe the school board deliberately provoked a strike so they could use the police powers of the state to punish their employees."

This state of affairs has aroused teacher bitterness, Bertolino says. Pressures are mounting for the Legislature to enact amendments establishing fair balance in the 1968 act.

IV

Court decisions have limited the rights of public employees in New Jersey. Teachers are seeking new laws to restore "balance" to the relationship between public employees and their employing board.

Since 1968, the New Jersey Supreme Court has placed three limitations on the actions public employees can take in an impasse with their employer, says Dr. Frederick L. Hipp, executive secretary of the New Jersey Educa-

tion Association. The court has ruled:

1. That public employees so far are not guaranteed any right to strike. The court reached this decision despite the fact that neither the New Jersey Constitution nor state law contains any prohibition against a strike by public employees. The court based its decision on "common law".

2. That public employees cannot even collectively quit their jobs if they are dissatisfied with their employer.

3. That the New Jersey Public Employment Relations Commission has no power to enforce the rights given to public employees by the Public Employment Relations Act. Since this took effect as Chapter 303 of the Laws of 1968, some employee groups have charged their employers with such violations as intimidating employee negotiators and refusing to negotiate in good faith. PERC originally handled these cases, but a 1970 Supreme Court decision has put them into the courts.

Bills have been introduced in the State Legislature to alter the "imbalance" caused by these decisions, says Dr. Hipp.

Assembly Bill 1255 would give PERC the power to enforce the rights given to public employees in Chapter 303. "Under A-1255, PERC could hear and decide charges made by either side and order appropriate remedies," says the NJEA executive.

"This would be a quicker and less expensive way for public employees to secure their legal rights than taking every case to court."

Assembly Bill 1200 contains recommendations by Walter Pease, the Plainfield lawyer who was PERC's first chairman, to end the injunctions against a public work stoppage that now are automatically issued by the Superior Court. Pease's recommendations would let the judge consider:

1. The equities of any strike by public employees.

2. Any mitigating circumstances.

3. Whether the public employer, by its conduct, had provoked the strike.

4. Efforts by the employee organization to prevent the strike.

5. The respective positions of the parties in meeting their legal obligations.

Under A-1200, the judge could still issue an injunction if, in his opinion, the strike posed a clear and present danger to public health or safety. The court would also issue the injunction if the employees had failed to use all legal procedures for settling the impasse.

"No one in our present procedure makes any attempt to determine who is responsible for a strike by public employees," Dr. Hipp says. "The court hearing would air the issues publicly and expose bad faith on either side. In such cases, a vindictive employer could no longer use the courts to fine and imprison his employees."

A-1200 would increase public pressures for peaceful settlements of disputes in the public sector, the NJEA executive believes. "When an employer knows that his position will be backed by a court injunction, there is little motivation to try to negotiate a settlement. Removing the one-sided injunction would restore balance to the negotiations process."

V

Procedures now exist for public employees to pursue professional goals and welfare. What's ahead in teacher-board relationships?

"The future probably holds harmony rather than conflict," predicts Lewis A. Applegate, director of public relations for the New Jersey Education Association.

"In other states with similar laws, conflict lingered for several years until both sides learned how to use the new procedures and granted the other party his due. In New Jersey, we are probably in the later stages of this type of unnecessary conflict."

Teachers will not abandon the goals they have set for improving their own status and the quality of education in their schools, Applegate says. Nor will school boards forget their responsibility to weigh their every action against the needs of children and the aspirations of the community.

"But with more experience, education, and a few adjustments to establish fair balance in the New Jersey Public Employment Relations Act," the NJEA Director says, "relationships between teachers and school boards should soon stabilize."

School boards will have to accept that state law requires them to negotiate with teachers on all of the terms and conditions of employment, Applegate says. The public will have to understand that negotiating proposals - the ideal - differ vastly from negotiated settlements - the practical.

The public must understand that negotiations cannot be conducted in the open, NJEA says. Negotiations, by their nature, are confidential. The presence of spectators would inhibit the free exchange of ideas. A public presence might polarize the negotiations, forcing both sides into inflexible positions.

The school board should listen to the public and weigh their suggestions, the NJEA Director says. But at the negotiating table, the public interest is protected by the school-board members.

"If admitting the public would help the parties reach agreement," Applegate says, "both sides would welcome it. To the contrary, teacher organizations and school boards almost unanimously oppose opening negotiations to the public."

The public should not necessarily become alarmed when an impasse is declared, Applegate says. "State law provides ways to resolve disputes. Some school boards even plan for their negotiations to end in mediation or fact-finding. It takes them off the hook."

"We believe the best means of establishing harmony lies in mutually acceptable agreements cooperatively developed by employer and employees," Applegate says.

"With good faith on both sides, negotiations should regularly bring agreement. When honest differences arise, state mediation or fact-finding should resolve them.

"All parties must recognize that proposals by teachers and deliberations by school boards can have but one ultimate goal: improvement of service to the public."

8

Impasse Resolution in the Public Sector

This chapter by William R. Word was first presented as an address to the 15th Annual Southeastern Conference on Collective Bargaining in Knoxville, Tennessee.

In the early 1960's government employees in several states and municipalities were given the right to negotiate with their employers over wages, hours and working conditions; but they were not given the legal right to strike. The question is: how effective can collective bargaining in the public sector be without the right to strike?

In the private sector, "the possibility of a strike is a prerequisite of free collective bargaining, just as the possibility of war is indispensable to national sovereignty. This is not to say that either wars or strikes are desirable, but simply that they are harder to eliminate than appears at first glance and that any effort to eliminate them requires some alternative way of settling disputes."[1] If the political judgment is made that strikes should not be a part of the collective bargaining process in the public sector, then the problem arises as to whether acceptable procedures can "be evolved which will provide equitable treatment to the employees of the public without impairing performance of the essential functions of representative government?"[2]

One procedure which is becoming widely used in the resolution of negotiation disputes in the public sector is factfinding. Typically, the factfinding procedure is invoked when either the public employer or the employee organization, or both, notify a state labor commission that their negotiation efforts have reached an impasse. The commission usually sends a representative to investigate the bargaining situation to determine whether a factfinder should be appointed. During the investigation the commission's representative might attempt mediation if he thinks his efforts would further the progress of negotiations. If the situation warrants, and mediation fails, the representative will certify to the commission that an impasse has been reached. The commission then appoints a factfinder who, in turn, holds a hearing and makes public recommendations.

These recommendations are not binding on the negotiating parties, but the conventional wisdom is that the parties will usually accept the recommendations because of the fear of public criticism. Thus, factfinding is a procedure designed to settle negotiation impasses by giving the bargaining process the needed measure of finality without resorting to economic warfare.

Change has been the nature of public employer-employee relations in the last twenty years, with government sovereignty the controlling issue. If the government, in the role of the public employer, is the sovereign power, then it can reserve the right to determine the wages and working conditions of its employees.[3] This was the traditional view espoused by government administrators in many states and municipalities and accepted by the public until as late as the 1950's. Then, the concept of sovereignty underwent a reappraisal as the public sector expanded and the number of public employees increased significantly.

This growth in public employment was a natural organizing target for American Federation of Labor-Congress of Industrial Organization (AFL-CIO) unions such as the American Federation of State, County and Municipal Employees (AFSCME), American Federation of Teachers (AFT) and the International Association of Fire Fighters (IAFF) as replacements for the National Education Association (NEA) and various benevolent police and firemen's societies.

Public employees and their representatives began to question the popular notion that the basic security of government employment and its protection by the Civil Service system compensated for a wage differential between public and private employment. Job security was now commonplace among most white-collar employees in the private sector.

The result was that the rationale behind the concept of government sovereignty in regard to public employer-employee relations began to be examined. Was the sovereignty concept being used by public employers as an excuse for maintaining the unilateral and possibly inequitable imposition of its employees' terms and conditions of employment?[4] Or, is it possible that this particular application of government was no more than a political stratagem being used by the existing social order?[5]

These two questions seem to be enough evidence to indicate that the absolute nature of sovereignty was doubted by at least a few. This rising trend of discontent approached the idea of sovereignty from a different point of view. The question was raised: If the government is sovereign, might it have the right to delegate some of its sovereignty? The general answer appeared to be that "inherent in the concept of sovereignty...is the Right of the State to elect to surrender some of its sovereign powers, and such an election occurs when a state agrees to negotiate with its employees concerning their terms and conditions of employment."[6] This alternative application of government sovereignty was made by several states and municipalities in the 1960's.

When they began to negotiate formally with government administrators under something analogous to private sector collective bargaining, public employees were forced to make a slight, but important, change in tactics. Before they were given the right to bargain, public employees tried to raise wages and improve their working conditions by lobbying. But, with the right to negotiate and the introduction of factfinding, the immediate concern of public employees shifted to the public in general. Instead of trying to persuade legislators to vote for a wage increase, the factfinding approach assumes that public employees will attempt to arouse favorable public opinion and let the public pressure the legislative body. Such an appeal to the general public was always an alternative, but the basic approach was lobbying. Even under factfinding, the employee organization may occasionally revert to lobbying. When a negotiated agreement is reached, both parties may have to try to persuade the legislature to implement the agreement. Any time the public employer

does not have fiscal responsibility, this possibility exists.

Another exception would involve the employee organization going directly to the legislature when the public employer rejects the recommendations of the factfinder. But, even with the exceptions under both approaches, the change is basic; and the responsiveness of public opinion is important because in public sector negotiations public opinion is supposed to substitute for economic persuasion.[7]

Public Employee Legislation

The cities of New York, Philadelphia and Cincinnati pioneered in the development of public employment negotiations. Their innovating efforts came about even with the existence of such restrictive laws as the Condon-Wadlin Act in New York State and the Ferguson Act in Ohio.[8] This early development was largely necessitated by the political and economic strength of the labor movement in these urban areas. Many of the public employees in these cities were organized by AFL-CIO affiliated unions as opposed to the benevolent associations that were prevalent in the smaller and less metropolitan areas of these states.

