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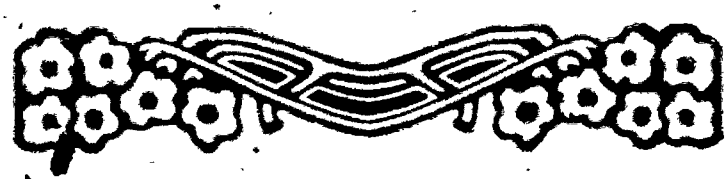
ABSTRACT

This book serves as a practical guide to be used by public agencies that have entered into collective bargaining with their employees and must therefore face the possibility of employee strikes and acts of militancy. Seven major areas are addressed: distinctions between public sector and private sector strikes; the use of interest arbitration as an alternative to strikes; major causes of strikes; warning signs of impending strikes; measures to take for avoiding strikes; legal actions that can be taken before, during, and after strikes; and methods for organizing strike plans. (Author/PGD)

COUNTERING STRIKES AND MILITANCY IN SCHOOL AND GOVERNMENT SERVICES



A PRACTICAL GUIDE FOR COPING WITH PUBLIC EMPLOYEE STRIFE

BY
RICHARD NEAL

COUNTERING STRIKES AND MILITANCY IN SCHOOL AND GOVERNMENT SERVICES

By

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ABOUT THE AUTHORS

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INTRODUCTION

Until one has experienced a labor strike in a school district or other government agency, it is difficult to appreciate the degree of disruption which takes place. The personnel and equipment responsible for the efficient operation of the agency are often taken for granted, until they turn up missing during the strike. The absence of one skilled worker in a crucial position (for example, the telephone operator at the main telephone switchboard) can create havoc where there is normally order. Hundreds of such workers (or even a few, in some cases) missing from their jobs can make the continued operation of the government agency impossible, unless thorough counter measures have been developed.

1. An Overview of the Book

This book addresses the following major areas:

a. The fundamental differences between strikes in the private sector and strikes in the public sector

b. Interest arbitration as an alternative to the strike

c. The major causes of public employee strikes

d. The telltale signs of a strike

e. What can be done to avoid strikes by public employees

f. Legal actions which can be taken prior to, during, and after the strike

g. How to organize a strike plan

2. Many Questions Answered

This book is a practical guide for how to cope with public employee strikes and acts of militancy. Specifically, the book answers a long list of questions which must be dealt

with when a government agency enters into collective bargaining with its employees and thereby automatically subjects itself to the possibility of a labor strike.

3. Threshhold Questions

Before an agency actually prepares for a strike, a number of threshhold questions should be examined:

a. How prevalent are public employee strikes?

b. Why are strikes in the public sector less tolerable than strikes in the industrial sector?

c. Is interest arbitration a viable alternative to the strike?

d. How do impasses, as possible precursors of a strike, develop and what can be done to break an impasse?

e. What are the major causes of strikes and what can be done about them?

f. What are some preemptive measures which can be taken to avoid strikes?

g. What are the major legal questions which must be addressed in the event of a strike?

4. Non-Legal Questions

As a strike becomes likely, a number of non-legal questions arise, the answers to which being imperative:

a. What is the attitude of the management staff regarding strikes by public employees? Can the managers be relied upon to carry on during a strike?

b. What must be done to assure the safety of those persons who remain on the job?

c. What must be done to assure the safety of the agency's clientele, for example, patients in a public hospital and students in a public school?

d. What must be done to protect agency property and equipment from sabotage and vandalism?

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o. What are the non-essential tasks of the agency which can be dispensed with temporarily during the strike, if necessary?

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u. If the agency is closed, should non-strikers be paid or laid off?

v. What role does the press and media play during a strike? How can they be helpful?

5. Legal Questions

A strike by public employees immediately brings to the surface a host of important issues which require legal advice:

a. What is a labor strike? Mass resignation? Picketing on company time? Slowdowns? Work-to-the-rule? Mass sick-outs? Obstructive picketing? Contract-stacking? Sit-downs? Hit-and-run?

b. If a governing body wishes to stop a strike, what legal actions must be taken?

c. What are the chances of a court not issuing an injunction?

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h. Can citizens sue the union for damages?

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kk. What actions are enjoinable?

ll. What powers does the judge have other than to issue an injunction?

mm. What legal action, if any, is required to set special pay rates for strike breakers?

nn. Exactly what procedures must be followed to serve TROs?

oo. Does employer property insurance pay off if damaged during a strike?

pp. Are financial penalties deductible from federal income tax?

qq. What specific actions should a governing body take to keep the agency running during a strike?

All of these questions and more are answered in this book.

CHAPTER I

THE INCIDENCE OF GOVERNMENT STRIKES

1. Just a sampling

From 1967 to 1980 there were several thousand public employee strikes throughout the United States. Following is a sampling of those strikes, each of which is documented:

1967 - On January 5 and 6, over one-half of the 834 Camden, New Jersey public school teachers called in "sick," closing five of the city's public schools.

1968 - In the spring, 50 high school students were arrested for vandalism while their New Haven, Connecticut school teachers were out on an illegal strike.

1969 - Sacramento, California: 127 social workers went out on strike because their county employer refused to bargain with them. They were fired.

1970 - In April, Montana experienced its first public employee strike when most of Butte's 500 public school teachers walked off the job.

1971 - In the spring, 2,000 San Francisco public school teachers went on strike because the city school board "refused to negotiate seriously with them."

1972 - The faculty of the Seattle Community College went on strike in February and closed the college.

1973 - In March, Oregon experienced its first strike when the Hillsboro public school teachers left their jobs, closing the schools for three days.

1974 - Sixteen Baltimore City jail guards were arrested while on strike for disorderly conduct.

1975 - During the week of August 19, striking San Francisco policemen were on a rampage of vandalism and sabotage.

1976 - October 6: Kansas City officials charged that some of the 92 fires that broke out during the three-day fire fighters' strike were deliberately set by striking firemen.

1977 - In Atlanta, Georgia, Mayor Maynard Jackson said striking city workers had turned violent, attacking non-strikers.

1978 - Just before Christmas, 50 Newark, New Jersey police cars had their windows smashed. Allegations were that it was done by the striking policemen.

1979 - On July 8, about 150 striking employees of the Tiffin Mental Health and Mental Retardation Center (Toledo, Ohio) barricaded center entrances.

1980 - On the third day of a sanitation strike, four striking city sanitations workers were charged with fire bombing a garbage truck manned with non-union personnel.

1981 - Philadelphia, October 30, according to an Associated Press Report, children finally traipsed back to school "a-skippin' just like they should," one grinning grandfather said, "and tired of watching 'Days of Our Lives' on TV."

That was not the only soap opera Philadelphia school children viewed almost to the edge of winter as they waited out a 50 day strike by the city's teachers.

They also watched a political sit-com that featured:

* A City Council session that broke up in a City of Brotherly Love brawl with councilmen throwing ice water at each other, engaging in duels with the hearing stenographer's tripod and finally just decking one another.

* A mayor who used a confrontation with striking teachers as a television opportunity to quote Rudyard Kipling about the virtue of

keeping your head while all those around you are losing theirs, only to watch as his driver lost his and started fighting with a teacher

* Clergymen who blocked downtown traffic to get the mayor's attention and teachers who marched on Philadelphia's historic City Hall chanting: "Mayor Green, Mayor Green, the kids are saying you've been mean"

The fall season's unusual version of the Philadelphia Story ground to an intermission, but probably not a conclusion in mid-week with the teachers accepting a court order to return to school just hours before labor union leaders threatened to close down the town in a one-day general strike.

Almost no one in Philadelphia was laughing. And almost no one thought the intermission had solved anything more than getting the kids back to school for the time being, more than seven weeks late.

At the interlude, the city still faced a $236 million school-budget deficit, a tough teachers' union accustomed to winning showdowns, a beleaguered mayor whose critics think he is using the crisis to prove his political manhood, and a real-world 1981 certainty that financially troubled cities like Philadelphia have little hope of running to either state or federal governments for aid.

2. Strikes not new

Strikes by teachers and other public employees are not as recent vintage as some may think. Although there are few official records of strikes prior to 1940, there are scattered reports of strikes by public employees from the turn of the century, including the infamous strike in 1919 by the Boston police. After 1940, the U.S. Bureau of Labor

Statistics began to keep records. A summary of those statistics is contained in this chapter.

Over the years there have been strikes by city bus drivers, grave diggers, draw bridge operators, physicians, graduate assistants, air control operators, prison guards, policemen, trash collectors, social workers, firefighters, school bus drivers, nurses, highway toll-takers, mechanics, custodians, sewer inspectors, cafeteria workers, and policemen.

Strikes by teachers have taken place in the smallest and the largest school districts in the nation. On Matinicus Island, Maine, the one-man teaching staff walked off the job, leaving 16 pupils. During the same school year (1968), some 50,000 teachers walked out of their schools in New York City, closing them to a million children.

On Matinicus Island, the 109-year-old, one room school house, 20 miles off the coast of Maine, reopened when a new teacher was hired and he crossed the one-man picket line set up by the striking teacher. The striking teacher walked off the job to protest "deplorable working conditions." The strike, he said, "put some grease in the gears," to have a new school building built for $30,000 and improve working conditions for the teacher.

In New York City, 50,000 teachers went on strike the same school year for similar reasons. This particular strike lasted 17 days and was executed to improve salaries and working conditions for teachers.

Since that time, militancy has escalated and the whole pace of negotiations has quickened. Since these two strikes, hundreds of other strikes by teachers have been held, hundreds of demonstrations have been organized, states have passed laws in an attempt to bring order out of chaos, school boards have been thrown out of office, teachers have been fined and jailed.

It's difficult to predict what the future may hold for public employee strikes. Will public employees become more demanding and militant as they face reductions in force and the ravages of inflation? Or, will public employees, out of fear of alienating the public, become more docile?

3. Strikes down

The number of public employee strikes is decreasing, according to the Bureau of Labor Statistics. In final figures for 1980 released in January 1982, the Bureau reported that the total number of work stoppages in government during 1980 was 536, down from 593 in 1979. Strikes against local governments decreased as well, dropping from 536 in 1979 to 493 in 1980. According to a report in NLC PEERS, a newsletter of the National League of Cities, preliminary figures for the first nine months of 1981 indicate public employee strikes are down 15 percent from the same period of 1980.

The Bureau of National Affairs, which has tracked strikes in education this year, says teacher job actions are down nearly 50 percent. Based on a survey of subscribers to its Government Employee Relations Report, BNA predicted that the duration of municipal strikes this year probably will be shorter. According to the BNA survey job security and reductions in force are the key issues of concern to both management and union respondents. Strikes and other job actions were priority concerns of only 27.3 percent of state and local respondents.

Labor disputes in education, according to the Bureau of Labor Statistics accounted for more than half of all government strikes in 1980, but the number decreased from the 1979 figure. Strike activity among state government workers also decreased sharply. Although the number of strikes in local government decreased, on the average those which did occur involved more persons than in 1979.

Pennsylvania sustained the most government strikes of all the states with 82, 40 of which were teacher strikes. Michigan, which had been the strike leader for the previous two years, dropped to second place in 1980 with 75 strikes, 48 by teachers. Ohio was third with 60 strikes.

4. Why the decline in strikes?

Not only were strikes on the decline in 1980 and 1981, but so was total union membership down in the public sector. Some blame the recession for the decline, but that is an assumption since during the recession of 1975, strikes had reached an all time high. Some experts claim that President Reagan's firing of thousands of striking air traffic controllers and the overwhelming public support for his action has sent a message to union leaders. As a result, the total number of strikes for 1981-82 may be only half the number projected.

Terry Herndon, the Executive Secretary of the National Education Association, claims that the air traffic controllers' debacle is not the reason for the decline in public school strikes. According to press reports, Herndon claims strikes are down because of Reagan's "attack on public education. It has healed some rifts. School boards and teachers share a commitment to public education. When times are good for public education, we fight over things like should salaries be $17,000 or $17,200. Well, in the context of the future of public education, that's not an important question. The adversity that faces public schools makes all the parties say we have enough troubles without fighting each other."

PUBLIC EMPLOYEE STRIKES 1940 - 1958[1]

Year	State Government[2]	Local Government[2]	School Districts[3]	Total
1940[4]			2	2
1941			1	1
1942		39	2	41
1943		51	2	53
1944	2	34	4	40
1945		32		32
1946	1	61	14	76
1947		14	20	34
1948		25	10	35
1949		7	5	12
1950		28		28
1951		36	6	42
1952		49	7	56
1953		30	1	31
1954	1	9	2	12
1955	1	16	1	18
1956		27	5	32
1957		12	2	14
TOTALS	5	470	84	559

[1]The Bureau of Labor Statistics has published data on strikes in government in its annual reports since 1942. Prior to that year, they had been included in a miscellaneous category--other non-manufacturing industries. From 1942 through 1957, "government," as used in work stoppage statistics, was confined to administration, protection, and sanitation services. Following the Federal Government's Standard Industrial Classification Manual, 1942 edition, establishments owned by the government were classified in their appropriate industry; publicly owned transportation and other utilities were included in transportation, communication, and other public utilities; public schools and libraries were included in education services. Beginning with strikes in 1958, the Bureau adopted the more detailed classification of "government" provided in the 1957 edition of the Standard Industrial Classification Manual, and all government stoppages, including municipally operated utilities, transportation, and publicly owned schools, were brought together under one classification. The Bureau was able to reconstruct the record of strikes in publicly owned utilities, transportation, and schools back to 1947, but a complete restoration to conform to current definitions was not attempted.

[2]Work stoppages: Government Employees 1940-61, April 1963 U.S. Bureau of Labor Statistics, Report #247.

[3]Work Stoppages and Teachers: History and Prospect, Ronald W. Glass, Monthly Labor Review, August 1967.

[4]For a study of government strikes prior to 1940, see David Ziskind, One Thousand Strikes of Government Employees (New York, Columbia University Press, 1940).