The first state to pass a general municipal statute requiring collective bargaining in the public sector was Wisconsin in 1959. This law was amended in 1962 to provide for the instatution of factfinding to be administered by the Wisconsin Employment Relations Commission (WERC). The federal government granted its employees the rights of recognition and negotiation in the Kennedy Executive Order #10988 in 1961. The major difference in the federal and Wisconsin procedures was that most federal employees were not given the right to negotiate over wages. In 1965, Connecticut, Michigan and Massachusetts adopted most of the basic provisions of the Wisconsin Municipal Statute; and in 1966, Rhode Island also followed Wisconsin's lead in passing its public employee bargaining law. In 1967, New York State finally replaced the Condon-Wadlin Act with the Taylor Law, which granted New York City certain freedoms to maintain independent procedures.[9] However, in 1969, the Taylor Law was amended to make the penalties for strikers similar to the restrictive provisions of the defunct Condon-Wadlin Act.

Factfinding's Relative Success

In judging the relative effectiveness of factfinding in substituting for the strike and generally complementing negotiations, it seems necessary to ask two questions: (1) How successful has the factfinding procedure been in resolving negotiation impasses? (2) Has this settlement procedure operated in such a manner that it will be a viable alternative in the future?

In order to derive some empirical evidence concerning these two questions, questionnaires were sent to public employers, employee organizations and factfinders who had participated in the factfinding procedure in Wisconsin and New York State. The following presentation is a summary of the results of that inquiry.[10]

Factfinding appeared to be successful in resolving negotiation disputes; in over 90% of the impasses in which recommendations were written, agreements resulted. Two of the more pertinent reasons for this success seemed to be the negotiating parties' respect for their factfinder and his recommendations, which were usually the basis for agreements even after one or both of the negotiating parties had initially rejected the factfinder's reward.

Successfully resolving a negotiation dispute with factfinding, however, does not necessarily mean that the procedure in general is successful in promoting future collective bargaining in the public sector. (An examination of the nature of negotiations before the initiation of the factfinding procedure revealed an absence of a substantial number of good-faith negotiation situations and a lack of significant negotiation progress in many cases. These results suggest the possibility that the parties might tend to overutilize the procedure in the future by failing to truly negotiate before initiating factfinding. In addition to less than favorable negotiation situations, one or both of the negotiating parties rejected the factfinder's recommendations in 39% of the cases, and public opinion was usually unable to influence these negotiating parties. These last two observations appear to indicate a lack of the needed quality of finality in the factfinding procedure.

On the basis of the above evidence, it was concluded that factfinding was an effective complement for collective bargaining process, but not necessarily an adequate substitute for the strike. And, though the factfinder and his recommendations have usually produced some type of agreement, it is possible that public sector factfinding will not meet the test of time. Consequently, attention must be directed to alternative solutions.

Show-Cause Hearings

According to George W. Taylor, the show-cause hearing is designed to "insure due process consideration of diverse claims."[11] The amended Taylor Law in New York State requires the negotiating parties to show cause before the appropriate legislative body if they reject the factfinder's recommendations. By forcing the rejecting party to defend himself before the final decision-making body, the hearing provides the negotiating parties with another forum through which the dispute may be settled. Having to justify his position could induce the rejecting party to reconsider his decision. If a mutual agreement is not reached, then the legislature can impose the terms of employment. But these are not necessarily the terms recommended by the factfinder.

There seems to be little doubt that the show-cause hearing has made some contribution to the resolution of impasses. Several New York State employee organizations expressed the feeling that the factfinder's recommendations might have been ignored without such a procedure. They also pointed out that sometimes the hearings produced counteroffers from either the public employer or the legislature. The existence of these legislative counteroffers

would appear to impair the proposition that public employer rejections necessarily result in unilateral impositions. For these and other reasons, over 70% of the employee groups favored show-cause hearings.

The show-cause hearing appears to have some weak points which might outweigh its contribution. One problem arises when the hearing is automatically introduced after a rejection. Guaranteeing this additional appeal could negate the factfinder's efforts in persuading the parties to accept his recommendations.[12] The tendency might be for more rejections and an extension of disputes, impairing the finality quality of factfinding.

Another complication exists when the public employer and the legislative body are identical, as they are in many New York State school systems. In these cases, the public employer would probably find it easy to justify his rejection to himself. Even in those instances where the public employer does not exercise the legislative function, it might be more fruitful to have representatives of the legislative body, with some direction from their members, on the negotiating team. The existence of legislative participation and guidelines during negotiations could possibly enhance bargaining progress and result in more settlements in which factfinding was not needed.

Strike

The focal point for disputes in the private sector is the strike. In the public sector, factfinding is the intended substitute. Factfinders in both Wisconsin and New York State seemed to express an uncertainty about the factfinding's adequacy as a strike substitute. Forty-seven percent said factfinding was not adequate, 36% thought the procedure was, and 17% were undecided. The opinions of these factfinders might help to reinforce a conclusion that factfinding has made some contribution to public employment bargaining, but whether it is sufficient or not is far from assured.

One proposal that has been made to strengthen factfinding is to combine the procedure with a selective right to strike. Several authorities favor giving employees the right to strike if the public employer rejects the factfinder's recommendations. The argument is that an employer rejection, and with it the possibility of a unilateral imposition, justifies protective action by the employees who are in danger of losing a favorable award.

The factfinders, however, were not very favorably inclined to this proposal. Only 29% indicated a preference for a strike after an employer rejection. One reason for opposition to the proposal could be the potential tendency for it to affect the factfinder's award. If the factfinder views his primary function as the resolution of disputes and not the provision of an equitable judgment, he might issue a report more acceptable to the employer.[13]

On the other hand, an after-rejection strike possibility could persuade public employers to accept recommendations which were completely out of line with the bargaining situation. After all, factfinders can make mistakes. Another possibility is that the proposal might tempt employees to extend negotiations to factfinding with the certainty that they could strike if the employer rejected. All these possibilities could result in a more ineffective factfinding procedure. Also, if strikes are acceptable after an employer rejection, the functional basis for factfinding as a strike substitute is undermined.

There are several reasons for advocating an unlimited right to strike in the public sector as a replacement for factfinding: (1) Given sufficient stimuli, strikes will occur anyway. (2) Meaningful collective bargaining may be impossible without the right to strike. (3) The right to strike might make both parties more responsible; the result could be fewer strikes. (4) Factfinding might not be an adequate substitute for the strike. (5) Strikes seem to arouse more political and social pressure than factfinding. (6) Illegal strikes may encourage contempt for the law. (7) There might be a tendency to overestimate the actual severity of public employee strikes on the public interest.

Granted these positive factors, the public still might not be ready to legalize the right to strike in the public sector. The continuous operation of all government services could be basic to the preferences of the electorate whether the absence of a particular operation would endanger the community or merely create a temporary inconvenience. But it is important that the public consider the consequences of their choice.

Compulsory Arbitration

In the private sector, the representatives of both union and management have traditionally rejected the use of compulsory arbitration for the resolution of their negotiation disputes. Two major reasons seem to be the belief that an independently negotiated agreement is easier to live with and that negotiation progress may be impaired by an automatic arbitration procedure. Another problem arises because of the uncertainty of whether an award will actually be accepted. In the public sector, the use of compulsory arbitration involves a further problem: the delegation of a legislative function. There is also the possibility that compulsory arbitration will increase "face-saving" by insulating the parties from public opinion. This last objective may not be too important, given the relative influence of public opinion in factfinding.

Whatever misgivings the employee organizations might have had about compulsory arbitration, the considerations did not seem sufficient to prevent these public employees from expressing a preference for this procedure over both factfinding and the strike. In answer to the question of how they would prefer to settle negotiation impasses in the public sector, 35% of the employees favored compulsory arbitration and 30% endorsed mediation. Factfinding was preferred by 18% of the employees and strikes by only 17%.

Several factors may help explain this preference for compulsory arbitration. Employee frustration could have resulted from employer rejections and from difficulty in getting factfinders' awards implemented. A general belief by employees that their bargaining position is so weak as to require a more binding alternative may be another explanation. Employee inexperience with collective negotiations and factfinding could also be a contributing factor.

Compulsory arbitration has been, and is being, used in the public sector. In Canada, public employees are given the choice between the right to strike and compulsory arbitration before each negotiating session. The great majority of these employee groups have chosen the arbitration route, and most of the agreements have been reached without a referral to arbitration.[14] Michigan and Rhode Island have legislated compulsory arbitration for fire and police bargaining impasses, with the latter state's act having been successfully tested for constitutionality. Voluntary, but binding, arbitration was used to settle the 1968 dispute between New York City and its sanitation employees. This use of compulsory arbitration by the public sector, especially in the United States, seems to suggest that the delegation problem is not insurmountable.

As an approximation to compulsory arbitration, Mayor John Lindsay has suggested another, more binding step for the impasse procedure. His proposal would entitle the New York City Office of Collective Bargaining (OCB) to make binding decisions for the negotiating parties in the event a panel's award is rejected.[15] The success of this proposal, if implemented, would possibly be tied to the parties' acceptance of the tripartite nature of the OCB which has seven members, three impartial, two labor and two city. For the board to alter an impasse panel's award after a rejection, the affirmative vote of at least one labor and one city member would be required. If the OCB failed to take action in thirty days, the impasse panel's recommendations would become binding.[16]

This proposal might improve the finality quality of the total impasse procedure but, at the same time, distract from collective bargaining efforts. If the OCB altered many recommendations and never punished the rejecting party with a less favorable award, the negotiating parties could have a tendency to extend negotiations past the impasse panels. The more binding alternative, however, might prove a complement to factfinding if the OCB altered only a small percentage of the rejected recommendations. Regardless of how the OCB acts, would the possibility of a binding award deter negotiation progress?

In deciding upon what impasse procedure to employ, major consideration should be given to the procedure which encourages negotiation progress; for that reason compulsory arbitration is used infrequently. Does this specification mean that binding arbitration should be discouraged in the public sector? Jacob Finkelman stated that "in the public sector, if public employees are denied the right to strike and if they are faced by an adamant management, collective bargaining may become an exercise in futility. To speak of collective bargaining in such circumstances as being rendered ineffective by compulsory arbitration is to shut one's eyes to the facts of life. There is no guarantee to either party that it will gain by going to arbitration."[17]

Arvid Anderson, in expounding on the use of voluntary and binding arbitration in critical disputes, was "not persuaded that the possibility of arbitration will mean that the parties will automatically abandon their efforts to reach a settlement by collective bargaining in favor of settlement by a third party."[18]

A greater guarantee of negotiation progress might result from the adoption of a compulsory arbitration proposal made by Carl Stevens.[19] His proposal is based on two essential concepts. First, "either party can invoke arbitration (in which event it is never refused)" and second, "a tripartite arbitration authority (or a one-party authority operating without a hearing) bases its awards on the one-or-the-other principle."[20] Under the second concept both parties would be required to submit a proposal for settling the dispute, and the arbitrator or panel could choose only one.

The thought of having to settle on the basis of the other party's recommendations is supposed to produce more compromises during negotiations. And, the uncertainty of the arbitrator's award (it cannot be a compromise) in this twist to compulsory arbitration could make it a more effective substitute for the strike than factfinding. According to Stevens, "the availability to the parties of an arbitration strategy under this type of system would seem to serve some of the functions usually associated with a strike strategy. For example, the arbitration strategy affords a technique for imposing a cost of disagreement and thus for invoking the negotiatory responses of concession and compromise."[21] This proposal appears to exhibit sufficient promise to merit a trial in those situations in which the negotiating parties have already had some bargaining experience.

Summary

With the absence of the strike deadline and significant public pressure, the factfinding procedure may lack an important quality - finality. The show-cause hearing and the strike after an employer rejection involve modifications of the factfinding procedure. But these suggestions appear unfavorable because they seem to weaken the role of the factfinder and his recommendations. Several reasons were presented to justify the employment of the strike as a replacement for factfinding, but this possibility was also rejected because of the unlikelihood of public acceptance. So, despite the customary criticisms surrounding its use in settling negotiation impasses, compulsory arbitration (requiring the arbitrator to use the one-or-the-other principle in issuing his award) seems to be a

relatively attractive alternative to the others.

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[1]Lloyd G. Reynolds, Labor Economics and Labor Relations, Fourth Edition (Englewood Cliffs: Prentice-Hall, Inc., 1964), p. 266.

[2]George W. Taylor, "Public Employment: Strike or Procedures," Industrial and Labor Relations Review, XX, No. 4 (July 1967), p. 618.

[3]Herbert R. Northrup and Gordon F. Bloom, Government and Labor (Homewood: Richard D. Irwin, Inc., 1963), pp. 455-456.

[4]"Public Employee Labor Relations: Proposals for Change in Present State Legislation," Vanderbilt Law Review, XX, No. 3 (April 1967), pp. 703-704.

[5]Jacob Finkelman, "When Bargaining Fails," Collective Bargaining in the Public Service: Theory and Practice, Kenneth O. Warner (editor), (Chicago: Public Personnel Association, 1967), p. 120.

[6]Howard J. Anderson, "Recent Developments Involving Public Employee Organization and Bargaining," Public Employee Organization and Bargaining, Howard J. Anderson (editor), (Washington: Bureau of National Affairs, 1968), p. 24.

[7]Extensive background material on these subjects is contained in Wilson R. Hart, Collective Bargaining in the Federal Civil Service (New York: Harper and Brothers, 1961); and William B. Vosloo, Collective Bargaining in the United States Federal Civil Service (Chicago: Public Personnel Association, 1966).

[8]Jean T. McKelvey, "Role of State Agencies in Public Employee Labor Relations," Industrial and Labor Relations Review, XX, No. 2 (January, 1967), pp. 183-184.

[9]A detailed legislative background is contained in James E. Young and Betty L. Brewer, State Legislation Affecting Labor Relations in State and Local Government, Labor and Industrial Relations Series No. 2 (Kent, Ohio: Kent State University Bureau of Economic and Business Research, 1968).

[10]A more extensive analysis of the results of this research is available in the author's unpublished doctoral dissertation, "Fact-Finding: Complement or Substitute for Collective Bargaining in Public Employment," The University of Tennessee, June, 1970.

[11]George W. Taylor, "Impasse Procedures - The Finality Question," Address before the New York Governor's Conference on Public Employment Relations, New York City, October 15, 1968.

[12]Arvid Anderson, "The Use of Fact-Finding in Dispute Settlement," Arbitration and Social Change, Gerald G. Somers (editor), (Washington: Bureau of National Affairs, 1969), p. 124.

[13]Robert A. Chanin, Remarks Before the New York Governor's Conference on Public Employment Relations, New York City, October 16, 1968.

[14]J. Douglas Muir, "Canada's Experience with the Right of Public Employees to Strike," Monthly Labor Review XCII, No. 7 (July 1969), p. 57.

[15]John V. Lindsay, Report to the New York State Legislature on Public Employment Relations, Government Employee Relations Report, No. 309 (August 11, 1969), B-3.

[16]Ibid.

[17]Finkelman, op. cit., p. 126.

[18]Arvid Anderson, Remarks Before the New York Governor's Conference on Public Employee Relations, New York City, October 15, 1968.

[19]Carl M. Stevens, "Is Compulsory Arbitration Compatible with Bargaining?" Industrial Relations, V, No. 2 (February 1966), pp. 38-52.

[20]Ibid., p. 49.

[21]Ibid., p. 50.

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Critique of Public Policy Toward Teacher Strikes

This chapter, by Dr. M. Sami Kassen and Marcia L. Mutterer, appeared in the April 1971 issue of Public Personnel Review, the journal of the Public Personnel Association.

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Teacher strikes are increasingly becoming a fact of life in our employee society. Some of the reasons for them are economic, other non-economic; some are real, others imagined. Low wages, poor working conditions, overcrowded classes, inadequate facilities, unimaginative curricula, lack of decision-making opportunities, and loss of status and prestige are often-cited causes of teacher strikes.

Public attitudes toward teacher strikes are primarily negative. Students, their parents, and their representatives in government are against strikes. They argue that the use of a militant tactic as a means of resolving disputes constitutes "a disregard for the educational needs of the children," "an irresponsible action," "a bad example to students," "a deliberate disregard for the public welfare," "a conscious defiance of the law," and "a blatant misuse of power." These critics are joined by some from within the teacher ranks led by the National Educational Association, which denounce strikes as "unprofessional behavior".*

A casual examination of strike statistics leads us to believe that the negative stance expressed in the anti-strike law provokes, rather than prevents, strikes. For one thing, the public reaction of "fighting fire with fire" ultimately results in levy defeats and a reduction in all services, the very things the teachers are fighting against. For another, punitive anti-strike laws are being violated by teachers with a calculated payoff in mind.

This negative approach has not brought the hoped for results; what is needed is a new and positive approach that enables teachers to secure equity without collectively withdrawing services. The objective of this article is twofold: to evaluate current public attitudes toward teacher strikes as expressed through anti-strike laws; and to propose two feasible alternatives to the strike.

A Critique of Anti-Strike Laws

The "teacher strikes" issue is a conflict between goals: (1) teachers' freedom to bargain collectively and ultimately to strike, bringing about a joint determination of wages and employment conditions; and (2) continued operation and maintenance of the public school system. It is largely because of this conflict that the use of the strike by public school teachers has become so controversial.

The current school of thought promotes the second goal at the expense of the first. Most of the formulae it offers involve an exchange of freedom for security. The medium of exchange commonly used is a legislative ban on strikes. The freedom that is surrendered is the teachers' freedom to bargain collectively and effectively. The security offered is the "convenience" of the target student population.

Should fundamental liberties be exchanged for expediency? Should anti-strike laws be kept on the books unchanged despite their ineffectiveness? Should teachers and other public employees continue to be denied the right to strike that other workers enjoy? The answers to these questions are central to a fair critique of the teacher strikes issue. Our overall theme is this: anti-strike laws lack a technical, logical, and practical foundation for their existence. They are not only anti-democratic in spirit, but illogical and unproductive as well.

Technically, the institution of collective bargaining requires two basic conditions: the presence of two autonomous, collective parties at the bargaining table; and the right of each party to apply pressure on the other and to use the ultimate economic weapon it possesses (i.e., the strike in the case of the employees; the lockout in the case of the employers). It is meaningless to talk about free collective bargaining for public school teachers without granting them the right to strike. Without that right, used or not, negotiation is inevitably reduced to capitulation. As Professor Taylor states in his article, "The Public Interest in Collective Negotiations in Education," in Teachers, Administrators, and Collective Bargaining, "There is, moreover, unfortunate evidence that some governmental administrators tend, consciously or not, to rely upon the ban on strikes as a license for the arbitrary exercise of prerogatives and as immunity against their failure to negotiate in good faith with employees. The public onus for strikes in the governmental area should not always be limited to the employee organizations involved."

Responsible union leaders also question anti-strike laws for the same technical reasons. They oppose an outright ban on strikes, accompanied by penalties, which would interfere with the effective development of collective bargaining. They argue that the public interest will best be served when government negotiates rather than legislates.

Public Officials Agree

Public officials, too, mirror this criticism of the anti-strike laws. They argue that the United States is one of the very few democratic countries that has a flat prohibition against public employee strikes. The socialist countries, the Latin American military regimes, and the authoritarian governments of Spain and Greece prohibit public employee strikes. But most European countries, including England, France, Sweden, and Italy, grant persons working for the government the right to strike in order to bring about changes in their conditions of employment.

In addition to the technical argument against anti-strike laws, there is a related logical one. Contrary to popular expectations, the enactment of the anti-strike laws by so

*There are five professional values which are believed to be imperiled by strikes of this kind: the service ideal; the moral basis of professional claims; the commitment to shared and cooperative decision-making; the commitment to reason; and the pursuit of distinction.

many states provided a classic example of the "end" not justifying the "means." The "end" pursued by such laws was the continued operation of the public school system. The "means" employed was to outlaw all strikes involving public employees despite the lack of overwhelming evidence that strikes have had a lasting detrimental effect on the public.

The effect of this preemptory legislative action was, and is, to deny teachers and other public employees their inherent right to determine how and under what conditions they will work. If there were no legislative ban on strikes, critics of teacher militancy would be unable to charge that the "end does not justify the means" when teachers go on strike. As Albert Foody says in his article in the Winter 1970 Changing Education, "Therefore, if the 'end doesn't justify the means' is an acceptable principle, then the anti-strike laws have no sound logical foundation for their existence. Consequently, these laws cannot reasonably be a logical basis for declaring strikes to be an improper 'means' for teachers to employ, because the anti-strike laws had to exist before the strikes could be considered illegal and hence an unsuitable means for use by teachers."