PUBLIC EMPLOYEE STRIKES 1958-80[5]

Year	Federal Government	State Government	Local Government	School Districts Teacher	School Districts Non-Teacher	Totals
1958	0	1	14	0	0	15
1959	0	4	19	2	3	28
1960	0	3	30	3	2	38
1961	0	0	27	1	1	29
1962	5 (4)*	1	20	1	5	33
1963	0	2	25	2	5	34
1964	0	4	28	9	9	50
1965	0	0	37	5	4	46
1966	0	9	103	30	24	166
1967	0	12	93	76	13	194
1968	3	16	147	88	24	278
1969	2	37	189	183	47	458
1970	3 (4)*	23	234	152	35	447
1971	2 (4)*	23	169	135	39	368
1972	0	40	248	87	100	475
1973	1 (4)*	29	240	117	107	494
1974	2 (5)*	34	215	133	77	461
1975	0	32	228	218	59	537
1976	1	25	214	138	49	427
1977	2 (1)*	44	256	111	81	494
1978	1	45	310	125	139	620
1979	0 (1)*	57	355	181	133	726
1980	1 (9)*	45	261	232	53	592
Totals	23	487	3,462	2,029	1,009	7,010

[5]Bureau of Labor Statistics Bulletin 2110, Work Stopages in Government 1980.
*"Analysis of Work Stoppages in the Federal Government, 1962-81", Eugene H. Becker, Monthly Labore Review, August, 1982

CHAPTER II

GOVERNMENT AND INDUSTRIAL STRIKES: A REAL CONTRAST

Collective bargaining as practiced under the various laws applicable to the private sector, such as the National Labor Relations Act, cannot be applied to public sector employment relations without serious damage to the social and economic fabric of the entire nation. These labor relations laws, of limited success in the private sector, would be a disaster in the public sector.

The fundamental reason that the private industry model for collective bargaining cannot be transferred intact to government services is that the two sectors are not comparable. Whereas the private sector is essentially a private economic matter between producer and specific consumers, government is essentially a public political matter between the government and citizens generally. Additionally, many government services are humane in nature; whereas, most private enterprise is based upon mutual gain. This fundamental incomparability of the private and public sectors is the basis for all of the many specific reasons that industrial labor-management collective bargaining cannot be transferred successfully to the public sector.

The National Labor Relations Act defines a private employer in broad terms delibertately so that the "rules of agency" apply. Thus, the term "employer" in private industry applies not only to the areas of management normally understood to be the employer group, but also to agents acting on behalf of the employer. Section 2(2) specifies that the Act ". . . shall not include the United States or any wholly owned government corporation, or any Federal Reserve Bank, or any state or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual. . . ."

This prohibition against applying the NLRA to the public sector was placed into the law for many reasons, not the least of which is that it was felt that the federal government had no constitutional right to insert itself into the labor relations affairs of state and local governments. But beyond that reason, there are many reasons why, then and now, the NLRA would be inappropriate for the public sector.

In contemplating the transfer of the NLRA to the public sector, or the establishment of any other collective bargaining law in the public sector, the following points need to be considered.

Right or wrong, the NLRA is based on a concept that there should be an economic balance between company owners and company employees. The Act itself is proof that the lawmakers felt that collective bargaining is the way to achieve this economic balance. The Act is based on an assumption that both the company owners and the unionized company employees need the cooperation of each other in order to survive. In the event of labor strife and the employees go on strike or the company locks the employees out, the Act assumes that the parties will be forced back together eventually, since the employees need their salaries from the company in order to avoid starvation, while the company needs the employees in order to stay in business and in order not to lose the investments in the company. Although the authors do not accept this basic premise of the NLRA, the fact is that the Act is built on this belief. Any imbalance in the economic force between the parties would be advantageous for one and disadvantageous for the other. For example, if striking employees were given their regular salaries by the government during the strike, there would be an imbalance in the economic power of the parties, in that the employees would have no incentive to return to work, thus placing the company at a distinct disadvantage.

In the public sector, there is no similar situation for two primary reasons:

a. Government cannot go out of business, and government services are required by law. These services are required by law because they are viewed as vital to citizens. No matter how many foolish concessions might be made at the bargaining table, the government agency conducting negotiations cannot, by law, go out of business. Whereas, in the private sector, if a company conducts its labor negotiations in an irresponsible manner, the company will cease to exist. In other words, the market-place is the ultimate curb to wrong decisions in the private sector. There is no marketplace for government decisions.

b. Government services are generally essential and almost always monopolistic. When a government agency is closed down temporarily by an organized union strike, the citizens have nowhere else to turn for government services essential to their needs. In the private sector, however, if one company producing shoes is closed by a labor strike, the consumer simply buys from another company. When a government agency is faced with a shutdown due to a strike by its employees, considerable political pressure is generated on the agency by citizens to keep services operating. The agency, therefore, is faced with two unacceptable choices:

   * Refuse to concede to union demands and run the risk of not delivering essential services to citizens; or
   * Concede to union demands, thus imposing a burden on taxpayers not anticipated and not approved free of duress.

In designing a collective bargaining law for public employees the following points should be considered.

1. Compulsory taxes help unions

In the private sector a labor union can squeeze only so much from an employer, because if the employer is forced to concede too much to the union, the employer will be forced to raise the price of its commodity to the point that it is no longer competitive. In which case, it's only a matter of time before the company and the union (along with all employees) are out of business. Unions of public employees generally don't have to worry about the employer going out of business. Government is in business because there is a law that says it must be in business and it cannot go out of business. For example, every state has a compulsory school attendance law, and every state has a compulsory tax system which supports public education. Every citizen must pay this tax whether he has children or not and whether or not his children attend a public school. Under these conditions there is no voluntary market control over the actions of teacher unions or the employer. Granted, there may be taxpayer resistance to higher taxes, but surely as we will all die, we will all continue to pay taxes. As long as the union knows the employer cannot go out of business, and as long as the employer knows he cannot go out of business, there is no final termination to the irresponsible behavior of either party.

2. The private sector offers more options to the consumer than does the public sector offer to the taxpayer

In private sector transactions, the consumer can make substitutions in his purchases. For example, if grapes have been driven beyond an acceptable price due to unionization of the grape workers, the consumer can substitute some lesser priced fruit. However, when government services have been driven to an unacceptable price by unionization of public employees, the taxpayer has no substitute to choose. The taxpayer's only choice is to petition his government or seek to reduce taxes generally, which might not even solve the specific problem which the taxpayer originally faced.

As a result of the opportunity to make substitute consumer choices in the private sector, there is more pressure on companies and their employees to keep their product or service competitive, which often means resisting costly labor contracts. Such economic pressure for reasonable settlement is less present in the public sector, thus creating more potential for an excessive concession to the union.

3. Some agencies cannot tax

Many government agencies, e.g., school districts, do not have the power to set a tax rate in order to pay for concessions made at the bargaining table. Consequently, many school boards have to face a serious dilemma when the funding body, e.g., county board of supervisors, fails to appropriate sufficient funds to underwrite the salaries and benefits negotiated by the school board. In such a situation, the school board is left with only two choices, both unacceptable:

a. Fund the negotiated salaries by transferring money from other accounts. This is unacceptable because transfers of such funds deprive other school departments of justified entitlements.

b. Renege on the negotiated agreement. This option, too, is less than acceptable because the organized employees are given a justifiable excuse for turning hostile to the school board.

Private companies do not face this problem. In almost all cases of labor negotiations in the private sector, the tentative agreement reached at the bargaining table is the agreement approved by management.

4. Government has high personnel costs

The budget of most government agencies (e.g., school districts) is attributable largely to personnel costs. How can the public interest be served equitably when a school

board, for example, is required to negotiate with only one portion of its constituency--its employees--on matters which cover 80 percent of its budget? Such an arrangement gives the organized employees of the school district (some of whom may not be citizens of the community) more voice in tax and budget matters than other citizens. There is no similar problem in the private sector because companies have no obligation to render public services.

5. Government employees get two bites of the apple

When public employees have the right to collective bargaining, it is on top of a right which private employees do not have--the right to exert political influence on the employer. As far back as 1967, one expert, Kurt L. Hanslowe, a member of the Cornell University faculty, stated that collective bargaining in the public sector ". . . has the potential of becoming a neat mutual back-scratching mechanism, whereby public employee representatives and politicians each reinforce the other's interest and domain, with the individual public employee and the individual citizen left to look on, while his employment conditions and his tax rate and public policies generally are being decided by entrenched and mutually supportive government officials and collective bargaining representatives over whom the public has diminishing control.[1]

The single most important threat of collective bargaining is that it distorts the economic and political balance of the nation, by vesting too much power in the hands of unionized workers and their private unions. Although only a minority of American workers have joined unions in the private sector, it is clear that their unions have achieved political clout disproportionate to their numbers and size.

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[1] The Emerging Law of Labor Relations in Public Employment, Kurt L. Hanslowe, Cornell University, 1967.

The danger of disproportionate clout is even greater among unionized public employees, because not only can they influence government as citizens, they can also influence government to their special interest at the bargaining table. In other words, the private sector employee can only petition his government, while the public employee can negotiate with his government.

6. Government management is weaker

As far as labor relations are concerned, management in government is weaker than its counterpart in private industry. One reason that management in private industry can survive unionism is that it possesses considerable "management initiative," a quality which allows company managers to run the company in the best interest of the owners. Such management intitiative is less prevalent in the public sector for many reasons.

a. Many government administrators and supervisors stand to gain as rank and file employees receive negotiated improvements in salaries and benefits, since the salaries and benefits of managers in the public sector are often indexed to that of the labor force. Consequently, government bureaucrats may lack the needed incentive to resist exorbitant union demands.

b. The presence of conflicting political pressures on top level managers in government service has a chilling impact on their initiative to make clear decisions in the best interests of the agency and the public it serves.

c. The governing bodies of many government agencies, e.g., school boards, experience a very high turnover, creating a shortage of experienced policy makers. This phenomenon produces too frequently persons who are unable to provide informed leadership for clear management decisions and persons who are too often manipulated by the union.

d. Some members of governing bodies of public agencies seem uncertain as to whether they are "bosses" or politicians. On the one hand, they are expected

to manage an organization; while, on the other hand, their decisions are often influenced by political factors not necessarily in the overall best interest of the agency and the public-at-large. In some cases, a member of a governing body is actually under the control of the employee union by virtue of the fact that the union members may have been the deciding force that put that person into public office. Such persons truly prostitute their public office by catering to the special interests of the agency employees over the general interests of the citizens. Unlike the public sector, boards of directors in the private sector have little confusion as to whether they are bosses or politicians. Consequently, management of private companies is more decisive than management of government agencies, resulting in generally more efficient operations.

e. Whereas owners of private companies generally view their executives as positive forces in the welfare of the company, such a productive relationship does not always exist in the public sector. It is not uncommon for governing bodies and their executive forces in public agencies to have a hostile relationship; the governing body viewing the administrators as an impedence to their will and the administrators viewing the members of the governing body as a threat to their job security and an obstacle to running an efficient agency.

f. Employees in private industry generally can be dismissed more easily than is the case in government service. Although a dismissed employee in private employment may have some right to appeal through the grievance procedure in the labor contract, such an employee lacks the many legal job security protections available in public service. Consequently, government management is less able to discipline employees than is the case in the private

sector. As a result, public employees cannot be made to perform as efficiently as private employees.

g. Unlike a private company, a government agency has no profit or loss incentive. Efficient government operation results in no profit and inefficient government operations results in no loss. Therefore, the consequences of unwise concessions at the bargaining table are less a concern in government service than in private enterprise.

As a result of the factors listed above, as well as other relevant differences, a major overall difference between private sector management and public sector administration can best be stated as follows:

Whereas private sector managers assume they can do anything that they are not specifically prohibited from doing, public sector administrators seem to believe that they can do only those things which they are specifically authorized to do.

7. Government is less flexible

Public agencies generally have less flexibility of operations than exists in created by employee unions, a government agency is unable to exercise several options available to a private company. For example:

a. A private company can go out of business rather than capitulate to union demands. A government agency must stay in business by law, no matter what actions are taken by the union. As a result, a government agency can agree to matters at the bargaining table which would not be tolerated by a private company. A government agency cannot be sold to escape an objectionable situation, nor can a government agency move to escape an unwanted union.

b. Whereas a private company can change its method of production, or even change its product, a government agency can never change its product (service) and can only slowly change its method of production (operation). Surrounded by laws, ordinances, regulations, and political forces, a public agency is often slow to make needed adjustments to problems created by restrictive labor contracts.

8. Government is subject to petitioning

The right to petition their government is a sacred right of U.S. citizens, protected by their Federal Constitution. This implies that all citizens should have an equitable right to influence their government's actions. It is understandable that some employees might want to establish their salaries, benefits, and working conditions through a process of collective bargaining by an exclusive representative. It is also understandable that all employees, both public and private, have a right to look out for their own welfare. However, they do not have a legally protected right to bind their employers on matters which deprive management of its right to manage and produce its goods and services as it sees fit. This caveat is even more applicable to the public sector. If government is to be responsive to all citizens, it must retain its policy-making and law-making powers, especially in areas involving service to citizens. If public employees want to bind themselves contractually on matters affecting their own exclusive welfare (i.e., compensation and benefits), that's their business. But public employees should have no right to negotiate labor contracts which interfere with government's obligation to serve all citizens in an equitable and economically efficient manner.

A private company, unlike a government agency, has a private obligation to serve only its customers. At any point that the customers are dissatisfied, they can go elsewhere. However, a government agency has a public obligation to serve all citizens. Therefore, the scope of bargaining in a public labor contract must be more narrow than that in the private sector. This need for a narrow scope of bargaining and the organized

union's expectation of a broad scope of bargaining inevitably leads to strife between public employees and public employers, a situation harmful to society as a whole.

9. A special word about strikes

Each of the above reasons demonstrates fundamental differences between public and private bargaining and each item above contributes support to a prohibition against strikes by public employees. Public employee strikes should be prohibited on one or both of the following gounds:

a. The essentiality of many government services to the health, safety, and welfare of the community; and

b. The belief that the strike is principally an economic weapon inappropriate to public employment.

Strikes by public employees cannot be construed as similar in any way to strikes in private industry, in that unique and vital services are involved, which are provided by a governmental unit which in many cases operates under monopoly or near-monopoly conditions. These services cannot be purchased by citizens except through these government agencies. Strikes by public employees are, in fact, strikes against the entire community, and unless the government is willing to establish competing agencies to provide alternative sources for these services, stoppages in these vital and unique services simply cannot be tolerated. Under present circumstances, however, public employers become the easy targets for unreasonable union demands.

Strikes do not serve the same economic purposes in the public sector that they serve in private industry. Strikes by public employees demonstrate no fair relationship between economic gains for the strikers and the damage their monopoly status enables them to

inflict on their fellow citizens. In the case of public employees, the strike threat is a political, not an economic weapon, and its use grants unfair power to a small group over the larger public group. If all people can be made to suffer through the willful display of monopoly power possessed by a few organized employees, it becomes the obligation of the government to provide effective machinery for protecting the public interest.

The air controllers' strike in 1981, was the epitome of raw power, through the withdrawal of essential and monopolistic services to the public. In that strike, a small maverick union caused two-thirds of the nation's air controllers to go on strike. The resulting harm to innocent citizens was so severe that the lodging of criminal charges against each controller personally would have been justified. In that strike, we saw an example of just how far a small group of public employees will go to improve their own selfish welfare. Although the union's press releases indicate that the strike was pulled on behalf of the public's best interests,[2] the real issues were:

a. The controllers wanted considerably more money for considerably less work; and

b. The union leadership wanted to prove its power.

That one obscene strike did more to teach citizens about the danger of public employee strikes than could have been done by any other means. As the Praetorian guards were trusted to guard Rome, but ended up sacking that city, so did the air controllers violate a sacred compact with the people who put them into public office by attempting to exploit their essential positions.

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[2]The union claimed that the strike was initiated because the skies were unsafe for the public, due to the fact that the FAA computers were not modern enough and that air controllers were subject to error due to overwork.

10. Demands for public services are inelastic

When the A&P grocery stores are closed due to a strike by the retail worker's union and grapes are no longe available due to a strike by the grape pickers, a consumer still has almost countless options available to him. He can shop at many other grocery stores and he can substitute many other fruits for grapes. In other words, the free market system gives the average consumer a wide variety of choices to meet his needs. However, since government services are monopolies and are in rather constant demand, the loss of those services due to a strike by the public employees can pose a serious threat to those citizens who rely on those services. To hypothesize a frightening possibility, suppose all U.S. Social Security Administration employees went on strike and millions of innocent citizens dependent on social security checks did not receive their entitlements? The actual lives of thousands of social security recipients depend on receiving the needed checks on the day that they are due. Is this example so far fetched that it has no credibility? I think not. Who would have thought that control tower operators would walk off their vital jobs and risk the lives of countless innocent victims, many of whom rely upon air travel as a necessity for their jobs?

As a result of this inelastic and constant demand for monopolistic government services, there is more pressure to settle a strike by government employees, than a strike by industrial employees. Although the employer in the private sector has considerable economic reason to settle a strike, there is political pressure in the public sector to settle a strike, regardless of the cost. As trash piles up in the homeowner's front yard due to a strike by trash collectors, the homeowner wants a settlement--now. **Citizens who demand an immediate settlement to a strike, often are not the ones who must pay the full cost of the settlement.**

Under a system which requires, under law, that all pay taxes whether or not they use the services of the government, inequities are bound to exist. For example, a number of

cities underwrite with tax revenues the local mass transit system. This means that some must pay taxes to support a transit system which they do not use. When the transit system is closed down due to a strike there is an immediate and understandable howl from those persons who use the transit system, particularly from those who rely upon the system in order to get to their jobs. In many ways these riders exert tremendous pressure on the city to settle the strike--at any cost--since much of the cost to settle the strike will be borne by persons who do not use the system. Why not demand an immediate settlement if someone else is going to pay for it?

But even where the user of a government service must pay for any increases granted to the government employees as a result of a strike, the increased cost to the taxpayer may be delayed. For example, a salary increase given to teachers in order to settle a strike may not be felt by the taxpayer until a year later, when the tax on his home is increased. In the private sector, an expensive strike settlement is often reflected immediately in the price of the commodity or service being sold. The private employer recognizes that there will be an immediate connection between the cost of the strike settlement and the cost of the items being sold. This connection tends to make for more responsible settlements in the private sector than in the public sector.

II. Firing public employees who engage in strike activities can be difficult

Public school teachers and college professors have job security protected by tenure laws. Federal employees are protected from dismissal by complicated and protracted civil service due process procedures. Many state employees are similarly provided job security by a host of state civil service regulations making the dismissal of employees a difficult process. Many local government and school district employees, too, are employed under provisions, either state law or local ordinance, which call for extensive review procedures prior to dismissal.

Additionally, many public employees, for example, teachers, have grass-roots constituencies which they can often count on to speak for them in times of job insecurity. Included in their constituency may actually be members of the employees' governing body (e.g., a school board), who may be stymied into taking adverse action against public employees who represent an important block of votes to keep members of the governing body in office.

Consequently, because of the nature of job security in public service, public employees who engage in illegal strikes are usually not fired. The celebrated dismissal of thousands of federal aviation control tower operators in the summer of 1981 was a conspicuous exception to the normal treatment of public employees who strike.

One reason that public employees get away with strikes is that many states have such harsh penalties against public employee strikes that there is often great reluctance in applying the penalties. New York State has handled this issue quite well. Under New York's Taylor Law (the state's bargaining law for public employees), a public employee who engages in a strike may lose two days' pay for each day on strike, plus he must pay income tax on the money deducted! Additionally, the union responsible for a strike can be fined and decertified. As a result of its enlightened law, New York has kept its public employee strikes at a reasonable level.

12. Public employee strikes affect the private sector

Union members and other workers in the private sector who support strikes by public employees may one day regret their support, should public employee strikes become common. While it is one thing to support the theoretical right to collective bargaining for all workers, it is quite another thing to support a strike by local firefighters when one's house is burning down, especially when those firefighters may actually work only a few hours each day and enjoy many fringe benefits. One must keep in mind that although a

labor strike may produce a temporary gain for the perpetrators, the gain is at someone else's expense. Strikes do not produce more of anything. They only take from the less powerful. Unionized workers in the private sector enjoy artificially high wages because of the low wages of the non-unionized. The unionized public employees who extract wage hikes as the result of a strike, gain at the expense of the unorganized taxpayer. In short, union gains based on clout and threat are always at somebody else's expense.

Should strikes by workers in both the private and public sector become widespread, they become increasingly self-defeating and unjust. Industrial workers go on strike to gain a greater share of the capital of the owners. As they make relative gains, public employees are then tempted to go on strike to gain parity with the private employees. Firemen go on strike to get pay equal to policemen. Teachers go on strike to stay ahead of policemen. Soon, everybody is on strike against everybody, but none of the strikes produce anything new. No capital is accumulated as a result of strikes. No new products result from strikes. Production is not increased as a result of a strike. In short, strikes simply transfer money from one group to a stronger group. As one group strikes for its own benefit, it really strikes against another working group. The result is a process of "the people bludgeoning the people in the name of the people" - to coin a phrase from Will Rogers.

* * *

Does bargaining help employees?

Advocates of collective bargaining in public services generally maintain that unless employees are permitted to negotiate under law with their employers, the public employees will not receive fair compensation and benefits and they will exploited. This theory fails to recognize an irrefutable economic fact. In order to obtain and keep employees of sufficient quality, government must compete in the marketplace for labor.

Government must compete with private industry as well as other government agencies. Chances are great that without collective bargaining public employees today would be about as well off as they are now. As a matter of fact, a 1982 study seems to indicate that this is true, at least as it applies to teachers. The conclusion of that study reads:

"The evidence suggests that, although the desire for increased salary is the major inducement for seeking unionization and collective bargaining privileges, neither of the two achieve the goal. Collective bargaining brings with it a greater probability of strikes and these strikes disrupt the educational process with a cost to the social fabric of the community that is all too often irrepairable.

"Various state legislatures have enacted compulsory collective bargaining legislation for teachers after being convinced by proponents that it would insure meritorious compensation for outstanding teachers and promote harmonious labor relations. With the same arguments, teachers were persuaded to join unions.

"However, the promised benefits have not materialized. Teachers have not realized any significant gains in compensation that could not have been acquired in the absence of union membership or the collective bargaining process. The harmonious labor relations that were to be an outgrowth of collective bargaining are non-existent. Instead, there has been a higher incidence of strikes and other job actions.

"The benefits supposedly derived from the use of collective bargaining do not, in the final analysis, accrue to the teachers or the public. Rather, the monetary and psychological rewards go to the personnel who staff the bargaining units, labor relations and specialists, professional negotiators and a myriad of others who are compensated for finding solutions to problems - problems of which they are part and which do not exist outside the confines of the collective bargaining process."[3]

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[3] The Effect of Collective Bargaining on Teacher Salaries, The Public Service Research Council, 1982.

Does bargaining decrease strikes?
Does bargaining improve pay?

The first state collective bargaining law was passed in Wisconsin in 1959. The year before that, in 1958, there was a total of only fifteen strikes by government employees. In that same year, 1958, there were about one million public employees in unions. Twenty years later in 1979, there were 38 states with bargaining laws, and six million public sector union members, and there were 725 strikes by government employees. In other words, from 1959 to 1979, when most of the states passed bargaining laws, strikes increased by about 5,000 percent. For twenty years union leaders convinced politicians that collective bargaining brings peace, tranquility, and dignity to the workplace. However, the facts seem to speak otherwise.

But were not these strikes necessary in order to get better salaries than would have been the case without strikes? Not so. Several studies have been conducted which indicate that public employee salaries in non-bargaining states have increased at about the same rate as salaries in bargaining states.[4] Why? Because every employer, whether unionized or not must compete in the labor market in order to obtain employees.

In 1970, the U.S. Supreme Court ruled that federal employees do not have the right to strike. The high court affirmed a lower court judgment that upheld the constitutionality of a federal law prohibiting strikes by public employees. This particular decision dealt with a case brought by the United Federation of Postal Clerks and it settled an issue that had long been debated. Some observers believe that this ruling could be extended to cover all state and municipal employees, including teachers. Although many states have public employee anti-strike laws, some have been challenged in the courts as violation of the constitutional free speech guarantee of the First Amendment. The high court has also affirmed a lower court ruling upholding the constitutionality of a New York law requiring a no-strike pledge from any union that represents state employees.

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[4] Ibid.

In summary.

This chapter has discussed many relevant factors which must be considered in transferring the NLRA to the public sector or in establishing any collective bargaining law in the public sector. The many reasons why the industrial model for bargaining should not be used in government service can be summarized as follows:

a. The strike is unlawful for public employees for good and valid reasons. More effective means for enforcing these laws are required. Even in the private sector there is no absolute and universal right to strike, since the nation has witnessed court injuctions against strikes by coal miners and railroad workers.

b. The legal framework for industrial collective bargaining developed in response to economic and social needs which are totally different from those that exist in the public sector today.

c. Government decision-making is highly diffused and involves a mixture of administrative and legislative functions. This mixture permits the opportunity for misunderstandings and increases the political power of unionized employees at the expense of the public interest.

d. Collective bargaining helps remove from the public the influence and control of the cost and determination of governmental services. The democratic process requires greater public participation, not less.

e. Governmental agencies usually have monopoly control over the delivery of essential services which helps invalidate the working of countervailing economic pressures. This transforms the public collective bargaining process into one of political pressures between unequals.

All of these reasons demonstrate the differences between public and private sector collective bargaining. These fundamental differences suggest that a totally new mechanism is required, not the transplantation of the industrial model. Besides, the

NLRA could not be transferred successfully to the public sector. The National Labor Relations Board and the federal courts have handed down countless interpretations and precedents which were based on the uniqueness of the private sector. Almost none of these decisions could be applied reasonably to the public sector scene.

CHAPTER III

INTEREST ARBITRATION: A STRIKE ALTERNATIVE?

The purpose of this chapter is to discuss the relationship between arbitration and strikes in the public sector. Grievance arbitration, always seen as a right by unions, has become quite commonplace and has found growing acceptance among employers as the proper way to settle disputes arising over the interpretation and application of the labor contract, thus minimizing greatly the possibility of a strike. On the other hand, "interest" arbitration is far from commonplace, but is, nevertheless, experiencing significant growth. However, as yet final and binding arbitration of contract disputes (that is, "interest" arbitration) has had an uncertain impact on the negotiations process, strikes, and government efficiency.

For purposes of this chapter, labor arbitration shall be defined as a third-party settlement of disputes between a union and an employer. Labor arbitration is usually used to settle disputes between parties of a labor agreement as to its application or interpretation. Since such arbitration consists of determining rights of a party to an agreement, it is referred to as a "rights" dispute or commonly as "grievance arbitration." In a typical dispute of this nature, the union (or employee) alleges that the employer has misapplied or misinterpreted some provision in the labor contract.

A second type of arbitration is called "interest" arbitration. It involves the determination of the <u>interests</u> of the parties, not their <u>rights</u> under an existing agreement. It applies to a determination by an arbitrator of the terms and conditions of a new renegotiated labor contract. This type of arbitration is seldom used in labor relations in this country, although it is used in some situations as an alternative to a strike over a new agreement.

Grievance arbitration is not a continuation of negotiations. In arbitration the parties have ceased to negotiate with each other and are trying to convince an arbitrator that their case would be upheld. It is sometimes called a judicial proceeding since the arbitrator must judge the case before him. Other arbitrators, however, avoid the word "judicial" as a description of the arbitrator's function. To them, the arbitrator is more than a judge since he must occasionally fill in the voids of the labor contract, and in this capacity he is "legislating" or setting up his own rules which he believes to be consistent with the labor agreement and the practices of the agency. Sometimes he must construct these rules from general labor relations practices.

Arbitration results in a decision which the parties have agreed in advance to accept. Mediation, however, is an effort by a third party to bring the parties together in agreement on their own. The parties have made no prior agreement, in mediation, to accept his conclusions. Fact finding, another form of dispute settlement, is merely an effort to obtain and point out the key facts in a dispute, in the hope that such facts will help the parties agree. Even when a fact-finding board makes recommendations, these carry no force beyond the persuasiveness and power of public opinion which they generate.

I. Grievance arbitration

The essence of a grievance procedure is to provide a means by which an employee, without jeopardizing his job, can express a complaint about his work or working conditions and obtain a fair hearing through progressively higher levels of management. Under collective bargaining, four important and related features have been added to this concept.

a. The collective bargaining contract, while it drastically limits the area of legitimate complaints by establishing the basic conditions of employment and rules for day-to-day administration deemed to be fair by mutual agreement, at the same time may create a source of grievances and disagreements through

ambiguities of language and omissions, as do changing circumstances and violations.

b. The union is recognized and accepted as the spokesman for the aggrieved worker and an inability to agree on a resolution of the issue becomes a dispute between union and management.

c. Because an unresolved grievance becomes a union-management dispute, a way ultimately must be found to reach settlements short of a strike or lockout or substitutes for such actions. Final and binding arbitration is the principal means to this end.

d. The process of adjusting grievances is itself defined in the labor contract and along with other aspects of collective bargaining, tends to become increasingly formal.

In the private sector, as early as 1950, grievance provisions were found in 94 percent of contracts,[1] and arbitration provisions were found in 89 percent of contracts.[2] The almost universal adoption of grievance procedures and grievance arbitration today in the private sector has given rise to the notion, which appears to be widely held, that strikes or lockouts arising during the term of agreements are universally outlawed. This is not correct, since strikes do take place occasionally even where grievance arbitration exists.

In the absence of an absolute ban on strikes and lockouts during the term of agreements, a work stoppage may occur in the private sector if:

a. No grievance procedure is provided.

b. No final and binding arbitration is provided.

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[1] "Grievance Procedures in Union Agreements, 1950-51," Monthly Labor Review, July 1951, p. 36.