There is still another simple and pragmatic argument against anti-strike laws. If these laws prevented strikes, no effort would be made to change them. A quick glance at strike statistics, however, makes it painfully clear that strikes in the public sector are on the rise, not on the decline. There were only 15 strikes in 1958. Last year, according to Business Week, there were 254. Along with this recent upsurge of strikes by public employees in general, those on the part of teachers have also increased. In the August 1967 Monthly Labor Review, Glass says that during the period 1956-1966, there were only 35 recorded teacher strikes. But the year 1966 marked a sudden upswing, with thirty-three stoppages recorded, followed by an additional 11 in the first quarter of 1967. This trend is bound to continue as teachers, sanitation workers, and other government employees take note of the postal strike and its outcome.

Teachers and public employees alike are weighing the results of abiding by the law against defying it. "We are beyond abstract lessons in legality," says Albert Shanker, president of the United Federation of Teachers. "Perhaps it is a bad lesson to be learned, but the City (of New York) has convinced us that striking brings us gains we cannot get any other way." The punitive laws appear to be provoking rather than preventing strikes.

A number of observers of the American labor relations scene support the contention that a legislative ban on strikes is sorely ineffective. As quoted by R. Neirynck in the Labor Law Journal, "It is no answer to the problem of preventing strikes of government employees to outlaw the strike by legislation. These have proved unworkable and mostly futile. If conditions become utterly intolerable, public employees will quit en masse, call it a strike or otherwise."

Seitz in the Marquette Law Review sums all of these thoughts, "It must be acknowledged... that regardless of public opinion toward strikes, and no matter what legal barriers may be raised by legislatures or courts, public employee strikes will never be entirely eliminated."

We can see then, that the legislative ban which was hoped to be a cure for the teacher strike problem is merely an action which may incite further complications and, in the final analysis, may cause more strikes than it prevents. It is precisely for this reason that the so-called wrong way (anti-strike) laws are now being re-examined by the law-making bodies of several states with the intent of amending or repealing them.

In summary, the technical, logical, and pragmatic arguments against anti-strike laws point to the need to develop procedures and machinery aimed at preventing strikes, rather than banning them and punishing strikes.

The Strike: Suggested Alternatives

A variety of solutions to the teachers' strike have been proposed: strict enforcement of anti-strike laws resulting in jail for strikers, compulsory arbitration, voluntary agreement not to strike, appointment of an ad hoc factfinding board, and the use of big name mediators. These traditional solutions have been inadequate. Either they treat the symptoms of strikes rather than causes, or they have been proposed in the laboratory but not tested under fire.

There are, however, two promising approaches that are seldom considered by labor experts and public officials; namely, the joint committee and non-stoppage strikes. Both alternatives have been around for some time and have been presented in various forms. Both are designed to preserve the institution of free collective bargaining and to maintain the public interest by keeping the schools open.

The Joint Committee

The primary function of the joint committee as an alternative to the teacher strike is to expedite the negotiation process. Ideally, joint committees would meet continuously to prepare for negotiations and also to oversee the administration of the forthcoming labor agreement.

The joint committee has three advantages over conventional methods of joint decision-making in public school systems. First, it provides for representation of teacher interests by the teacher organization rather than by individual teachers selected by the administration. This is possible since members are elected by their peers rather than selected by their superiors.

Second, the joint committee enlarges and enhances teacher participation in the process of formulating educational policies which has traditionally been the prerogative and responsibility of the administration and the school

board. Whereas collective bargaining is most suitable to the quantitative aspect of educational decision (e.g., deciding both the level and allocation of educational resource use and deciding between alternative programs of a known value), the joint committee possesses the expertise required for qualitative decisions (e.g., the development and evaluation of educational services and programs).

The third and most important advantage of this advisory body is its objectivity. It recommends issues to be negotiated and does much to reduce conflict and promote agreement during actual negotiations. This objectivity is a function of the members' time and freedom to attend to a larger variety of alternatives, a definite advantage over crisis bargaining. In addition, this on-going process enhances the notion that knowledgeable persons bargain, thereby reducing the possibility of wildcat strikes.

In summary, the logic behind such a committee would be similar to that expressed by John Dunlop regarding the Kaiser-Steelworker goal, "I think the most important single invention is the notion that parties shall meet regularly and systematically outside the bargaining table to study problems. Certain questions that confront industry (education) today, ...can only be adequately handled by working on them over a period of years, not by coming to one single negotiation crisis."

The Non-Stoppage Strike

If the proposal for a joint-committee is seriously considered and implemented, the collective bargaining procedure can become an effective technique within the educational system without the perennial threat of a strike. But there may be times when agreement is not reached and a strike is forthcoming.

The primary function of the second proposed alternative, the "non-stoppage" strike, is to maintain uninterrupted public services, thereby decreasing the possibility of withdrawing public financial support. This solution to the problem was discussed by S. L. Stokes in the February 1969 Labor Law Journal.

During the non-stoppage strike, teachers would remain on the job during bargaining sessions but would forego a certain percentage of their salary. An equal amount would be removed from the board's operating budget, but the amount taken from the budget is not to endanger the teacher's due amount as this would create "double jeopardy". The logic behind this practical solution is that teachers don't lose as much pay as they would in striking, and the board is forced to operate with less funds without curtailing services. Failure to reach early agreement would have a direct economic effect.

To what extent have these two alternatives been tested? In a study which appears in the March 1969 Labor Law Review of the joint committee as used in several public school systems, Thomas Love concluded that while additional time was needed to evaluate this new technique, it was clearly superior to traditional methods of involving teachers in deciding school policy.

The non-stoppage strike was used in the early 1960's in the Miami Transit strike. The plan worked until the company claimed that a favorable public reaction to continued service was being translated into tips for bus drivers. It is likely that a favorable public opinion aroused by a non-stoppage teacher strike would be translated into increased school levies. The non-stoppage strike would be more likely to work where most teachers are union members, so that the school cannot operate in the face of a strike. In places such as the inner city where there is a great deal of pressure for continued service, the non-stoppage strike may be the most effective way of reducing negative public reaction to teacher demands.

In conclusion, by removing flat prohibitions that deny teachers the right to strike, lawmakers would be discarding old myths in favor of new realities. Yet, just as the right to strike should not be indiscriminately forbidden, so too, the same right need not be indiscriminately granted. Procedural prerequisites that would strengthen the institution of collective bargaining would appear to be desirable. Teacher organizations could be required to bargain collectively on a more regular basis through a joint committee. They might also be required to submit to mediation and a factfinding procedure before being permitted to strike legally. Even then the effect of the strike as the ultimate economic weapon can be reproduced with equal effectiveness through the non-stoppage strike.

ABA Report on State Labor Laws

(Following is the report of the American Bar Association's Committee on State Labor Law, the second such report issued by the ABA in the past two years. The report reviews the status of collective bargaining in public employment in the various states.)

NEW LABOR RELATIONS LEGISLATION

1969-70 brought a significant increase in state legislation vesting in public employees the privilege to participate in determination of their working conditions beyond the constitutional right of petition. As of May 1970, forty states have legislation authorizing some union activity by public employees, although in the majority of states it is limited in scope. Two states have legislation prohibiting union activity in the public sector, and eight states have no legislation at all. The public employees in Georgia suffered a setback when the Georgia Supreme Court declared a statute applicable to one county and one city unconstitutional.

Among those states where the concept of collective bargaining or the privilege of employees to meet and confer with public employers has been formally adopted by legislation, there is little uniformity in the extent of employee rights and the type of employees covered.

To bring some order to this conglomeration of public sector collective bargaining statutes, we have grouped the legislation into three major categories: (1) mandatory legislation; (2) permissive legislation; and (3) minimal legislation. Mandatory statutes require the public employers to negotiate with their employees. Permissive statutes authorize the employer to negotiate. Minimal statutes afford employees limited rights. The mandatory and permissive statutes generally authorize either collective bargaining or meet and confer relationships, the latter apparently intended to be something less than collective bargaining.

In early 1970, twenty-four states had thirty-four different mandatory statutes requiring either meet and confer or collective bargaining relationships. The states are California (state and local; teachers); Connecticut (teachers; local); Delaware (local; state and county; transit); Florida (teachers; county firemen); Hawaii (state, county and local); Idaho (firemen); Louisiana (public transit); Maine (teachers and firemen); Maryland (teachers); Massachusetts (state and local); Michigan (local); Minnesota (state and local; teachers; non-profit hospitals); Missouri (all except police and teachers); Montana (nurses); Nevada (local); New Hampshire (state); New Jersey (state and local); New York (state and local); North Dakota (teachers); Oregon (state and local; teachers; nurses); Rhode Island (local fire, police and teachers and state); Washington (state and local; teachers); Wisconsin (local except police; state); and Wyoming (firemen).

Eleven states have fourteen permissive statutes, making meet and confer or collective bargaining relationships permissible. They are: Alaska (state, local and teachers); Delaware (local); Florida (teachers); Illinois (state; transit; universities); Kentucky (state); Nebraska (state and local; teachers); New Hampshire (city); New Mexico (transit); South Dakota (state and local); Vermont (city); and Washington (public utilities).

Fourteen states have the minimal type of statute, under which a limited number of employees have only basic rights, such as the right to join a union or present proposals to the employer. Eight of these states have only miminal statutes: Alabama (firemen); Arizona (state and local); Arkansas (state and local); Indiana (teachers); Iowa (state and local). Six of the states which have minimal statutes for certain employees, have comprehensive statutes for others. These states and their minimal statutes are Florida (state and local); Illinois (firemen); Missouri (state and local); Nebraska (firemen); North Dakota (state and local); and California (firemen).

1. State Legislation

Since the last Report, sixteen states authorized their public employees to engage in some type of collective activity. Fifteen states enacted public employee relations statutes, and six states amended their statutes.

Alaska. Alaska amended its bargaining law by adding collective bargaining by teachers. The amendments provide for exclusive representation, mediation boards to resolve impasses with non-binding recommendations, and a requirement that grievance procedures be included in all negotiated contracts. (345 GERR G-1.)