[2] "Arbitration Provisions in Collective Agreements, 1952," Monthly Labor Review, March 1953, p. 261.

c. Certain issues are nonarbitrable.

d. Certain issues are excluded from the grievance and arbitration procedure.

e. The contract is deemed to be cancelled on particular types of contract violations.

f. Noncompliance with decisions and awards is charged.

g. The grievance machinery breaks down.

Generally speaking, strikes are illegal in the public sector; therefore, some parties reason there is no need to buy a no-strike provision by granting final and binding arbitration of grievances. Of course unions do not agree with this reasoning because they feel there must be some assurance that management will abide by a labor contract and they see binding arbitration of grievances as the rightful solution. Many union leaders view the refusal to grant grievance arbitration as grounds for striking.

Although the process of arbitration has been around for centuries, it has been viewed with suspicion by court judges who sometimes considered arbitration to be a circumvention of the legitimate judicial system. However, beginning early in this century, arbitration has become accepted generally as a viable dispute settlement process and usually the courts will now enforce arbitration decisions. Three U.S. Supreme Court decisions, known as the "Steelworkers Trilogy," finalized the legality of voluntary arbitration.[3]

As a result of these decisions, the courts may (in the private sector):

a. Order a stay of arbitration;

b. Enforce an agreement to arbitrate; or

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[3]USWA v. American Manufacturing Company, 363 U.S. 564; USWA v. Warrior and Gulf Navigation Company, 363 U.S. 574; USWA v. Enterprise Wheel and Car Corporation 365 U.S. 593.

c. Enforce an arbitrator's award, unless there has been fraud, misconduct, arbitrary action, error, or illegal action.

Although these decisions arose from disputes in the private sector, the same rationale has been emerging in the public sector, despite the fact that the issue of governmental sovereignty has made both rights arbitration and interest arbitration more controversial than has been the case in the private sector. Those who oppose arbitration claim that arbitration is an illegal delegation of sovereign authority. However, increasingly an agreement to arbitrate is being viewed as a mere willingness of a governing body to delegate only the interpretation and application of disputed contract language which has been arrived at bilaterally between representatives of the governing body and representatives of the employees.

2. Advantages and disadvantages of grievance arbitration

Although some management personnel may be hesitant to admit it, there are several advantages to the use of grievance arbitration, under the right conditions:

a. Even though strikes by public employees are generally illegal, as a practical matter they do take place. As a matter of fact, there were about 7,000 strikes by public employees between 1958 and 1980. Some of these strikes were caused by employers who allegedly refused to carry out the terms of the labor contract. If all such disputes are resolved by an impartial arbitrator, goes the argument, there is less chance that there will be strikes over disputes with contract application and interpretation.

b. Arbitration settlements are much cheaper than court settlements. Whereas a court case over a contract dispute might cost $100,000 in legal fees, that same issue might be resolved by an arbitrator for less than $1,000!

c. Arbitration awards are more expeditious than court procedures. Whereas court dockets are crowded and decisions might take years to render, arbitration

awards can often be given in a matter of days and seldom in more than two months.

d. Unlike decisions made by civil service review panels, arbitrators are chosen mutually by the parties involved in the dispute. Consequently, there is more likelihood that the losing paty will feel that he received a fair decision, and as a result, he is more likely to abide by the decision.

e. An arbitrator is usually more familiar with the matters under arbitration than a court judge. As a result, there is greater chance of equitable and acceptable decisions.

However, there are some disadvantages to grievance arbitration. For example:

a. The low cost of grievance arbitration may encourage the excessive use of the procedure.

b. Arbitrators might be more inclined to intrude upon the "sovereign rights" of public employers than would be the case with a court review.

As stated earlier, grievance arbitration has advantages, under certain conditions. Those conditions are:

a. The definition of a grievance should be restricted to an allegation by an employee that there has been a misapplication or misinterpretation of his rights as specified in the labor contract. Since a labor contract is arrived at bilaterally through negotiations between labor and management, it is not unreasonable that an impartial third party (an arbitrator) should make the final decision in disputes between the parties over the meaning and application of the contract. It would be unreasonable, however, for an arbitrator to rule on disputes regarding matters outside of the labor contract which had not been the subject of negotiations, such as disputes over the employer's general policies, assuming these policies do not contradict the terms of the labor contract.

b. The language of the contract should be clear and concise with both parties in agreement as to the meaning of the language contained in the contract. Most grievances arise from differences of opinion as to the meaning of contract language. Well written and mutually understood language can minimize language disputes.

c. The scope of the contract should be limited to wages, hours, benefits, and "working conditions," in other words, the self interests of employees. The contract should contain no commitments which interfere with the employer's right to manage. For specific suggestions on how to control the scope of bargaining, the reader should consult the book, Negotiations Strategies, by Richard G. Neal.

3. Interest arbitration

Since government generally provides monopolistic and essential services (e.g., police protection), many citizens fear that collective bargaining inevitably will result in strikes and strikes in government agencies deprive citizens of essential government services. Consequently, strikes by government employees are generally prohibited by law; although there has been a growing number of exceptions to this generality. Under the belief that strikes are an essential part, if not a right, of collective bargaining, some leaders and experts have advocated that the final step in contract negotiations impasses should be some form of final and binding arbitration. According to these persons, binding arbitration would, by its nature, preclude strikes and thereby provide continuous government operation. These advocates also seem to feel that the presence of binding arbitration of negotiations impasses would result in a more meaningful contract for the parties. Whether or not these hypotheses are correct is a question still unanswered after many years of debate and experimentation. But even if future experiences should indicate

that interest arbitration reduces strikes, the next question is: at what price to the taxpayer in terms of higher taxes and at what price to citizens generally in terms of quality of government services?

4. **Two forms of interest arbitration**

When final and binding arbitration is used to resolve a negotiations impasse, it takes two general forms: conventional arbitration and final-offer arbitration. Under conventional arbitration the unresolved issues are presented to the arbitrator with each party presenting its side of the dispute to the arbitrator, followed by rebuttals from each side. The arbitrator takes into consideration the testimony of each party, plus any other considerations which he views as relevant to the disputes and issues a decision which is final and binding on both parties.

Under final-offer arbitration, each party makes its best offer and the arbitrator chooses one of the offers. Final-offer arbitration can be on an item-by-item basis, or it can be on a package basis. On an item-by-item basis, each party presents its final and best offer on each unresolved item. The arbitrator must then choose either the union's offer or management's offer on each item separately. Under package arbitration, each side presents its best and final offer on all issues as one package, with the understanding that the arbitrator will choose the entire package of only one of the parties.

As far as item-by-item arbitration is concerned, there are several advantages:

a. The difference between the positions of the two parties on each item is narrowed because each party wants its position chosen. Consequently, the distance between the parties on each item is narrowed, making the final selection of the arbitrator more likely to be accepted by the losing party than would have otherwise been the case.

b. Each party is forced to compromise and compromise is the heart of negotiations.

c. The arbitrator is given more flexibility in structuring a total decision which would come closer to satisfying both parties than would be the case in package arbitration.

d. Each party can remain firm on important issues without losing the entire package. This allows the arbitrator to help each party on those items about which it feels strongly.

e. Even though one party is likely to lose on some items, it is likely to win on some items, thus providing a face-saving escape for both parties.

There are also certain disadvantages to item-by-item arbitration:

a. In dichotomous situations where no matter which side the arbitrator chooses, the other side is presented with an impossible situation, a serious dilemma is encountered.

b. Serious good faith bargaining may be discouraged because the parties may prefer to gamble that the arbitrator will give what is wanted.

c. Item-by-item negotiations may not terminate negotiations because the parties may be dissatisfied and continue to negotiate for a more satisfactory settlement.

As far as package arbitration is concerned, there appears to be only one major advantage. Each party is forced to compromise because it either wins all or loses all. In other words, the loss of a total package poses such a threat that extreme compromise is called for.

Some of the disadvantages of package arbitration are:

a. All flexibility is removed from the arbitrator to use his skills to fashion a total package that makes both parties reasonably happy.

b. Since one party must lose the entire package, the award may be intolerable.

c. Even under the best of conditions, the entire package can create hostile labor relations.

d. In the hands of inexperienced negotiators and an incompetent arbitrator, package arbitration can be a disaster.

In the private sector, interest arbitration has been used in the railroad industry for many years with some degree of success. In August 1970, in an interview, George Meany, President of the AFL-CIO, stated clearly that alternatives to the labor strike should be sought, such as binding arbitration.[4] Soon thereafter, in 1973, the steel industry entered into a no-strike agreement through the use of binding arbitration, but the arbitration clause proved so expensive to steel employers that according to top industry officials "the steel companies are prepared to risk a crisis unless they can convince the union to cut the costs that were built into the original no-strike accord."[5] Consequently, interest arbitration was not included in the contract which expires in 1983. In 1974, final-offer arbitration was introduced into major league baseball for salary disputes. Generally speaking, however, the steel industry and baseball cases are isolated instances in the private sector which almost universally prefers to use strikes in lieu of interest arbitration.

As early as 1966, Steves suggested "final-offer" or "either-or" arbitration in an article which concerned itself with alternatives to labor strikes.[6] Some view compulsory arbitration of negotiations disputes as serving the same purpose as the strike in that both

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[4]R. Theodore Clark, Jr., "Public Employee Strikes: Some Proposed Solutions," Labor Law Journal, Vol. 23, No. 2 (Feb. 1972), p. 116.

[5]U.S. News & World Report, "Steel's No-Strike Pact: Out the Window?," May 26, 1980, p. 85.

[6]Carl M. Stevens, "Is Compulsory Arbitration Compatible with Bargaining?" Industrial Relations, Vol. 5, Feb. 1966), pp. 38-52.

arbitration and strikes (or the threat of either) motivates the parties to broaden their negotiations horizons. However, the history of Australia's labor relations would not seem to support this theory.

The earliest and longest use of compulsory interest arbitration is found in Australia where the experience has been in place for over half a century.[7] As the result of this long experience, three developments seem to have emerged in Australia:

a. Unions have become stronger than employers.

b. Compulsory arbitration has stultified the collective bargaining process.

c. Labor strikes are common despite compulsory arbitration.

Based upon the Australian experience, many consider compulsory interest arbitration to be antithetical to collective bargaining as we know it in the United States. But of course, the Australian experience may not be entirely applicable to the American scene.

As far as compulsory interest arbitration in the United States is concerned, Minnesota has had a statute requiring arbitration of labor relations disputes in private and non-profit hospitals since 1947. By 1971, six states had adopted some form of compulsory arbitration of collective bargaining disputes between public employers and firefighters and/or police.[8] The reason for the introduction of compulsory arbitration into the public sector was clearly the result of fear of public employee strikes (particularly among the protective services) and the belief that compulsory arbitration would prevent strikes. In

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[7]Kenneth F. Walker, Industrial Relations in Australia (Cambridge: Harvard Univ. Press, 1956), and J. E. Isaac, Trends in Australian Industrial Relations (Melbourne: Melbourne Univ. Press, 1962).

[8]J. Joseph Loewenberg, "Compulsory Arbitration for Police and Fire Fighters in Pennsylvania," Industrial Labor Relations Review, 23 (Ap. 1970): 367-79. See also: J. Joseph Loewenberg, "Compulsory Binding Arbitration in the Public Sector," a paper for the International Symposium on Public Employee Labor Relations, New York City, May 4, 1971.

the case of Nebraska, collective bargaining disputes in the public sector have been resolved by the Nebraska Court of Industrial Relations since 1969.

One of the main fears of compulsory binding arbitration of negotiations disputes is that because of the very nature of arbitration, one or both parties may find the arbitrator's word unacceptable. From the employer's point of view, this fear centers around the issue of affordability, the hypothesis being that arbitrators will issue awards for salary settlements beyond the affordability of the employer and beyond that called for by market conditions. However, a study as early as 1974 "clearly contradict(s) the belief that settlements awarded under compulsory arbitration are higher than those arrived at by other means of dispute settlement.[9] In this study, the authors found no significant differences between the awards of arbitrators and the settlements which resulted from negotiations and conventional means of dispute resolution.

In 1975, Peter Feuille assessed final offer arbitration and admonished readers in his "final thoughts"[10] that ". . . the data on this subject (final offer arbitration) can support both positive and negative conclusions so it should surprise no one that a room full of labor relations experts will produce conflicting opinions about final offer arbitration." However, Feuille's personal opinion, as expressed in his book, is that "Final offer arbitration does a better job than conventional arbitration in inducing negotiated agreements."

In 1975, the New Jersey School Boards Association (NJSBA) presented a report to the New Jersey Public Employee Relations commission of final offer arbitration.[11] In

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[9]Robert H. Bezdek and David W. Ripley, "Compulsory Arbitration Versus Negotiations for Public Safety Employees: The Michigan Experience," Journal of Collective Negotiations 3 (Spring 1974): 174-75.

[10]Peter Feuille, Final Offer Arbitration, International Personnel Management Association, 1975, p. 56.

[11]The Case for Fair and Final Offer Arbitration, presented by Lester Aron, Esq., Director of Labor Relations for the New Jersey School Boards Asociation, April 30, 1975.

this report, the authors discuss and rebutt the claimed disadvantages of binding arbitration which are:

a. Binding arbitration discourages collective bargaining because the parties will simply hold to a favorable position in the hope that their position will influence the decision of the arbitrator.

b. Arbitrators will make awards beyond the affordability of the employer.

c. Arbitration does not prevent strikes.

The author of the NJSBA report examines each of these allegations in detail and concludes his report by stating: "Fair and final offer arbitration is not designed to be an end in itself. As pointed out earlier, the clear desire of all parties involved in the negotiating process is to be able to arrive at a negotiated, not dictated, settlement. The evidence clearly indicates that if finality is necessary in negotiations as we believe it to be, fair and final offer arbitration has proved far superior to conventional arbitration, mediation and fact finding."[12] Soon thereafter, New Jersey became another state to adopt interest arbitration as a part of its collective bargaining law for public employees.

In 1977, J. Joseph Loewenberg had concluded that "The important issues, then, may not be whether or not compulsory arbitration should be permitted as an end to labor disputes. Events have outstripped theory and already provide an answer to that question. The evidence, to date, in Canada and the United States suggests that compulsory arbitration is possible under certain conditions and that the traditional arguments against its use are inapplicable. The problem now is to determine in which cases compulsory arbitration may be an appropriate terminal procedure and how compulsory arbitration should be structured in these cases to maximize the viability of collective bargaining."[13]

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[12] Ibid., p. 26.

[13] J. Joseph Loewenberg, "The Effect of Compulsory Arbitration on Collective Negotiations," Impasse and Grievance Resolution, Baywood Publishing Co., Farmingdale, NY, 1977, p. 69.

In 1977, Zagoria listed ten things wrong with compulsory arbitration.[14] These objections seem to encompass all of the objections expressed by public employment managers generally. Mr. Zagoria stated in his article:

> My problem is with legislated, required, binding arbitration of bargaining impasses--interest arbitration. I approach the subject from the vantage point of Henry Clay, who said, "Government is a trust, and the officers of government are trustees; and both the trust and the trustees are created for the benefit of the people."
>
> I believe there are at least 10 things wrong with compulsory arbitration:
>
> 1. It discourages honest, good faith collective bargaining. As long as this extra step is available, there is a possibility that a party will hold back on compromise-making accommodations on which effective bargaining relies. Concessions already made are not nearly as important to an arbitrator as the issues still in contention. Even informal sounding-out on additional issues may be withheld for fear it will be made part of the arbitration boundaries.
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> 2. It places far-reaching power in the hands of a person, not elected, not accountable to elect officials and not necessarily a resident of the community or even of the state involved. He is unlikely to be trained or experienced in municipal finances or administration. Yet his decision constitutes, nonetheless, a mandate on the community leadership, which can force substantial changes in taxation, public policy priorities and the ability to manage the work force. . . .
>
> 3. The arbitrator is an ad hoc appointee with no continuing responsibility to make an award that is workable as well as just. There is no year-round accountability, contrary to principles of representative government and sound public administration. It is a little like Sherlock Holmes dropping in to solve a case and then handing down a decree for the detailed day-to-day running of Scotland Yard for the next 12 months or two years.
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> 4. It is probably impossible to make an award for one group of workers without affecting other groups of municipal workers, yet an arbitrator has neither the authority nor responsibility to examine their situation. The "ripple" effect of his decision could have a tidal wave effect on the city administration.
>
> 5. Contracts are not negotiated in isolation from past or future arrangements. It is difficult to make an award for one contract without dealing with how it fits generally into long-term labor relations, into future city plans, some of which are not yet formulated or expressed. As William Simkin has said of industry, "No 'outsider' can know or feel with the same depth of penetration as bargainers who 'live with' an industry." Obviously, familiarity with these nuances are equally true in governmental units.

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[14] "Compulsory, Binding Arbitration Boosted and Pilloried," Labor-management Relations Service News Letter, April 30, 1977, p. 3.

6. The process is unbalanced since it makes a no-risk or low-risk step available to a union or employee organization. Rarely will an arbitrator even consider awarding a union less than what management has already offered.

7. Arbitrators, since they are part of the peace-making machinery, tend to provide something for each side in their award regardless sometimes of the actual merits involved. Some cynics suggest this may be part of an arbitrator's job-preservation program, but in either case the award will not be the parties' own selections from the collective bargaining menu.

8. Arbitration is an expensive add-on to the bargaining process. There are the steadily rising fees of arbitrators and now a growing use of economic consultants to prepare a case and accompanying exhibits, and as one side goes down this path, the other almost has to follow in self-defense.

9. It is a time-consuming process. Most arbitrators insist on an adequate showing of bargaining before their work commences; then there is framing the issues in contention, time to prepare a case and perhaps briefs, plead the case, await preparation of the arbitrator's award, clarify (if necessary) and then implement. The Massachusetts League of Cities and Towns found the average length of time consumed in the arbitration phase alone was more than a full year.

10. There are serious questions of constitutionality. As Tim Bornstein has pointed out 12 cases have reached decision by state supreme courts--nine found the arbitration laws constitutional; two divided evenly and three recent verdicts found them unconstitutional. One of the three, the Colorado Supreme Court, noted last year that "A contrary holding, in our view would seriously conflict with basic tenets of representative government. Fundamental among these tenets is the percept that officials engaged in governmental decision-making (e.g., setting budgets, salaries and other terms and conditions of employment) must be accountable to the citizens they represent. Binding arbitration removes these decisions from the aegis of elected representatives, placing them in the hands of an outside person who has no accountability to the public." . . .

The basic question posed by compulsory interest arbitration is who can best represent the public interest in a bargaining impasse--the mayor chosen by the people, accountable to the people and whose concerns take in the entire city work force as well as the long range needs of the entire community, or an arbitrator, who has been given the assignment of doing equity by a limited group of workers, and in so doing may be affecting the 70 percent or more of the city's budget involving personnel services as well as forcing drastic changes in the level of services and the tax system of the municipality. If his decision is disliked, he cannot be voted out of office even if 100 percent of the electorate so desires.

You would have the same effect if you led the Mayor and the City Council into a large closet, locked the door and turned the key over to a stranger, who came to town to clean up a personnel problem in one department, and wound up preparing a plan for fiscal chaos.

Let this be on someone else's conscience—not mine.

In 1978, at the annual meeting of the National Academy of Arbitrators in New Orleans, Iowa's 1974 collective bargaining law, which provided a form of arbitration of negotiations disputes, was given support by John Loihl, who was a member of Iowa's Public Employment Relations Board, the body which oversees the state's bargaining law. In his address entitled, "Final Offer Plus: Interest Arbitration in Iowa," Mr. Loihl concluded: The results are encouraging, particularly when viewed as the first fullblown experiment with legalated arbitration for public employees other than those in the "essential" services . . . On the basis of the experience to date the Iowa procedure has worked well. It has been an effective alternative to the strike in providing a balance of bargaining power to ensure good faith negotitations and the continued delivery of governmental services.

According to a study by Olson,[15] during the first five years of Wisconsin's final offer arbitration law, from 1973-1977, there were approximately 852 public sector negotiations, 65 percent of which were settled without third-party intervention. The remaining 296 cases were mediated by the state's labor commission. In 145 of these cases an actual impasse was declared and an arbitrator was appointed, 23 of these cases reached an agreement without the issuance of an award. As a result, only 14 percent of all negotiations in Wisconsin's public sector during 1973-1977 resulted in the issuance of an arbitrator's award. To what extent Wisconsin's experience reduces strikes or impacts on negotiations generally is not clear in this study.

One argument against final offer package arbitration states that arbitrators will attempt to satisfy the parties by taking turns in awarding a "win" to each party in an

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[15]Craig A. Olson, "Does Final Offer Allow Bargaining that Conventional Arbitration Chills?," Monthly Labor Review, U.S. Dept. of Labor, May 1979.

attempt to compromise and assure greater job security to the arbitrator. A study by Feuille and Dworkin,[16] however, seems to dispute this allegation. According to their study ". . . there is no reason to date for policy makers to reject final offer arbitration as an impasse resolution option because of the fear that arbitrators will attempt to keep the world in perfect balance." In other words, according to this study, arbitrators do not take turns in awarding "wins" to the parties.

Interest arbitration by final offer selection has been used in the United States federal government service by the Federal Service Impasse Panel. According to Section 2471.11(a) of the Panel Rules, the FSIP may break impasses by whatever "methods and procedures which the Panel considers appropriate." Under this authority, FSIP has issued numerous awards in cases of negotiations impasses in the federal employment service. To date, the authors are unaware of any study which has been conducted to determine the impact of such practices on negotiations generally in the federal employment service.

4. Authors' conclusions

A review of the literature, plus the authors' own experience, indicate that there is no final judgment on interest arbitration generally or final judgment on any of the specific variations of interest arbitration, including final offer arbitration. However, certain interim conclusions can be drawn:

a. Under certain conditions, interest arbitration is legal in the public sector as noted later in this chapter. But in several cases interest arbitration has been determined illegal.[17]

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[16]Peter Feuille and James I. Dworkin, "Does Wisconsin's Final Offer Arbitration Offer Only Intemporal Compromise?," Monthly Labor Review, U.S. Dept. of Labor, May 1979.

[17]Compulsory arbitration statutes were ruled illegal by Supreme Court decisions in the following states:

b. Interest arbitration has spread considerably in a relatively brief period of time as indicated by the PSRC study.

c. The appropriateness or inappropriateness of interest arbitration will never be determined to the satisfaction of all parties with an interest in public sector labor negotiations. Union leaders, legislators, politicians, taxpayers, public employees, and citizens generally all have a different stake in interest arbitration. What is good for one of these groups may well be bad for another group.

d. Unions appear more interested in interest arbitration than employers. This may become even more true as employers become more resistant to union demands and the courts increasingly take punitive action against unions and employees who engage in illegal strikes.

In the opinion of the authors, motivated by the best interest for efficient and responsive government, all forms of final and binding interest arbitration should be resisted. As discussed thoroughly elsewhere in this book, there are drastic differences between the public sector and the private sector which call for entirely different approaches to labor relations. Public employers are generally sovereign bodies accountable to the public with no profit incentive. As such, school boards, county boards, and similar governing bodies are fully capable of making final decisions which affect

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South Dakota: City of Sioux Falls Firefighters Local 814, Fraternal Order of Police, Lodge #1, et al.; South Dakota Supreme Court, Case #11406,11411,11424, Oct. 9, 1975.

California: Barry Bagley, et al. v. City of Manhattan Beach, et al.; Supreme Court of Cal., Case #L.A. 30523, Sept. 16, 1976.

Utah: Salt Lake City, et al. v. International Assn. of Firefighters, Locals 593, 1645, 2064; Utah Supreme Court, Case #14689, April 25, 1977.

Colorado: Greely Police Union and Donald O'Leary v. City Council of Greely, et al.; Colo. Supreme Court, Case #26922, Aug. 23, 1976.

employees in a fair and enlightened manner. Unaccountable arbitration is not needed to resolve negotiations disputes. In the long run, an illegal strike is preferable.

6. States that allow arbitration

In 1982, there were 19 states which had some form of interest arbitration.[18] Those states were:

a. Alaska - Compulsory for police, fire, correctional, and hospital unions which are denied the right to strike. Unions granted limited strike rights are also subject to compulsory arbitration when those strikes are enjoined.

b. Connecticut - compulsory for municipal and teacher unions. For municipal unions a three-member panel engages in issue-by-issue final offer arbitration 90 days after expiration of current agreement. For education unions, a three-member panel selects between last best offers of both sides 20 days before school budgets are due at local boards of finance.

c. Hawaii - disputes involving firefighters are submitted to compulsory arbitration if differences persist 15 days following declaration of an impasse. A three-member panel selected in the traditional manner shall render a binding decision on a total package final offer basis.

d. Iowa - binding arbitration for all public unions at the request of either party if an impasse persists following fact finding. The parties may use a single arbitrator or a three-member panel. The arbitrator or panel may choose on an issue-by-issue basis from among the final offers of each party or the fact finder's recommendation.

e. Maine - statutes in Maine cover state unions, municipal unions (including teachers) and University of Maine employees. They provide for arbitration of

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[18] Binding Arbitration and Public Sector Labor Disputes, Public Service Research Council, 1982, pp. 21-22.

unresolved issues remaining after mediation and fact finding. If both parties can agree, a single arbitrator may be used. Otherwise, a three-member panel picked in the traditional manner will resolve the dispute. The award is advisory on economic matters and binding on all others.

f. **Michigan** - binding arbitration covers police, firefighters, state police, and certain emergency medical personnel unions. Impasses not resolved by mediation or fact finding within 30 days are submitted to a three-man arbitration panel. A decision is rendered on an issue-by-issue final offer basis.

g. **Minnesota** - arbitration for all public unions. Upon declaration of an impasse, parties submit final offers of unresolved items to a single arbitrator if they so choose or to a three-member panel. To select a panel, the parties alternately strike names from a list of seven arbitrators until three remain. Teacher unions are granted a choice between striking or arbitration. The remaining public unions are permitted to strike only if the employer refuses to submit unresolved items to arbitration or refuses to abide by an arbitration award.

h. **Montana** - legislation in 1979 applicable to firefighters and some state employee unions. Either party may request last best offer, issue-by-issue arbitration.

i. **Nebraska** - all public employee unions covered with a unique impasse resolution device. A Court of Industrial Relations considers all disputes and issues a binding decision. The court is a permanent body whose members are employed by the state.

j. **Nevada** - covers local government employee unions, including teachers and state nurses unions, and provides that the parties may agree in advance to make all or parts of a fact finder's report binding.

k. **New Jersey** - police and firefighters unions are covered by compulsory arbitration. The parties have a choice on the form of arbitration to be used,

either a single arbitrator or a panel. Arbitration can be conventional or final offer and final offer may be issue-by-issue or total package.

l. **New York** - police and firefighters unions are covered by compulsory arbitration with a conventional, three member panel. These provisions are renewable on a two-year basis. The present extension expires July 1, 1983.

m. **Oregon** - compulsory arbitration for police, firefighters, and prison guard unions are legally prohibited from striking. The parties may choose a single arbitrator or a panel of three selected by striking names from a list of seven. Arbitration is conventional. In cases where otherwise legal strikes are enjoined, remaining unresolved issues must be submitted to arbitration.

n. **Pennsylvania** - compulsory arbitration for police, firefighters, guards at prisons and mental hospitals, and court employees. Each party selects one member of the three-man panel and these two select the chairman. Arbitration is conventional and is invoked at the request of either party or if no agreement is reached after 30 days of negotiations.

o. **Rhode Island** - several statutes provide for arbitration for all public unions. In the case of police and firefighters, all issues unresolved after 30 days of negotiations are submitted to a three-member panel for conventional arbitration. Arbitration is instituted for others if mediation fails to settle all impasses. For state employee unions this is compulsory. For municipal employees and teachers unions it is instituted at the request of either party.

p. **Vermont** - compulsory arbitration for municipal employee, police, and firefighter unions on a local option basis. Municipalities may opt by a referendum vote to provide the binding procedures. Arbitration is instituted if an impasse persists 20 days following a fact finder's report. The three-member panel engages in conventional arbitration.

q. **Washington** - compulsory for uniformed personnel if an impasse persists 45 days after mediation and fact finding commences. A three-member panel engages in conventional arbitration.

r. **Wisconsin** - compulsory binding arbitration for municipal unions. At the request of either party, disputes involving police and firefighters unions are submitted to compulsory binding arbitration. A single arbitrator is selected by each party alternately striking names from a list of five. Unless conventional arbitration is specified by the parties, the decision will be rendered on a total package final offer basis. Compulsory binding arbitration for municipal employees created by 1979 legislation allowing parties to agree to binding arbitration or strike option. A single arbitrator, selected as above, decides between final offers. The statute will expire July 1, 1987.

s. **Wyoming** - the firefighter bargaining statute provides for compulsory arbitration if no agreement is reached within 30 days. Arbitration is by a three-member panel.

CHAPTER IV

30 CAUSES OF STRIKES

(And What You Can Do About Them)

Between 1958 and 1980, there were approximately 7,000 strikes by government employees. Every one of these strikes was caused by something. Granted, in many of these strikes there was more than one cause, but usually there was a main cause. For example, although there were several reasons for the national strike by federal air traffic controllers, there was one reason which stood out from the others. In the opinion of the authors, the main cause of the controllers' strike was a miscalculation on the part of the union leadership. The union leadership did not calculate that all striking controllers would be permanently fired.