Connecticut. Connecticut amended its bargaining law for teachers by adding provisions which (1) require separate administrators' and teachers' units; (2) mandate legislative bodies of school districts to authorize funds to implement negotiated settlements unless contracts are rejected within thirty days after adoption; (3) authorize court injunctions to

enforce the no-strike provisions of the statute; (4) require the Governor to establish an arbitration panel in which arbitrators for bargaining disputes may be chosen; and (5) guarantee the right of employees to organize free from interference, restraint or other discriminatory practices. (P.A. No. 298, as amended by P.A. 811, 1969; Gen. Stat. of Conn. Sec. 10-153a to 10-153b; 311 GERR E-5.).

Delaware. The Professional Negotiation Act is a collective bargaining statute for certified non-administrative employees. Work stoppages are prohibited. A striking teachers' organization may lose its negotiated dues checkoff privileges for one year and its right to exclusive representation for two years. The adoption of binding arbitration by contract is prohibited, but three-member panels for the resolution of impasses are authorized. (Del. Code Ann. Ch. 40, Title 14 L. 1969; 322 GERR F-1.)

Florida. The right to organize and negotiate professionally was granted to public school teachers, counsellors, librarians and other employees engaged in classroom teaching duties in counties of not less than 390,000 nor more than 450,000. School boards are obligated to meet and confer in good faith with representatives of the teachers. Unresolved issues may be submitted to advisory arbitration. (Ch. 69-1424, Fla. Laws of 1969; 19 SLL 248.)
[Ed. Note: The situation in Florida became somewhat blurred on March 13, 1970, when Governor Claude R. Kirk, Jr., issued orders barring collective bargaining by state and local employees.]

Hawaii. A comprehensive bill granting collective bargaining rights to all public employees in Hawaii has been passed by the Hawaiian legislature and is expected to be approved by the Governor. The bill has two precedent setting features: (1) it grants the right to strike after a sixty-day cooling off period and thirty days of mediation and fact finding; (2) it authorizes the deduction of agency service fees upon the request of an exclusive representative.

The right to strike is limited to the extent that if the public health or safety is threatened, the public employer may petition the five-member tripartite Hawaii Public Employment Relations Board to make an investigation. Strikes which pose an "imminent or present danger to the health and safety of the public" may be prohibited. It is lawful for an employee to strike only after (1) the requirements relating to the resolution of disputes have been complied with in good faith; (2) the proceedings for the prevention of prohibited practices have been exhausted; (3) sixty days have elapsed since the recommendations of the fact finding board were made public; and (4) an exclusive representative has given a ten-day notice of the intent to strike to the Board and to the employer.

The statute provides a three-step procedure for resolving impasses; mediation, fact finding, and voluntary arbitration. (349 GERR F-3.)

Idaho. Idaho fire fighters became the first public employees in the state to gain bargaining rights. Firemen have the right to "bargain collectively," but the statute obligates public authorities to "meet confer in good faith" with representatives of the bargaining agent. Contracts are limited to one year. All unresolved issues remaining thirty days after the finders panel for recommendations. The parties must accept the recommendations of the panel within thirty days after they are issued, or not at all. No other dispute settlement procedures are provided. Strikes and recognition of picketlines are prohibited. (343 GERR B-5.)

Kansas. Certificated school employees, except administrators, may form, join and assist or refrain from employee organizational activity, be represented by a professional employees' organization, and present and make known proposals to boards of education and superintendents of schools. Representation administration is vested in the State Board of Education. Agreements between boards of education and employees' representatives may contain procedures for arbitration of grievances. Although strikes are not expressly prohibited, the act provides that it shall not be construed to authorize strikes by professional employees. (H.B. 1647, 343 GERR G-1.)

Maine. The Maine Municipal Public Employees Labor Relations Law which became effective on October 1, 1969, and was amended effective February 9, 1970, is applicable to municipalities, towns and school districts, water districts, sewer districts, or any subdivision thereof. The several units of government are obligated to bargain collectively with the bargaining agents for wages, hours, working conditions and contract grievance arbitration, except that school districts are only required to "meet and consult but not negotiate" on educational policies. The act contains employer and employee unfair labor practices, with work stoppages, slowdowns and strikes specified as employee unfair labor practices. Representation administration is vested in the Commissioner of Labor and Industry, with appeal to a three-member Public Employees Labor Relations Appeals Board; jurisdiction to enjoin prohibited acts; in the courts. The act establishes a three-phase procedure for the resolution of bargaining impasses: mediation, fact finding, and arbitration, the latter mandatory at the request of either party. A majority recommendation of the three-member arbitration board on salaries, pensions, and insurance is advisory only, but recommendations on all other matters are binding, subject to court review. (Me, Rev. Stat., Title 26, Ch 9-A, 306 GERR E-1.)

Massachusetts. An act was passed which authorizes exclusive bargaining representatives of employees of Boston and surrounding Suffolk County to negotiate contacts requiring the payment of an agency service fee by non-union employees, and that a contract stipulating a service fee be approved by a majority of all employees in the bargaining unit. The agency service fee must be proportionally commensurate with the costs of collective bargaining and contract administration. (300 GERR B-1.)

Michigan. Public Act 312, providing for binding arbitration to resolve police and fire fighters' wage disputes, permits either the employees or their public employer to initiate binding arbitration. If a dispute has not been settled thirty days after submission to mediation, compulsory arbitration by a tripartite panel may be requested.[2] If the parties fail to select the neutral member of the panel, he is appointed by the chairman of the Michigan Employment Relations Commission. The panel's award must be issued within sixty days of its formation, and may be enforced in a circuit court at the request of either party or reviewed to determine whether the award was based on substantial evidence or whether the panel lacked or exceeded its jurisdiction. The law expires June 30, 1972. (311 GERR B-1.)

Montana. Under a new law (which replaced a statute limited to two years), registered professional and licensed practical nurses employed in health care facilities have the privilege to bargain. The statute, which took effect July 1, 1969, vests the State Board of Health with authority to determine the appropriate bargaining units and conduct representation elections. Employees of public or private health care facilities may strike after a thirty-day notice and provided another health care facility within a 150-mile radius remains open. (Ch. 320, L. 1969; 296 GERR G-1.)

Nevada. The Nevada Local Government Employee-Management Relations Act covers employees of political subdivisions of the state or of public and quasi-public corporations. Each employer is required to "negotiate" with "the recognized employee organization." Public employers unilaterally determine majority status and bargaining units, subject to appeal to the Local Government Employee-Management Relations Board. The Board is authorized to provide mediation and fact finding services according to a negotiations time-table in the law. Strikes are prohibited and employee organizations must agree to a no-strike pledge as a condition for recognition. The statute includes a "management rights" subsection. (Ch. 650, L. 1969; 302 GERR E-1.)

An unique aspect of the Nevada law is that the National Center for Dispute Settlements of the American Arbitration Association will administer the mediation and fact finding functions. (332 GERR B-7.)

New Hampshire. The statute covers all classified state employees and non-academic employees of state educational institutions except department heads and executive officers. The act establishes a three-member commission for representation administration. The chief executive of each unit of state government is required to "meet...and to bargain in good faith" with a certified and recognized employee organization. Contracts for a maximum of five years' duration are authorized, and all agreements must contain an anti-strike provision. Any employee organization engaging in a strike may be decertified under the act. (Ch. 98-C, L. 1969; 311 GERR E-3.

North Dakota. The act, which covers certified public school employees and administrators, provides for representation elections to be conducted by school boards, requires school boards to meet and negotiate in good faith, and establishes impasse procedures. Separate units of certified personnel and administrators are required. The parties may request mediation or fact finding by the Education Fact Finding Commission established under the act. Strikes are prohibited. (297 GERR F-1.)

Oregon. Oregon amended its collective bargaining statute for teachers to provide that unions may represent school employees, who formerly could be represented only individually or by a committee. Union negotiators must be certified employees of the school district whose teachers they represent. Either party may request appointment of consultants in case of an impasse. (Ch. 647, L. 1969, amending Ore. Rev. Stat., 342.450, 342.460 and 342.470; 311 GERR E-7.)

Rhode Island. Amendments to Rhode Island bargaining laws authorize state police below the rank of lieutenant to engage in negotiations; permit the parties to municipal firemen's contracts to delegate bargaining; and extend the legal duration of municipal police and firemen's contracts from one to three years. The Governor vetoed a bill which would have granted municipal police bargaining rights. (351 GERR E-1.)

South Dakota. The statute covers state and local employees. It prohibits strikes, and imposes fines on persons engaging in unlawful strike activity. Government agencies are required to recognize organizations of public employees "to the extent to which they represent employees" of the agency. Organizations which represent a majority in an appropriate unit are formally recognized, which vests in them the right "to meet and confer and otherwise communicate" with the government agency. The Labor Commissioner has authority to resolve representation disputes. (291 GERR E-1.)

Vermont. Vermont followed its earlier statute covering state employees (1969 Report, p. 57) by granting collective bargaining rights to teachers, principals, assistant principles and administrators other than superintendents and assistant superintendents. A referendum procedure to determine representation matters is established, with disputes in election matters to be resolved by the American Arbitration Association. Both parties are required to "negotiate in good faith." There are no unfair or prohibited practices; mediation and fact finding are the means to resolve impasses. The act does not authorize strikes, but provides that no restraining order or temporary or permanent injunction shall be granted against a strike unless there is a "clear and present danger to a sound program of school education." (Ch. 97,L. 1969, 297 GERR E-1.)

Washington. The State of Washington amended its Public Employees Collective Bargaining Act to authorize the Department of Labor and Industries to prevent unfair labor practices against the public employers and bargaining representatives and to issue remedial orders.

The Higer Education Personnel Law establishes a system of personnel administration for the institutions of higher education in the state. It applies to all employees of state colleges, universities and state community colleges except administrators, faculty, and governing boards. The law establishes a higher education personnel board which may adopt rules and regulations for employees' participation in the development and administration of personnel policies.

In Oklahoma, Governor Dewey Bartlett vetoed a bill authorizing collective bargaining for police and firemen. In his veto message, the governor said that under existing law, municipalities could enter into collective bargaining agreements, and he felt "this should remain discretionary with the locally elected officials rather than be dictated by the state." (345 GERR B-16.) Earlier he vetoed a similar bill for teachers.

The Advisory Commission on Intergovermental Relations, composed of representatives of federal, state and local governments and private citizens, recommended the "meet and confer in good faith" approach for states without public sector collective bargaining laws. (72 LRR 106; 342 GERR E-1.)

POWER TO BARGAIN

1. Court Decisions

With one exception, all of the cases involving the constitutionality of various state statutes were resolved in favor of the statute.

The New Jersey Supreme Court upheld the constitutionality of the state's Employer-Employee Relations Act, rejecting a contention that the state constitution prohibits the legislature from providing for exclusive representation. Lullo v. International Association of Fire Fighters, Local 1066, 262 A. 2d 681 (N.J. 1970).

The United States Supreme Court declined to review a decision of the New York State Court of Appeals affirming the constitutionality of the state's Taylor Law as a valid exercise of state policy, and not violative of either the federal or state constitutions. City of New York v. De Lury, 23 N.Y. 2d 175, 243 N.E. 2d 128 (1969), app. dismissed, 394 U.S. 455, 89 S. Ct. 1223 (1969), reh. denied, 346 U.S. 872, 90 S. Ct. 37 (1969).

In another case involving the constitutionality of the Taylor Law, the United States Supreme Court upheld the constitutionality of the statute by dismissing an appeal from a ruling by the New York Court of Appeals that representatives of New York City's striking teachers are not denied equal protection of the law by the state's statutory scheme that affords striking private employees the right to a jury in a trial for contempt, while denying that right to similarly accused public employees. Shanker v. Rankin, 396 U.S. 120, 72 LRRM 2866 (1969).

The Nevada Supreme Court found that an intiative petition passed by the Las Vegas voters in 1968 providing a retroactive wage increase to firefighters and tying their salaries to those of the police was constitutional. City of Las Vegas v. Ackerman, 457 P. 2d 525 (Nev. 1969).

Following the lead of Wyoming (1969 Report, p. 64), two state supreme courts upheld the constitutionality of compulsory arbitration statutes in 1969. The Rhode Island Supreme Court rejected the contentions that the police-fire act improperly delegated legislative power to arbitrators and that the act did not include sufficient guidelines. City of Warwick v. Warwick Regular Firemen's Association, 256 A. 2d 206 (R.I. 1969). The constitutionality of the Pennsylvania statute was affirmed in Harney v. Russo, 345 Pa. 183, 255 A. 3d 560 (1969).

In Georgia, the Supreme Court found that state's only collective bargaining statute unconstitutional because limited solely to one city and the surrounding county. Local 574, International Association of Fire Fighters v. Floyd, 225 Ga. 625, 170 S.E. 2d 394 (1969).

In Dade County Classroom Teachers Association, Inc. v. Ryan, 225 So. 2d 903 (Fla. 1969), the Florida Supreme Court affirmed the constitutionality of a state statute providing that no person or group of persons may, by intimidation or coercion, compel any employee to join or refrain from joining a labor organization. The statute precludes an employees' organization from acting as sole bargaining representative for all teachers in a school system. In passing, the court noted that "public employees have the same rights of collective bargaining as are granted private employees" by the Florida "right-to-work" statute.

Several courts found the public employers have authority, but are not required, to bargain with their employees absent a mandatory statute.

In State Board of Regents, State of Iowa v. United Packing-house and Allied Workers, Local 1248, 173 N. W. 2d 110 (Iowa 1970), the Iowa Supreme Court found that in the absence of legislation, "(t)he Board of Regents has power and authority to meet with representatives of an employees' union to discuss wages, working conditions and grievances..." but is not required to do so.

The court of Appeals for the Seventh Circuit tayed a preliminary injunctions issued by a district court prohibiting the Indianapolis Board of School Commissioners from bargaining individually with teachers and invalidating individual contracts between the school board and teachers. The temporary injunction was granted when the school board submitted individual contracts to teachers after its recognition of a bargaining representative. In the district court's view, this constituted unjustifiable interference with the teachers' constitutional rights of free speech, association, petition, equal protection and the due process of law. The Court of Appeals opined that "there is no constitutional duty to bargain collectively with an exclusive

bargaining agent." In staying the injunction, the court noted "the need to get teachers under contract either through individual or collective bargaining...." Indianapolis Education Association v. Lewallen, 72 LRRM 2071 (7th Cir. 1969).

The jurisdiction of the Michigan Employment Relations Commission over state universities was approved in Board of Control of Eastern Michigan University v. Labor Mediation Board, 18 Mich. App. 435, 171 N.W. 2d 471 (1969). The Court of Appeals held that the two state universities are public employers and their employees are public employees; therefore, the Michigan Public Employment Relations Act is applicable to the universities. Article IV, Par. 48 of the Constitution provides: "The Legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service."

2. Attorney General Opinion

The Attorney General of Louisiana held police have the right to join unions and bargain collectively, but may not strike. (322 GERR B-12.)

REPRESENTATION ISSUES

1. Supervisors

A question of continuing interest is whether, and to what extent, supervisors are protected under state laws regulating employment relations in the public sector.

The Wisconsin Employment Relations Commission reiterated prior holdings that the rights granted by the Municipal Employee relations Act are inapplicable to supervisors, hence the statute does not prohibit municipal employers from directing its supervisors not to join a labor organization. City of Cudahy, 334 GERR C-3 (1969). The union urged that supervisory employees are free to belong to a union under the constitutionally protected right to freely associate. The Commission declined to determine whether supervisors have a constitutional privilege to belong to a union, since there are judicial forums available better suited to determine constitutional questions.

One such forum, a federal district court in Florida, held that a Florida statute forbidding membership by administrative and supervisory school personnel of one county school system in unions that represent teachers violated the First and Fourteenth Amendments of the Federal Constitution. Orr v. Thorp, 308 F. Supp. 1369, 73 LRRM 2063 (S.D. Fla. (1969).

The Michigan and New Jersey laws extend organization and other rights to supervisory employees.

The New Jersey Public Employment Relations Board permitted a Director of Elementary Education, a "managerial employee," to be included in a supervisory unit containing other supervisors (principals and their assistants) whom the Director supervised, since the New Jersey state law does not proscribe a combination of managerial and supervisory employees in the same unit or belonging to the same organization. West Orange Board of Education, 306 GERR B-5 (1969).

In Hillsdale Community Schools v. Michigan Labor Mediation Board, No. 6697 (1970,) the Michigan Court of Appeals affirmed the Michigan Board's (now Employment Relations Commission) decision (1969 Report, p.61) that the issue of domination or assistance of a rank-and-file unit by reason of inclusion of supervisors will be determined only in an unfair labor practice case on the basis of evidence disclosing domination or assistance; and that the Michigan statute covers supervisors, who, however, must be in separate bargaining units from rank and file employees.

Several cases involve the supervisory status of officers in police and fire departments. All of the fire officers except the chief, including the deputy fire chief, a captain and two lieutenants, were found to be non-supervisory by the Vermont State Labor Relations Board in IAFF Local 881 and City of Barre, 298 GERR B-3 (1969), as the result of the power of the City Manager over the fire department the lack of deviation from prescribed policy by these officers, the grievance route that commences with the fire chief and terminates with the City Council, and, perhaps not to be overlooked, the fact that "all of the employees.... with the exception of the chief have been involved in a union group since 1946." However, the captains and lieutenants in Petition of Burlington Fire Prevention Association, Inc. (1969) were termed supervisors because the first step in the grievance procedure involves the appropriate lieutenant, these officers had the discretion to deviate from the weekly duty assignment list, and they possessed authority to effectively recommend promotion, discipline, layoff, and the like.

The Wisconsin Employment Relations Commission held that in a fire department consisting of one chief, two captains, two lieutenants and twelve motor pump operators, the two captains were supervisory and the two lieutenants were not supervisory, stating, among other factors, that to exclude lieutenants from the unit would result in an unreasonable ratio of supervisory positions to non-supervisory positions. City of Cudahy, supra.

In Town of Farmington (Police Department), Case Nos. ME 1707 and MEE 1711, Decision No. 816 (Sept. 1968), the Connecticut Board, including sergents in a unit of policemen, held that the statutory criteria do not necessarily apply to police and fire departments. This means that "higher supervisory positions shall be included in the unit in police and fire departments than in other departments."

Since law enforcement personnel are excluded from the definition of employees within the meaning of the Wisconsin Municipal Employee Relations Act, the Wisconsin Commission held that it has no jurisdiction to conduct an election among them. Waukesha County, Decision 9216 (1969). However, in the same case, the Commission noted that law enforcement personnel

are permitted to proceed to fact finding and held that if, in a petition for fact finding, questions arise concerning the authenticity of figures in determining a majority, the appropriateness of a unit, or the eligibles therin, the Commission would determine such issues and certify the results.

The Wisconsin Supreme Court affirmed a Wisconsin Employment Relations Commission ruling that city attorneys have the privilege to organize and affiliate with an organization of their own choice. The Commission rejected the executive-supervisor-confidential exclusionary argument because the management and labor relations information available to the attorneys did not directly apply to relations between the city and the attorney association. City of Milwaukee v. Wisconsin Employment Relations Commission. 168 N.W. 2d 809, 71 LRRM 2314 (Wis. 1969).

In Southwestern Michigan College and Southwestern Michigan College Education Association, 282 GERR B-6 (1969), the Michigan Employment Relations Commission affirmed a trial examiner's finding that college department chairmen and directors of the Health and Athletic Departments were nonsupervisory employees and should be included in a bargaining unit with other teaching personnel. Although the chairmen and directors participated in the interviewing and evaluation of members of their departments as to their teaching ability, their recommendations were generally not accepted without further investigation or consideration by the Dean and could not be considered "effective." The existence of periodic or occasional evaluation was not a sufficient basis for determination that they were supervisors.

The Wisconsin Employment Relations Commissions, in University of Wisconsin-Madison, Decision No. 9261-A (Sept. 1969), held that neither teaching assistants nor their designated representative have access to the provisions and procedures established in the State Employment Relations Act because teaching assistants are in the unclassified service of state employment, and the act covers only persons in the classified service.

The Michigan Employment Relations Commission, however, ruled in Wayne State University, 330 GERR B-1 (1969), that an ad hoc group of student assistants and technicians employed by Wayne State University qualified as a "labor organization" and thereby was covered under the state's public employee bargaining law. But the Commission dismissed the group's petition for a representation election among fifty-four clerical employees on the ground that the appropriate unit should include all 1,500 student assistants employed by the University.