Over a period of many years the authors have studied and observed public employee strikes and have concluded that all of the major causes of strikes can be identified. By being aware of the causes of government employee strikes, management can plan a strategy, accompanied by appropriate tactics, which correct the conditions which cause a strike. Admittedly, not all strikes can be stopped, or should be stopped. Some strikes are inevitable, no matter what action management takes. In other cases the price for stopping a strike is more than management can pay. But in most cases strikes are avoidable if management knows what are the common causes of strikes and is willing to take prudent action to neutralize those causes.

Following, then, are the major causes of strikes by government employees with suggestions for how to remedy such causes.

1. Dictatorial personnel practices by management

Unfortunately, there are still government jurisdictions and agencies today in which the employees are treated without due regard for their feelings and welfare. It was the presence of such treatment which created many of the unions we have today in the public sector. Although government agencies may be able to get away with such practices where there is no bargaining law for public employees, once a bargaining law is passed, these jurisdictions become the first to organize--and with a vengeance!

Even though a government agency may not be able to pay wages as high as it would like, there are many other ways to enlist the loyalty of the employees. All enlightened personnel practices are based on the concept of respect for the employees as valuable assets to the agency. One of the reasons that Japanese industry seems to get so much work from its employees is that Japanese employers view their employees as a capital investment which must be protected and improved. By adopting this general concept in American public service, specific enlightened practices should follow naturally.

2. The use of coercion, threats, and other power tactics

For many years the authors have worked closely with top management personnel in a variety of situations and have observed how frequently "central office" executives (e.g., the mayor and his staff, the school superintendent and his staff, etc.) develop the "bunker" syndrome. This syndrome is expressed in actions and attitudes which seem to indicate that top management feels it is surrounded by the "enemy," the enemy being rank and file employees, the public, the governing body, and anybody else not in top management. True, sometimes there are understandable reasons for this attitude in some situations. True, also, the top is a lonely place, whether it is the White House or the school superintendent's office; and as such, a chief executive can easily develop a sense of

insecurity. However, when such attitudes become endemic, they can set into motion a whole series of coercive and dictatorial actions designed to control the workforce by fear.

Such actions are usually expressed in terms of overly rigid work rules and harsh supervision, all of which undermine whatever natural loyalty employees may have for their employer. Even if the agency can get away with such management, it is the agency itself which ultimately suffers along with the employees because of reduced quality of public service which results from such mismanagement.

3. Reduction in force in a manner unacceptable to the union

The dismissal of employees due to a reduction in force (RIF) is a very serious matter to those dismissed and a real threat to those who remain. So much so, that such RIFs carried out in an arbitrary manner have been the cause of strikes. To minimize the likelihood of a strike due to RIF, the employer should negotiate a mutually agreeable RIF provision, or in the absence of a collective bargaining relationship, adopt a fair RIF policy after soliciting suggestions from employees and their representatives. Most RIF procedures should give consideration to seniority in the selection of personnel for destaffing. Additionally, there should be a provision for prior notice of intended RIF, as well as allowance made to recall those who have been RIFed.

4. Failure to give proper recognition to the union

As explained earlier, most of the strikes in the early days of collective bargaining in the private sector were caused by the failure of employers to give proper recognition to unions. To this day, one of the most offensive acts which an employer can take is refusal to recognize a union, particularly if it has won a representation election. But, even though representation strikes are the most common result of failure to recognize a union, some strikes have occurred even after the union has been recognized by the employer.

The most frequent cause of such strikes being the failure of the employer to work with the union as the exclusive representative of the workforce; in other words, bypassing the union and dealing directly with employees on negotiable matters.

Once a union has been recognized it should be given reasonable cooperation and recognition. Whenever grievances are being considered the union should be notified. Whenever matters of compensation, benefits, hours, and working conditions are being reviewed, the union should be involved. In short, the union should be taken in as an equal partner as concerning contract grievances and on matters of negotiations.

5. Union busting tactics by management

Some employers do not want to deal with an employee union regardless of any collective bargaining law and will take extreme actions to neutralize the union. Such tactics include:

a. intimidating union leaders

b. discrimination against union members

c. bypassing the union

d. contracting out

e. other similar actions

In cases where collective bargaining is protected by law, such anti-union tactics can mean warfare. Not only does management run the risk of various unfair labor practices by following such strategies, but management invites the union to organize a strike in order to achieve what it views as legitimate recognition.

Employers should be allowed to exercise their legal rights in their efforts to remain union free. But whether such efforts are legal or illegal, a union dedicated to its cause will likely fight back with counter-tactics in its efforts to win recognition. Before undertaking any serious anti-union strategies, an employer should seek the advice of an

expert labor relations consultant. There are some 15,000 unionized government agencies in the United States as of 1980. In the opinion of the authors, there would be fewer unionized agencies today if public employers had exercised their legal right to challenge the organizing efforts of the union.

6. Management takes adverse action against the union leaders

In a number of strikes it appears that management sought out one or more union leaders in order to frighten the union or to set an example for other employees. Such actions are highly offensive to the union members and should be avoided at all costs.

The most common mistake made by a public employer in this area is to attempt to dismiss an employee who has become a union leader or an instigator to form a union. No public employer should attempt to dismiss a public employee because of union membership unless activities result from the membership so interfere with the employee's performance that his work is so unsatisfactory that he deserved to be dismissed. Under any conditions less severe than this, the employee is likely protected by his constitutional right to free speech and assembly.

7. Reprisals by management

In a few instances management has attempted to retaliate against the union for actions taken by the union which the employer found disagreeable. When such retaliations are detected by the union they can become a rallying cry for the union and its members. Certainly, retaliations have no place in sound labor relations.

The process of negotiations can become acrimonious. There will be "wins" and "losses" for both sides, but neither side should carry a grudge to the extent that war-like, unethical, or illegal actions are taken against the adversary. A labor contract creates a form of marriage without the option for divorce. Consequently, every reasonable effort

should be made by both parties to respect the rights and dignity of the other and to cooperate for mutual gain.

8. Removal of benefits won through bargaining

As a general rule, once a benefit appears in the labor contract, it is there permanently, and any attempt to remove it unilaterally or through negotiations will be met with understandable stiff resistance from the union. Unions view the removal of hard-won benefits as a dare to strike--a dare they are likely to accept.

If the removal of benefits is necessary, however, the best way to proceed is to follow the process of "retrieval bargaining," a difficult procedure of removing through negotiations that which was earned through negotiations. For more information on how to carry out retrieval bargaining, refer to the book, Retrieval Bargaining, by Richard G. Neal.

9. Taking public positions before bargaining begins

Sometimes inexperienced union leadership will publicly announce its negotiations demands to the media before negotiations actually begin. The purpose of this approach is to gain publicity for the union and thereby raise its profile and enhance its image among the workers. However, a more common result of such an ill-advised tactic is that the expectations of the union members are raised beyond what the union can deliver. As a consequence, the union may recommend to its members a proposed agreement substantially less than what was expected, resulting in a vote of contract rejection. When a contract is rejected which has been presented by the union, one more strike ingredient has been added.

To minimize such public utterances, the parties should agree at the outset of negotiations that there will be no press releases, except as mutually agreed to by the

parties. Such a ground rule, before negotiations begin, will assure that only acceptable releases will be made to the public.

10. Rivalry between two unions competing for the same membership

In many municipalities, school districts, and other government agencies, there is more than one union seeking exclusive recognition for the same group of employees. Often the competition between these unions to gain majority support escalates into very aggressive campaigns. The major issue in these representative efforts is usually which union is the toughest; or, which union is most capable of delivering more benefits and better working conditions to the employees. In such a competition the employer can get caught in the crossfire between the warring unions.

In their efforts to win members, unions often undertake tactics to make their opponents look bad. This misguidance is an attempt to win the loyalty of the employees away from the employer or the opposing union. In their exuberance to win support, the unions can so radicalize the employees that demonstrations of their strength and unity become imperative. Once such demonstrations are started they can easily expand into a full-fledged strike.

When caught in a situation where two strong unions are vying for the same membership, the best general strategy for management is to maintain a firm but fair position at the bargining table. Any attempt to favor one union over the other, or any attempt to engage in union busting, surely will meet with failure.

11. Incompetent negotiators

If there is any one common major cause of strikes, it is incompetent negotiators. Most strikes in the public sector have taken place where there was an inexperienced negotiator involved. Frankly, if both management and the union have competent and

professional spokespersons, there seldom is any excuse for a strike. Therefore, both parties should give the highest priority to the selection of a skilled negotiator. If no such person is available on the agency staff, then the agency should seek the services of an outside consultant, or make quick arrangements to train an existing staff member.

12. Excessive generosity in the first agreement

In hundreds of cases where public agencies negotiated for the first time, very comprehensive and generous contracts were granted. There were many reasons for such excessive concessions--inexperience, fear, poor advice, etc. But whatever the reason, such agreements left little room for future concessions by management. Furthermore, by granting over-generous contracts, unions were given the impression that similar concessions would be the norm of the future. As a consequence, in successive negotiations unions often had high expectations to receive, while management had low expectations to give. Such a drastic incongruency in expectations can create so many unresolved disputes that a strike becomes the only acceptable way to resolve the impasse.

The message here is: don't give away any more than is reasonably necessary to reach an agreement and to achieve acceptable relations with the union and the employees.

13. Lack of binding arbitration of grievances

During the early stages of collective bargaining in the private sector, many labor contracts did not contain a provision for resolving disputes over the application and interpretation of the labor contract. Consequently, a number of strikes in those days occurred during the life of the labor contract over an allegation that management was not implementing the labor contract properly. The number of strikes in the public sector over the absence of binding arbitration of grievances has not been nearly as great as that in the private sector. However, there have been some public employee strikes due to the

absence of binding arbitration of grievances and allegations of the union that management was not implementing the labor contract correctly.

The fact that some strikes have been caused by the absence of binding arbitration of grievances is not to suggest necessarily that all labor contracts in the public sector contain such a provision. Whether or not arbitration is contained in a labor contract is a matter of law and negotiations between the parties.

Given the proper conditions, binding arbitration of grievances can be a valuable aide for management, as well as the union. Those proper conditions are:

a. The contract language must be properly written with mutually agreed to understanding.

b. The definition of a grievance should be restricted to allegations that there has been a misapplication or misinterpretation of the specific terms of the written agreement.

c. The agency should have a history of peaceful labor relations.

14. Dispute over the scope of negotiations

There is probably no issue in public sector bargaining (particularly among public school teachers) which causes more deadlocks than differences over what is negotiable. From management's point of view, the scope of bargaining should be limited to wages, hours, benefits, and working conditions. "Working conditions" should be negotiated only to the extent that they do not interfere with the rights of management. For example, whereas a school board could rightfully refuse to negotiate class size because it is a management right to decide class size, that same school board could not refuse to negotiate a demand that teachers be paid extra for students assigned to them in excess of a certain number. The tactics involved in restricting the scope of bargaining are quite

numerous and complex. The book Negotiations Strategies, by Richard G. Neal, contains a full chapter on this subject with practical suggestions.

15. Insufficient time for negotiations

Under normal conditions, negotiations on an entire contract should allow sufficient time for negotiations, sufficient time to resolve an impasse if an agreement is not reached, and sufficient time to ratify the agreement--all before the agency budget is adopted. Should insufficient time be allowed for the full process of negotiations, and should the employer take unilateral action on matters under negotiations, the possibility of a strike is increased. Therefore, every effort should be made to allow an appropriate length of time to permit negotiations to succeed.

As a general rule, negotiations should start several months prior to the budget adoption deadline. Meetings should be scheduled in advance and an agenda should be mutually agreed upon for each meeting. Each meeting should be about three hours. Meefings of less than three hours provide insufficient time to make progress, while meetings of more than three hours can become too burdensome. All necessary homework should be finished in preparation for each meeting. The time at each meeting should be spent on negotiations and not in long successes or socialization. These simple rules will help assure that sufficient time is available to finalize an agreement.

16. Too many demands to be dealt with reasonably

Some state and national public employee unions have "master contracts" which are used to assist local unions in their efforts to start bargaining for the first time. This master contract is a comprehensive labor contract which the patent union considers to be ideal and is usually quite long, containing several hundred individual issues. One can well imagine the problem at the intial opening of negotiations on a first contract of being faced with the presentation of several hundred demands. And this is exactly what has

happened in hundreds of governmental jurisdictions throughout the nation, and continues to happen today as school districts and municipalities enter into labor negotiations for the first time.

In some situations, the presentation of several hundred demands has simply overwhelmed both parties, making an agreement almost impossible. When faced with the impossibility of an agreement, the likelihood of a strike is increased significantly. When confronted with a master contract, both negotiators must use their utmost skill to rid the table of padding and to focus attention on the important issues.

One technique which the authors have found to be effective when faced with a voluminous contract proposal is to write a complete contract proposal as a counterproposal, thus forcing the union to negotiate from management's written proposal.

17. Negotiations in public

As discussed elsewhere in this book, a number of states have some form of "sunshine" bargaining. Although there are no final and definitive conclusions at this time as to the overall impact of "fishbowl" bargaining on the operation of government, the authors are of the opinion that bargaining in the public is not in the best interests of either the union or the government agency. Reasons for this opinion are explained in the book, Negotiations Strategies, by Richard G. Neal.

Simply stated, bargaining in the public can make compromise for either party more difficult than if they were bargaining in private. Furthermore, the parties are tempted to play to an audience, or the press, and make statements which may be difficult to retract because of the presence of so many witnesses. Whereas, in private bargaining sessions positions can be easily retreated from. Also, public bargaining sessions can create strong antagonisms between the parties due to embarrassment in front of an audience. Under the worst conditions, the parties can work themselves into a relationship so hostile that

negotiations break down, thus laying the groundwork for a strike. Therefore, under most conditions where permitted by law, management should condition negotiations on the agreement that they be conducted in private with press releases by mutual agreement.

18. Employer is given incorrect reports on the status of negotiations

Just as the union will sometimes incorrectly inform its membership of the status of negotiations, so will the management team sometimes misguide the governing body as to that status. In most instances, such misguidance takes the form of exaggerating the implications of the union's demands and failing to reassure the governing body that an agreement can eventually be reached by good faith bargaining on both sides. Given such a prejudicial report, a governing body can be easily led to overreacting to the union and into taking such a tough reactionary position that reasonable compromises cannot be made to the union. And without any movement from management, the union may be forced to take drastic actions away from the bargaining table.

Therefore, the wise and experienced negotiator tries to convey to the employer in regular reports that steady progress is being made. Naturally, as serious problems arise, these, too, should be discussed with the governing body. But in all cases, the negotiator should convey a sense of control and stability.