Faculities and nonteaching professionals in colleges and universities are organizing to a greater extent, and the laws guaranteeing employee rights are extended to such employees in higher education in some states, notably Massachusetts, New Jersey and New York. The primary representation issues which have arisen in higher education cases are (1) should teaching and nonteaching professionals be combined in one professional unit, or should they be placed in two separate units; and (2) should the employees on each campus constitute a separate unit, or should the appropriate unit be a multicampus, statewide unit.

In its first representation decision, the New Jersey Public Employment Relations Commission found appropriate a unit at each of six state colleges rather than a unit of all colleges combined. This decision was predicated upon a finding that the employees looked to the individual college for their day-to-day supervision, each college affected the tenure of its staff and governed its working conditions, and there was a measure of local autonomy in each of its state colleges. In addition, the Commission established a unit of teaching, research, academic support and administrative personnel, excluding managerial executives and supervisors. New Jersey State Colleges, 293 GERR E-1 (1969).

In State of New York and State University Federation of Teachers 312 GERR B-11 (1969), the New York Public Employment Relations Board's Director of Representation determined that a single multicampus, statewide unit of State of New York University professional employees was appropriate, rejecting the contention of the petitioning employee organization that a "dual unit" should be devised which would permit (1) negotiation of local issues at each campus; and (2) the combining of local negotiating units into a statewide unit to deal with issues common to all campuses. In addition, it was held that the Faculty Senate could participate in the election as an employee organization, leaving the question of whether the Senate was employer-dominated for resolution under the new "improper practices" machinery of the Taylor Act. Finally, the unit included both faculty and nonteaching professionals. Affirmed by the New York Public Employment Relations Board, 323 GERR B-4 (1969).

Unlike the New York and New Jersey agencies, however, the Massachusetts Labor Relations Commission, in Boston State College, 321 GERR B-1 (1969), determined that professional employees should be represented in separate academic and nonacademic units because of their distinguishing characteristics, a position in agreement with the employer and contrary to that taken by the two employee organizations involved.

A decision by the New Jersey Public Employment Relations Commission directing an election in a bi-state Port Authority commenced a jurisdictional entanglement which was resolved by the Pennsylvania Supreme Court in Coyle v. Port Authority Transit Corporation, 263 A. 2d 739 (Pa. 1970). The court reversed a Pennsylvania trial court which had accepted jurisdiction of an action by one union to require the Port Authority to bargain with it rather than the union certified by the New Jersey Public Employment Relations Commission. The Pennsylvania court held that New Jersey, where the principal offices,

maintenance center, and eight of the twelve sub-stations were located, where all employees reported to work, and where 95% of the employees actually worked, had jurisdiction; hence, it vacated the order of the trial court.

2. Legality of Exclusive Recognition

There were several significant state supreme court decisions involving the legality of exclusive recognition, with a mixed conclusion on the question of whether the majority employee representative could, or should, act as the exclusive bargaining representative for all employees in the unit.

The Wisconsin Supreme Court upheld the concept of exclusive representation in Board of School Directors of Milwaukee v. Wisconsin Employment Relations Commission, 42 Wis. 2d 637, 168 N.W. 2d 92, 71 LRRM 2607 (1969). It agreed with WERC that an employer may grant certain privileges to an organization representing a majority of employees and deny the same privileges to a minority organization without committing unlawful interference, restraint, or discrimination in violation of the Municipal Employee Relations Act. The test applied in determining the legality of the privileges, as stated by WERC and affirmed by the Supreme Court is:

> "(T)hose rights or benefits which are granted exclusively to the majority representative, and thus denied to minority organizations, must in some rational manner be related to the functions of the majority organization in its representative capacity, and must not be to entrench such organization as the bargaining representative."

In applying this test, the court reversed the WERC determination that an exclusive checkoff in favor of only the majority representative was permissible as one of the privileged acts of cooperation to which the majority representative is entitled. The court could find no relationship between the granting of exclusive checkoff and the functioning of the majority organization in its representative capacity, and held that "if check off is granted for any, it must be granted for all." Additionally, the court, unlike WERC, found it was not a prohibited practice for an employer to deny minority unions the privilege to express their views at a public hearing. The court's rationale was that such appearances would constitute "negotiations" and the majority representative has exclusive privileges in this area. Finally, the court agreed with WERC that names, addresses, salaries, and working conditions of public employees are a matter of public record, so that the minority organization as well as the majority organization has access to such records.

In Dade County Classroom Teachers Association, Inc. v. Dade County Education Association, 225 S. 2d 903 (Fla. 1969), the Florida Supreme Court, applying a peculiar combination of constitutional and statutory provisions, held that representatives of public employees may not be accorded exclusive representation. Voluntary dues checkoff and use of school facilities were found to be permissible, but such privleges granted one representative must also be granted to all other collective bargaining representatives.

3. Bar to an Election

Many states, including Massachusetts, Michigan, New York, Oregon and Wisconsin, have recognized circumstances where an existing collective bargaining agreement bars a new election unless the election petition is filed at a proper time. However, an oral commitment to extend an expired collective bargaining agreement cannot bar a representation election requested by a rival organization, according to the Massachusetts Labor Relations Commission in School Committee of Springfield, 328 GERR B-7 (1969). Any such agreement should be in writing, it stated, in order to attain a stability of the employer-employee relationship.

Pending fact-finding proceedings were recognized as a bar to an election by the Wisconsin Employment Relations Commission in City of Milwaukee (Bureau of Municipal Equipment), 321 GERR B-5 (1969).

4. Bargaining Unit Issues

Many significant unit determinations of 1969-70 occurred under recent laws granting organization and bargaining rights to state government employees.

In Civil Service Employees Association v. Helsby, 305 GERR B-9 (1969), the New York Court of Appeals upheld a determination of the New York Public Employment Relations Board that five units based upon occupational groupings are most appropriate bargaining units for state employees, holding that it was not arbitrary or capricious or a deviation from statutory standards. The five units of state employees in which elections were directed by the New York Public Employment Relations Board were a security unit, an operational unit, an institutional unit, an administrative services unit, and a professional, scientific and technical service unit.

In its first certification case, the Vermont State Employees Labor Relations Board avoided "over-fragmentation" in creating a single statewide unit of all state employees, except employees at the state colleges, while leaving the door open to the possible approval of some fragmentation. Using the concept of over-fragmentation and the fact that "state officials at the unit level have power to take positive action on matters subject to negotiation," the Board, in In Re Vermont State Employees Association, Inc., October 7, 1969, granted the Association the unit it requested. The Board conceded that severing supervisory employees from non-supervisory employees would be more appropriate than a single unit, but the combined unit was not inappropriate, and the Association sought a combined unit.

5. Other Representation Issues

Several questions have arisen concerning the legality and propriety of representation of law enforcement personnel. The Michigan Court of Appeals, in City of Escanaba v. M.L.M.E., 19 Mich. App. 273, 330 GERR E-4 (1969),

uphold the Michigan Employment Relations Commission in its determination that municipal policemen are "public employees" and may therefor be represented in collective bargaining by a labor organization (Teamsters) composed of private as well as public employees.

In Medford v. Local No. 446, 42 Wis. 2d 581, 167 N.W. 2d 414 (1969), the Wisconsin Supreme Court held that law enforcement employees may be represented by an international union in fact-finding proceedings as well as in conferences and negotiations as held in a prior case. Although it is now clear that an international union may appropriately represent law enforcement employees in Wisconsin, the question of whether a municipality may prohibit law enforcement personnel from joining an international union remains open. The Municipal Act does not grant law enforcement personnel the right to join a labor organization. The question as to whether law enforcement personnel have a constitutionally protected right to join a union was raised in the Medford case, but the Supreme Court stated that a consideration of this issue was not necessary to the decision.

A finding that deputy sheriffs are public employees was made by the New York Public Employment Relations Board in County of Ulster, 337 GERR D-2 (1970). In the same case it was concluded that the county and the sheriff (an elective, constitutional office) were joint employers, since the salaries of the deputy sheriffs are paid by the County Board, but the non-economic terms and conditions of employment were determined by the sheriff.

The Michigan and Wisconsin labor agencies both determined in 1969 that payment of municipal employees from funds contributed by the federal government does not deprive these employees of right guaranteed by state law.

The Michigan Employment Relations Commission held that high school ROTC instructors whose salaries were partially reimbursed by the Army were eligible for representation. Detroit Federation of Teachers and Detroit Board of Education, 302 GERR B-4 (1969).

The Wisconsin Employment Relations Commission held that teachers and social work aides of the Milwaukee School Board whose salaries were paid from federal and state funds were entitled to representation. District Council 48, AFSCME and Milwaukee Board of School Dir., 301 GERR B-3 (1969).

The policies of the New York City Office of Collective Bargaining (OCB) and the rulings of the AFL-CIO Internal Disputes Plan clashed in Local No. 3, IBEW and City of New York and District Council 37, AFL-CIO, 305 GERR B-4 (1969). The OCB declined to set aside a union's certification as bargaining representative despite an AFL-CIO Internal Disputes ruling that it had engaged in "raiding" against a rival AFL-CIO union. OCB held that the statutory right of employees to bargain through representatives of their own choosing was paramount to the no-raiding pact between the AFL-CIO affiliates, and that this right must be recognized and effectuated since the majority union still desired to represent the employees dispite the AFL-CIO ruling.

It should be obvious from the examples given above, as well as from experience of recent years, that state and local governments should act to establish appropriate representation machinery to determine the wishes of employees and to resolve supervisory questions, unit determination questions, and the like. Experience has demonstrated that such machinery is essential if disputes over representation are to be resolved peacefully. Many strikes occurred in 1969 as a result of disputes over recognition and representation. Such disputes can have a national impact, such as occurred in Memphis, Tennessee, and in the strike involving Charleston, South Carolina's public hospitals and hospital workers. In the opinion of the Committee, necessary representation machinery should be established by all states so that there should be no need for an employee organization in public employment to engage in a work stoppage over issues of recognition and representation. The question to be faced in the 1970's is whether the states will assume their rightful responsibility in this area or whether, because of a lack of state action, it will become necessary for Congress to assume this burden at the national level.

UNFAIR LABOR PRACTICES

1. Conduct of Bargaining

During the last year, several cases involving the legal effect of activities occuring during collective bargaining were decided.