19. Incorrect and inflammatory information distributed to employees by the union

Occasionally, in its zeal to rally the employees, the union may overstate its case against the employer and so radicalize the union members that a strike becomes unavoidable. Although there is no guaranteed solution to such tactics, direct communications from management to the employees is necessary in this type of situation. In such cases, only face to face communications between employees and the employer will dispell any misinformation. In communicating directly with the employees, however, the

employer must be certain that no attempt is made to bypass the union and negotiate directly with the employees. Under some bargaining laws, such action would be ruled to be an unfair labor practice.

20. Bargaining in bad faith

Good faith bargaining generally entails the willingness of both parties to meet at mutually agreeable times and places in order to exchange proposals and counterproposals in a sincere effort to reach a written agreement on specified issues; normally wages, benefits, and working conditions. Although good faith strongly implies that concessions are necessary--in fact, there is no law which requires that either party make a concession. Any act which deviates from the definition of good faith bargaining is likely to be bad faith bargaining and may be considered unfair labor practice by the union.

Labor unions universally regard the right to engage in collective bargaining as their number one priority. Any effort by management to undermine this precious right by engaging in bad faith bargaining will inevitably incur the wrath of the union. In a number of public strike situations, the manner in which the employer approached the negotiations process was the real issue; not wages, or benefits, or working conditions.

In light of the experiences in the private sector during the first decade of bargaining under federal law, the attitude of public unions today toward bad faith bargaining in the private sector, most of the strikes were over organizational issues and procedural matters --often involving allegations by the unions that employers were not engaging in proper bargaining procedures.

Good faith bargaining generally involves the willingness of the parties to meet at mutually agreeable times and places in an effort to reach an agreement through the exchange of proposals and counterproposals. Although good faith bargaining does not

require that either party make a concession, there cannot be agreement without concessions. So, compromise is the heart of negotiations.

To assure that labor negotiations are conducted properly, many state bargaining laws contain a list of prohibited practices, usually referred to as "unfair labor practices." To minimize the risk of committing an unfair labor practice, employers should be familiar with the state's bargaining law on this subject. If legal assistance is needed to interpret the meaning of unfair labor parctices, appropriate legal counsel should be sought.

21. Ad hominem conflicts between the negotiators for both sides

There have been a few instances where the relationship between the two chief spokesmen was so acrimonious that productive negotiations became impossible. The authors have known of several cases where the negotiator for management was so inept and obnoxious, that the union had a ready-made excuse to take any action necessary in order to circumvent management's negotiator. Naturally, unions, too, sometimes produce an obstreperous spokesperson.

When it is certain that the source of the problem is the chief negotiator, that person should be removed, but in a manner so as not to undermine the concept of exclusive spokesperson. That means that there must be some unrelated reason for changing spokespersons.

22. Intransigence on the part of either party

If negotiations are to lead to an agreement, there must be concessions made by both parties. Unfortunately, occasions do arise when one or both parties refuse to make reasonable concessions, resulting in a breaking off of negotiations. Such breaking off of negotiations can be one of the first signals of an impending strike, and the employer of the negotiator should be alert to any unreasonable "stonewalling" on the part of its

negotiator. When there is a stalemate in negotiations, each party should look first at its own behavior in an attempt to determine if any actions can be taken to reopen the flow of agreements.

Compromise is the heart of labor negotiations. But when should one compromise, and how much should one compromise? Based upon extensive experience in a variety of situations, the authors have developed a list of 21 suggestions associated with the art of compromise. These suggestions can be reviewed in the book, Negotiations Strategies.

23. Backing either side into a corner

The purpose of labor negotiations is to reach an agreement between labor and management; therefore, any act which interferes with that objective should be avoided. When the opponent is placed in a position where there is no escape, problems can arise for both parties.

By way of a simple example, let us suppose that management gives an ultimatum to the union that negotiations sessions will take place only in the office of the chief executive. Aside from the fact that such an ultimatum is an unfair labor practice in most instances, the union, given such an ultimatum, has been backed into a corner. Management, too, has put itself in an untenable position by making such an ill-advised demand. As a result, both parties could find themselves at loggerheads. Should such a deadlock persist, sooner or later the union will turn to other means to open negotiations.

In this hypothetical case, both parties have an unnecessary problem caused by an incompetent negotiator. An experienced negotiator must always couch his proposals and responses in a manner which allows some escape for the opponent. In the hypothetical case cited, the management negotiator should have made a proposal to meet in the chief executive's office and then proceeded to negotiate an agreement on that issue. Naturally,

the management negotiator should include in his negotiations plan the possibility of paying a price for a demand which is basically distasteful to the union.

24. Failure of the governing body to offer a salary acceptable to the union

One of the most common issues present during a strike is a dispute over wages. Although there is a point below which a union will not accept a salary offer, most unions will accept less than they planned on if management has bargained in good faith and explained its case well.

However, convincing a union to take less than it had planned for is not easy. The process of persuasion involves the presence of a high degree of credibility and trust. It often depends on the presentation of convincing data. And, timing of salary offers is of paramount importance. For example, a 6 percent salary offer made at the opening of negotiations in the fall of the year might be laughed at by the union. That same offer, preceded by lower offers, made on the eve of budget adoption, might be accepted with relief.

25. Management underestimates the union's power

One certain invitation to confrontation is for one party to misjudge the power and will of the other. One function of an expert negotiator is to determine the power of the adversary and the will of the adversary to exercise its power. In a wide range of public sector strikes, a major reason for the strike was management's underestimation of the unioin's power and its willingness to use that power. In strikes caused by this type of misjudgment, the employer is usually forced to make compromises during the strike which should have been made prior to the strike--compromises which likely would have avoided a strike. In the book, Negotiations Strategies, considerable attention is given to the nature of power in labor negotiations. By becoming familiar with the concepts presented there,

the reader should be able to better anticipate the power of the opponent and the willingness of the opponent to use its power.

26. The union miscalculates the will of the employees or the power of the employer

A union can precipitate a strike by its failure to faithfully represent its members and by a misjudgment of the union members' willingness to support a strike. A union can also precipitate a strike by its failure to calculate accurately the will of the employer to resist union demands.

A perceptive union representative should know exactly what the union membership is able and willing to do in the name of collective bargaining. Similarly, an experienced union negotiator should make it his business to know how much pressure from the union will be tolerated by management. Failure of either party to adequately assess the strength of the other can be an open invitation to take actions which create such hostile relations that a strike becomes inevitable.

27. Injunctions against union actions

In many cases where a union is on the verge of taking illegal strike actions, the employer will seek and obtain an injunction requiring that the union cease and desist. In some cases, the union views such action as a challenge to the union's power and responds with a withdrawal of services or an escalation in other militant actions. There is no one answer as to whether or not an injunction should be sought in all cases of threatened strikes or actual strikes, since each case is different and requires special handling.

In most cases, however, where an injunction could be used, it does not resolve the underlying problem. The underlying problem usually is best resolved through negotiation. Furthermore, in the view of the authors, many situations requiring an injunction are the result of a poor overall labor relations program.

28. Incarceration of union officials

In numerous illegal public employee strikes, a strike has been exacerbated or prolonged by the imprisonment of union leaders. Invariably the result of such punitive action is that the union leaders become martyrs. This statement, however, does not mean that union leaders should never be placed in jail for leading an illegal strike. In some cases, imprisonment of the strike leaders is a proper response. In other cases, such a response would be unwise.

29. Failure to ratify the contract

One of the worst experiences that a negotiator can have is for his employer to reject a proposed contract tentatively agreed to at the bargaining table. Such rejection is viewed by the union as a supreme act of bad faith and grounds to take strong aggressive actions. If both management and the union have taken reasonable positions, and if both parties are represented by competent negotiators, the ratification of tentative agreements should be routine. However, not all negotiations are conducted in a reasonable manner and proposed contracts are sometimes rejected. Unless management is willing to compromise its position and make an alternative offer acceptable to the union, conditions for a possible strike can be created. Therefore, both parties should work out their internal relationships to assure that a proposed contract is ratified.

30. The appropriating body fails to fund a negotiated agreement

There have been a number of strikes precipitated by failure of the appropriating body for the agency to appropriate funds sufficient to fund the salary agreed to at the bargaining table. To avoid this unfortunate situation, this rule should be adhered to: **Don't promise what you can't deliver, and deliver what you promise.** Where the union negotiates with a governing body that is also the appropriating (tax levying) authority, there is seldom any excuse for the violation of this rule. Even when the union is

negotiating with a fiscally dependent body (e.g., a school board), while there may be some excuse in failing to obtain sufficient money to fund the agreement, in most cases, through careful coordination with the appropriating body, there should be adequate funds available.

CHAPTER V

IMPASSE: INEVITABLE PRECURSOR?

A negotiations impasse almost always precedes a labor strike. Under typical situations, the parties have taken what appear to be final positions on unresolved issues and the union chooses to strike as a means of forcing management to change its position. But a strike is only one means to resolve an impasse. Many other methods are available and have been used in the public sector. The following methods can be used to break a negotiations deadlock:

a. In most instances, the best method for resolving an impasse is **continued negotiations.** In the vast majority of situations, a negotiated settlement is preferable to any other type of settlement, because a negotiated settlement is one by which the parties come together voluntarily through the process of good faith give and take.

b. **Mediation** is the most common procedure followed in the event of a labor negotiations impasse. This method, too, is very acceptable, since the mediator has no power to force the parties to do anything they don't want to do. Consequently, a mediated settlement is one entered into voluntarily.

c. **Fact-finding,** used very little in negotiaiton impasses, generally is not an effective means for resolving serious impasses, since only the facts of the dispute are presented, with no power to mediate or make recommendations for settlement.

d. With the advent of collective bargaining into the public sector, a new term was coined--"advisory arbitration." According to the purest definition, there can be no "advisory" arbitration, since arbitration, according to its historic definition, is final and binding. It is not advisory. Nevertheless, advisory arbitration does

now take place in the public sector and it is generally a process that combines all of the methods mentioned above. In other words, under advisory arbitration, the arbitrator convenes the parties, listens to their testimony, collects the facts, tries mediation, encourages the parties to continue to negotiate, and then prepares a final report which is advisory to the parties in the hope that it will help them come together in agreement.

d. **Interest arbitration** (discussed in Chapter III of this book) is used sparingly in public sector impasses, but its use is increasing. When this method is used to resolve an impasse, the arbitrator considers various relevant facts in the dispute and issues an award which is final and binding.

e. In a few public sector situations, impasses have been resolved by a public **referendum.** This method has had such limited use that its viability is unknown.

f. In one state (Nebraska) negotiations impasses can be terminated by an **industrial labor relations court,** the only state in the nation which uses this approach.

g. In some states the **state agency** which administers the state's bargaining law can issue awards or otherwise assist in the resolution of a negotiations impasse.

h. In hundreds of public sector impasse situations, the **courts** have taken various forms of actions (especially during a strike - a form of impasse) to bring an impasse to closure.

i. Of course, **political pressure** is frequently a factor in the resolution of negotiations impasses in the public sector. After all, in the public sector the party that wins the support of the public is the party that "wins" negotiations.

I. Causes of Impasse

With few exceptions, strikes by public employees are illegal. Despite this almost universal prohibition, however, there are several hundred strikes by public employees each

year. Normally, though, while most negotiations in the public sector do take place without a strike, it is very common for collective bargaining in the public sector to experience an impasse.

An impasse is a deadlock between the parties--a stalemate. An impasse is a dead-end street, from which neither party can see an exit. Since strikes are illegal in the public sector, most state laws have provided an alternative to the strike, e.g., mediation and fact finding. Given this situation, impasses are very common in public sector collective bargaining.

There are many causes of impasses, among which are:

a. **Too many demands.** Sometimes one party (more often, the union) will introduce more damands than can be reasonably negotiated over a reasonable period of time. As a result, the parties run out of time with unresolved items still on the table.

b. **Not enough time.** Quite often in new contract negotiations, the parties underestimate the great amount of time required to negotiate on all items. Therefore, when the impasse deadline is reached, a number of items remain at issue.

c. **Political gain.** An impasse is sometimes used as a political technique for management to demonstrate that it is being tough, or for the union to show its members that it refuses to give up on its demands.

d. **Disputes over the scope of bargaining.** Arguments over what is negotiable consume much time in public sector negotiations, particularly among white-collar professional employees such as social workers, teachers, and nurses. It is very common for an impasse to exist over whether or not management is required to negotiate on a particular subject, e.g., class size in public education.

e. **Failure to ratify.** Although not a common happening, the union or the governing body do infrequently fail to ratify a proposed agreement. In such cases, an automatic impasse exists.

f. **Intransigence.** Sometimes an impasse is caused because one or both parties are too "hard-nosed." Such an attitude is generally to be avoided. The essence of negotiations is the willingness to try and reach an agreement.

g. **Lack of expertise.** In the early days of collective bargaining in the public sector, many impasses were caused by the inexperience of the negotiators, particularly those representing management.

h. **Union rivalry.** In a number of governmental jurisdictions, two or more unions may compete for the right to represent employees exclusively. given this situation, the union in power is forced to prove its toughness and such an attitude generally leads to an impasse in negotiations.

i. **Lack of funds.** Recently a number of governmental jurisdictions have faced an unfamiliar shortage of public funds. Consequently, they have been unable to meet the demands of their employees at the bargaining table, thus causing an inevitable impasse in negotiations.

j. **Fiscal dependence.** Many governmental units which negotiate with employees are not taxing authorities; they cannot raise their own funds. For example, school boards in some states rely upon the county to provide needed funds. Since such bodies cannot guarantee compensable benefits at the bargaining table due to the fact that the funds must come from another source, some unions have been unwilling to sign an agreement without a guarantee that the promised salary increase will in fact be delivered. In such situations, an impasse often results.

k. **As a bargaining tactic.** Some negotiators see the impasse provisions as an advantageous tool in negotiations. The union may see a fact finding procedure as an additional opportunity to obtain some benefits which it would not otherwise get. Management, on the other hand, may see an impasse proceeding as an opportunity to wear the opposition down.

l. **Encouragement by law.** As stated earlier, strikes by public employees are generally illegal. In lieu of strikes, most state laws provide an impasse procedure, the results of which are advisory on the governing body. this provision of law, according to some experts, encourages the parties not to negotiate, but to go to impasse.

m. **Personality conflicts.** Although it should not happen between professionals, some negotiators do have personality conflicts which can be so adverse that successful negotiations are impossible.

n. **Absence of ground rules.** Some negotiators are so inept that they cannot even agree where and when to meet. Consequently, all of their time is spent arguing over the procedures of negotiations, leaving too little time for substantive matters.

o. **Inadequate homework.** Negotiations requires endless hours of preparation. Failure to complete such preparation inevitably results in inadequate time to conclude an agreement.