The clash of individual v. collective contracts was faced by the Michigan Employment Relations Commission in two cases.

In Bullock Creek School District of Midland County, 311 GERR F-1 (1969), the Commission, noting that an amendment to the School Code adopted after PERA refers to individual contracts, held that the issuance of individual contracts to teachers while bargaining was in progress is not per se a breach of the school district's bargaining obligation. A factor in decision was the School Code provision that in the event a collective bargaining agreement with increased benefits for teachers is subsequently entered into, the collective bargaining agreement modifies the individual contract. Affirmed on rehearing, 1970 MERC L. Op. 112.

However, when the submission of individual contracts to teachers was coupled with a statement that teachers who sign individual contracts would receive fringe benefits while those who refused would not, the school board action was illegal. Gibraltar School District, 345 GERR B-4 (1970).

In a similar case, a Wisconsin Employment Relations Commission trial examiner found that a school district interfered with teachers' organizing rights by requiring them to sign individual contracts which contain negotiable salary items but which did not state that such items would be superseded by any subsequent agreement negotiated by the teachers' association. Dimbrook Education Association 343 GERR B-1 (1970).

The uncertainty of the impact which a pending lawsuit may have on a public employer was held by the Wisconsin Employment Relations Commission not to excuse the employer from bargaining. A lawsuit was pending in the circuit court on the validity of a 1967-69 contract. The city refused to bargain on the ground that it could not determine until the lawsuit was adjudicated its financial liabilities which could have a substantial impact on its 1970 contract offer. The Commission held that the employer could not postpone bargaining by reason of the pending court action, noting that "there is nothing to prevent the potential impact...from being considered by the ...employer and the offers it may make to the proposals of the petitioner." City of West Allis, 355 GERR B-6 (1969).

The Michigan Employment Relations Commission ruled, in a two-to-one decision, that a public employer is not excused from bargaining even though its employees are engaged in a strike violating state law. One Commissioner concluded that to suspend an employer's duty to bargain during a strike would add a penalty to those provided by the legislature for violation of PERA's anti-strike provision. A second Commissioner placed emphasis on the primary purpose of PERA to promote prompt settlement of labor disputes, arguing that suspension of an employer's duty to bargain during a strike would impede, rather than further, resolution of bargaining issues.

Noting the position of the NLRB and the courts, the Chairman dissented, arguing that the duty to bargain was suspended during a strike, and urging that there is a greater basis for a public employer's release from its obligation when public employees violate the no-strike provision of the statute than there is of a private employer in breach of a contract by a union. Saginaw Township Board of Education, 339 GERR B-5 (1970).

The Connecticut State Labor Relations Board held that rejection by a union membership of a contract after having adopted each provision of the contract separately was a refusal to bargain. Town of Windsor, 324 GERR B-4 (1969).

2. Mandatory Subjects of Bargaining

a. Union Security

In Foltz v. Dayton, 22 Ohio Misc. 27 (1969), the Common Pleas Court of Montgomery County held that an authorization in a collective bargaining contract between a union and a city for the involuntary checkoff of employee wages to collect agency shop fees was invalid because it was in violation of Ohio law and because a checkoff of the union dues by a city serves no public purpose and therefore is ultra vires.

A similar result was reached in Civil Service Personnel Association v. Ballard (Summit County Ct. Com. Pleas), 344 GERR B-1 (1970), where an agency shop clause was found invalid because it was contrary to the state and federal constitutions.

In Oakland County Sheriff's Department, 227 GERR F-1 (1968)(1969 Report, p. 65), the Michigan Employment Relations Commission held the agency shop to be legal, thus a mandatory subject of bargaining. Several circuit court cases, including Smigel v. Southgate Community Schools, 70 LRRM 2042 (Wayne County Cir. Ct., 1968), (1969 Report, p.66), agreed with the Commission. Now, the Michigan Court of Appeals has approved the concept of an agency shop, but held that the service fee may not exceed "a non-member's proportionate share of the cost of negotiating and administering this contract." The case was remanded to the circuit court to determine the correct amount of the agency shop service fee. Smigel v. Southgate Community School District, Case No. 7298, 341 GERR B-9 (1970).

b. Grievance Arbitration

In Rockland Professional Fire Fighters Association v. City of Rockland, 261 A. 2d 418 (Me. 1970), the Maine Supreme Court held that although the State's Fire Fighters Arbitration Law directly authorizes only binding arbitration of impasses, its grant of "other recognized rights of labor" included the right to negotiate binding arbitration of grievances.

In its first "Spielberg doctrine" case, the Michigan Employment Relations Commission, departing from the NLRA rule, refused to entertain a complaint involving a contract interpretation, on the ground that the union had refused to use the contract grievance procedure. The Commission recognized that there will be situations involving contract construction and alleged unfair labor practices of which it would take jurisdiction, "(b)ut employees should make every effort to resolve issues primarily contractual under the contract dispute settling procedure." City of Flint, 345 GERR C-3 (1970).

c. Miscellaneous

The conflict between a public employment relations act and a home rule charter was considered by the Michigan Employment Relations Commission in City of Flint, 347 GERR C-2 (1970). A city charter provided a uniform pay plan for all city employees. A union representing employees in a municipal hospital requested that the city bargain on wage rates, with the understanding that agreed changes would be effectuated without submission to the voters. The city maintained that the charter provision could not be changed through collective bargaining, but stated it would recommend to the voters any changes agreed to by city and union. The Commission held that PERA prevailed over the home rule charter, noting that:

> "(W)ere (the city's) position to prevail, the Home Rule City could diminish the scope of, and even eliminate, the requirement of PERA to engage in collective bargaining, by adopting, through vote of the electorate, charter provisions detailing terms and conditions of employment ordinarily found in collective bargaining contracts."

3. Strikes

a. Sanctions

New York's Taylor Act provides that PERB shall determine whether a union has called, tried to prevent, or has made or is making good faith efforts to terminate, a strike. While the statute does not authorize PERB to determine whether the public employer caused or contributed to the strike, PERB has applied this test. Thus, PERB refused to order forfeiture of dues deduction privileges because of a city's provocation in refusal to bargain in good faith even though the union had breached the Taylor Act. City of Troy Uniformed Firemen's Association, 323 GERR B-2 (1969).

But in Civil Service Employees Association, Inc., 298 GERR B-6 (1969), PERB ruled that the employees' association was responsible for a strike by its members, notwithstanding the fact that the organization did not formally authorize the strike pursuant to the provisions of its constitution and by-laws.

In National Education Association, Inc. v. County Board of Public Instruction, 299 F. Supp. 834 (D.C., Fla. 1969), the court ruled that a Florida school board violated state law and the Fourteenth Amendment by making the reinstatement of teachers who had resigned en masse contingent on the payment of a fine. The court stated that the teachers had effectively resigned and were legally free not to return to the classroom, and hence the school board was not free to condition their return on payment of a fine.

In Michigan Civil Service Commission v. AFSCME Local 1342 (Wayne County Cir. Ct.), 329 GERR B-1 (1969), the court vacated a Michigan Civil Service Commission order revoking dues checkoff privileges of the AFSCME local for a strike at a Liquor Control Commission warehouse. The suspension of dues deduction was invalid because there was no provision for such a penalty in the Civil Service Commission Rules.

b. The Right to Strike

The courts of appeal of California in two cases held that employees do not have a right to strike in the absence of specific legislation, such strikes being prohibited by the common law. Almond v. County of Sacramento, 276 A.C.A. 51, 315 GERR E-1 (1969); City of San Diego v. AFSCME Local 127, 352 GERR E-1 (1970).

In the most interesting case of the year involving strikes, the Indiana Supreme Court declared, in a three-to-two decision, that the common law prohibits strikes by public school teachers, and upheld a contempt of court action against the Anderson Federation of Teachers for violation of a restraining order issued to avert a walkout. The majority opinion cited the overwhelming weight of authority in the United States. In a vigorous and scholarly dissent, two judges held that public employees have a right to strike until and unless the state legislature enacts a comprehensive labor relations statute. Anderson Federation of Teachers v. School City of Anderson, 251 N.E. 2d 15 (1969).

In Garavalia v. City of Stillwater, 168 N.W. 2d 336, 71 LRRM 2144 (Minn. 1969), the issue was whether the collective bargaining statute or the Veterans' Preference Act prevailed. The Minnesota Supreme Court held that firemen who strike in violation of the Minnesota statute were automatically terminated by operation of law, were not discharged by the city, and were therefore not entitled to hearing prior to discharge as guaranteed by the Veterans' Preference Act.

c. Federal v. State Jurisdiction of Public Employees Strikes

In City of Evanston v. Buick, 73 LRRM 2290 (1970), the United States Court of Appeals for the Seventh Circuit held that public employees may not rely on the Thirteenth Amendment's general prohibition of involuntary servitude or on other constitutional provisions to remove a case requesting a temporary injunction against a strike from a state court to a federal court.

4. Amnesty Agreements

The courts of three states upheld the power of public employers to negotiate binding strike settlement agreements.

The Pennsylvania Supreme Court based an increase in teachers' salaries negotiated during a strike on an amnesty law applicable to teachers enacted by the legislature in 1968. The increase, the court held, did not violate the anti-strike act because of the 1968 statute. Legman v. School District of the City of Scranton, 345 GERR B-1 (1970).

Circuit courts in Wisconsin and Michigan upheld amnesty agreements negotiated during a strike, in the absence of affirmative legislation. In Durkin v. Board of Police and Fire Commissioners, City of Madison, 331 GERR B-1 (1969), the circuit court held that the agreement prevented a city from instituting disciplinary action against strikers. A Michigan court, in State, County & Municipal Local 214, International Brotherhood of Teamsters v. City of Dearborn (Wayne County Cir. Ct.), 304 GERR B-2 (1969), enjoined a city from suspending a steward contrary to the settlement agreement.

Respectfully submitted
Richard L. Epstein, Co-Chairman
John Paul Jennings, Co-Chairman
Robert G. Howlett, Co-Chairman

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1. A new Hawaiian statute was passed by the legislature, but had not been signed by the governor at the time the Report was written.

2. The statute is ambiguous as to whether both mediation and fact-finding are conditions precedent to arbitration or only mediation. The Michigan Employment Relations Commission has expressed the opinion that only pre-arbitration mediation is required.