2. Avoiding Impasse

In order to avoid an impasse in negotiations, the following suggestions have been proven successful in a number of situations:

a. Proposals should be limited to only those necessary to being about productive labor relations.

b. Adequate time should be provided to assure that all issues are thoroughly explored.

c. The scope of bargaining should be agreed to prior to negotiations.

d. Once a tentative contract has been agreed to by the negotiators, it should be ratified by both parties.

e. Both parties should keep an open mind on all issues and should commit themselves to reaching an agreement.

f. Persons who are not competent in negotiations should not be assigned the job of chief spokesperson.

g. An employer, even though fiscally dependent, should deliver what is promised at the bargaining table.

h. An impasse should not be used as a bargaining tactic.

i. Personality conflicts should be kept out of negotiations.

j. Workable ground rules should be agreed to prior to negotiations.

k. The negotiator and his team should do all of their needed homework.

Even though the above advice may be followed to the letter, impasses will occur anyway. Should an impasse occur, despite efforts to avoid such a situation, the following suggestions can prove to be helpful.

3. <u>In the event of impasse</u>

a. Management should be careful in discussing affordability. In the private sector, when an employer states that it cannot afford the union demands, the question of affordability then becomes a subject of negotiations. although the National Labor Relations Act does not apply to the public sector, the concept of discussing affordability does apply. If management states that its reason for rejecting a union proposal is based upon lack of funds, then the issue is subject

to review by a fact finder or mediator, should the parties reach an impasse later. And experience has shown that it is almost impossible to prove to a mediator or fact finder that the governmental unit cannot afford more than its last offer.

b. Once an impasse is reached and negotiations are over, it may become necessary for the employee union to communicate directly with the members of the governing body in order to persuade those persons to reconsider their position. By the same token, management may find it necessary to bypass the union and communicate directly with the employees in order to persuade them to accept management's last offer.

c. If it is inevitable that no agreement will be reached at the bargaining table, and that an impasse is unavoidable, then it may be necessary to "save something for the mediator." This means that either party may need to save some additional concessions for later in the hope that such a tactic will being about an agreement.

d. Before entering into the impasse proceeding, have the mediator (or fact finder) verify what has been agreed to; otherwise, the parties may discover after the mediator has left that there are remaining unresolved issues not discussed with him.

e. If you must go to impasse, try to avoid going on only one issue. If there are several unresolved issues (especially if there is still room for movement), there is greater opportunity for the mediator to bring about an agreement.

CHAPTER VI

THE TELLTALE SIGNS

Seldom has there been a strike by public employees that was not known in advance by the public employer or one that should not have been known in advance by the employer. Granted, there have been a few strikes which came as a complete surprise, but generally speaking, even the least perceptive employer should be able to detect some signs of a possible strike. The signs are almost always there. All the employer must do is look for them.

After many years of carefully following public employee strike activities throughout the nation, the author has concluded that all strikes are preceded by one or more of the same indicators, regardless of locality and regardless of the type of employees. The standard telltale signs of an impending strike follow.

1. Tensions in the negotiations process

As a general rule, labor negotiations are carried out in a somewhat routine and decorous manner. Should the union turn hostile and abusive, the change usually indicates a serious problem. Although hostility is sometimes feigned as a negotiations tactic to intimidate the employer into taking action which would not otherwise be taken, that tactic can be used only a few times before its effectiveness wears off. Therefore, abrupt and drastic deterioration in the decorum of negotiations should be viewed with concern as a possible indicator of concerted action by the union outside of the bargaining process at the table.

2. History of strife

There are a number of public employment situations around the nation which the author is familiar with (but cannot identify) where employee strikes are a regular part of

negotiations. One can almost predict that in these jurisdictions strikes will take place almost on a regular basis. A community cannot divorce itself from its past, and the past is often an indicator of the future. If a union has resorted to strikes in the past in an effort to get its way, that same union will likely do the same in the future. Therefore, the history of negotiations and the track record of the union can be telltale signs of what is to come.

3. Boycott of selected activities

A wise union uses as little power as possible to get its way. Rather than invoke a full-fledged strike to obtain a concession, a mere threat is better, if it will get the desired concession. For example, there have been countless cases of public employees refusing to perform certain selected parts of their job in order to signal the employer that the union means business. The refusal of teachers to attend to certain extracurricular duties and the refusal by the police to complete certain required paperwork are examples of selective boycotts. Such boycotts should indicate to the employer that the issue which caused the boycott is one which should be taken seriously. That is not to suggest that the employer automatically give in to the union's demand, but rather to suggest that the issue be given good faith consideration.

4. Crisis training of employees

If there is to be a successful strike, it must usually take place under the leadership of trained persons. Consequently, it is not uncommon for state and national unions of public employees to offer regular training programs on labor relations generally, and bargaining tactics specifically. In some cases, where a strike has taken place, it has taken place because of collaboration between the local union and the parent union. In such cases the strike has often been preceded by the enrollment of key local union leaders in a strike training program. Seldom do employees give their personal time to prepare for a

strike unless they intend to use their training. Unfortunately, even when local circumstances do not justify a strike, training programs for a strike have a way of self-perpetuating themselves into a self-fulfilling prophecy. In other words, a seminar for employees on how to conduct a strike can be one of the causes for a strike.

5. Stonewalling

Extreme intransigence at the bargaining table is referred to as "stonewalling." Stonewalling is often a sign that the union has drawn the line and is ready to fight. Once all attempts have been discarded to be reasonable, that is usually a sign that the union is ready to move on to other tactics, such as a strike. Although stonewalling can be used as a bluff, that ruse can be used only once or twice before it loses its effectiveness. When real stonewalling is taking place on an important issue, the employer should view this as another possible telltale sign of a possible strike or some other concerted action designed to intimidate the employer into taking action which he would not otherwise take.

6. New faces

When a strike is being seriously considered, the local union will often seek help from the state or national union in the form of professional organizers. When these outsiders are seen with agency employees, particularly if there is tension in negotiations, their presence should be interpreted as a sign that the union is planning some persuasive action beyond the bonds of the bargaining table.

7. Threats

Ideally, negotiations should be a peaceful exchange of proposals and counterproposals by labor and management in an effort to reach an accommodation useful to both parties. When either party departs from this good faith relationship and threatens to harm the other party in order to get its way, a new and harmful element is introduced

into bargaining. A threat is an action which is designed to cause someone to take desired action, not because it is right, but because if the desired action is not taken, harm will ensue. Once either party attempts to get its way by threatening to hurt the other party, it's difficult to return to friendly relations. That's why the introduction of threats and harmful acts into the bargaining process should be viewed as a sign that the union is ready to take any action necessary to get its way, including an all-out strike.

8. Walkouts

On occasion, when tensions mount in negotiations, the union may abruptly walk out on a negotiations session, or refuse to attend a scheduled meeting. Such walkouts, except when used as a bluff, indicate that the union is close to considering further negotiations pointless. Short of offering abject capitulation, the employer should make every reasonable effort to induce the union to return to negotiations; otherwise, the union may be forced to devise other more unacceptable means to get its way. Although an employer may find it tempting to allow negotiations to break off, such action is usually ill-advised, since continued negotiations, except when counterproductive, are preferable to most other actions which the union might take.

9. Work-to-the-rule

When teachers do only that which is required of them, and policemen issue tickets in every single traffic violation, no matter how slight, they are "working-to-the-rule." Such a tactic is often just as effective as a strike, but does not carry with it the risks of a strike, such as dismissal. Working-to-the-rule can be quite intimidating to some first-line supervisors, since they become overwhelmed with a sense of loss of control over their subordinates. A successful work-to-the-rule indicates to the employer that the union really has control over the workforce. This, too, can be effectively threatening to the employer, because control of the workforce is fundamental to managing the agency.

10. Picketing

Picketing is almost always a telltale sign of a possible strike. Picketing is the process of posting union members around the work site, usually carrying placards, to demonstrate to the public and the employer that the union is seriously dissatisfied with the progress of negotiations. During a strike the picketers perform the additional duty of discouraging entrance by others to the work site and reporting to the union the names of those who do enter the work site. If carried out peaceably, picketing is generally legal and should be dealt with by the employer with care and seriousness. The presence of picketers increases the risk of confrontations with a resultant increase in the escalation of tensions. As tensions increase, sensible negotiations become more difficult. Consequently, when pickets appear, all good faith effort should be made to resolve the issue which caused them to appear.

11. Disappearance of essential items

All public agencies have essential items which are needed to operate the agency. For example, many school districts must have operating school buses to transport students. Sanitation districts must have operating trucks to collect trash. Public school classrooms need roll books and lesson plans for substitute teachers. Maintenance personnel must have keys in order to open doors and operate equipment. Consequently, when parts of buses and trucks (e.g., distributor caps) disappear, when roll books and rosters disappear, and when keys disappear from key racks, these disappearances can be a sure sign of an imminent strike. Consequently, when other signs of a strike exist, special care should be taken to protect the essential items of the agency from disappearance.

12. Selective concerted actions

As stated earlier, strikes do not usually appear unannounced. They are almost always preceded by definite telltale signs. In order to avoid the risk of a strike, unions

will frequently employ many other tactics designed to induce the employer to make a concession wanted by the union. Sporadic concerted use of sick leave, selective refusal to attend agency meetings, demonstrations in the agency cafeteria, refusal to speak with supervisors, work slow-downs, orchestrated insubordination, and premeditated harrassment of supervisors are all examples of concerted actions designed to force the employer to take actions sought by the union. If such actions are unsuccessful, they are sometimes followed by a full withdrawal of services.

Whether or not an employer wishes to treat such actions as a strike is a matter of management judgment and legal consideration. Although the precise legal determination of what constitutes a strike varies from state to state and situation to situation, the most general definition which can be applied to a strike by public employees is: **Any concerted action by employees designed as a bargaining tactic which interferes with the official functions of the employer.** Therefore, as a general rule a strike by public employees has three basic elements:

a. It is concerted. That means that two or more employees conspire to take some action.

b. It is designed as a bargaining tactic. In other words, the action being taken is being carried out to induce the employer to take some action which likely would not otherwise be taken.

c. It interferes with the legitimate and official functions of the agency. All government agencies have duties which must be performed by law. When employees conspire a bargaining tactic which interferes with these functions, a strike probably exists.

13. Excessive grievances

Almost all union contracts contain a grievance procedure as an essential component of the contract. Under healthy labor relations, the grievance procedure is used only for sincere allegations that the contract has been misapplied or misinterpreted. However, as relationships deteriorate during negotiations, the union may decide to use the grievance machinery to harrass the employer. Any abrupt and drastic increase in grievances, especially if they are frivolous and mean, is a certain sign that the union is greatly upset over something. If management is too insensitive to know what is wrong, it should ask the union why so many grievances are being lodged. Chances are that some good faith move by management will bring an end to the use of the grievance procedure as a bargaining weapon. As a matter of fact, in some industrial labor contracts, the final signing of the contract has been contingent upon the withdrawal of all pending grievances.

14. Communications blitzes

In the public sector, labor negotiations, especially in the event of a strike or an impending strike, the actions between management and the union can be viewed as a struggle over who shall gain the support of the public. Massive telephone campaigns, telephone "hot lines," speakers' bureaus, inflamatory press releases, distribution of brochures and posters, and other similar media events are tactics employed by the union to influence the governing body of the agency by bringing to bear forces beyond those of the union itself. Such actions are frequently signs that negotiations are breaking down and that the union has moved on to other techniques to gain its objectives. Such communication blitzes can be just a few steps removed from a strike.

15. The crisis center

As relationships between management and labor worsen and the union decides that more stringent action is called for, "crisis" centers may appear on the scene. The crisis

center can be at the union headquarters or some other location used temporarily until the "crisis" is passed. Usually the crisis center opens with much fanfare, accompanied by press releases, photographs, speeches, and other histrionics designed to gain publicity. Usually the center is staffed from morning until late at night and serves as the nerve center for union activities related to the "crisis." Special telephone "hot lines" might be installed to facilitate communications, and an instant printer rented to duplicate communications hurriedly. Usually a large temporary sign is affixed to the front of the headquarters announcing to the public the nature of the center. Not infrequently, union members are stationed outside of the headquarters to accost passersby. The crisis center is almost an infallible sign that strike is under serious consideration.

16. Proliferation of rumors

Although not as easily identified as some other telltale signs, a general undertone of rumors among rank and file employees can be a sign that something is brewing. Such rumors come to the attention of management through various sources. Sometimes a reporter will tip off the chief executive. Frequently, information regarding union plans will come through an employee who may be the spouse of a supervisor. On occasion, foremen and "straw" bosses will pick up information from their crews. Regardless of how such rumors of an impending strike may find their way to the employer, they should be investigated to determine their credibility.

17. Mass demonstrations

Whenever a group of employees assemble without official sanction from the employer over some dispute or grievance with the employer, there is usually a serious matter to be dealt with. Mass meetings of employees serve several purposes. They signal the employer that the workers are very unhappy. They help radicalize the workers by screwing up their will for stronger action, and they provide large numbers of employees

for recruitment purposes. Additionally, such mass meetings provide instant news for the media and instant attention for the union. These mass meetings, particularly if they are well attended and especially if they take place during a confrontation in negotiations, are clear signs that the union has needed control over the workers, and they should be viewed by management as a significant shift in the loyalty of the employees from their employer to their union. Such meetings are also a sign that employees are willing to join together for mass action.

18. Indigenous tactics

Different groups of public employees use tactics of militancy which are indigenous to the nature of their work. For example, teachers will often attempt to use their classroom to propagandize students regarding a dispute between the teachers' union and the school board. Or, air controllers have been known to unnecessarily "stack" incoming flights over an airport, in order to impress the public and management with their potential clout. In other words, there are special tactics employed in special situations and the perceptive manager should be aware of these indigenous tactics.

CHAPTER VII

WHAT IS A PUBLIC EMPLOYEE STRIKE?

Every person who is planning how to deal with public employee militancy needs a good working knowledge of the law which applies to this field. As a strike or other action by employees becomes imminent, each step by the governing body and government administrator and each step by the employees and their organization is fraught with legal implications. The government administrator and the government's attorney need to be able to assess these implications correctly, for these matters generally end up in court, and the court will review each step side by side.

1. What is a strike?

A public officer's first need is to be able to distinguish what employee actions constitute a strike. This is often not as simple as it sounds, for many militant employee actions do not amount to a strike.

A "strike" in common usage is a cessation of all work in an attempt to obtain better pay or working conditions. Legally, however, it is much more broadly defined, and includes any concerted withholding of or interfering with services for the purpose of obtaining more favorable working terms and conditions. The key elements are that two or more employees must act in concert, they must withhold or interfere with the performing of normal services, and they must do so for the purpose of obtaining some concession or benefit. A single employee who vents his grievance by walking off the job is not guilty of strike, though of course he may be subject to disciplinary action for other reasons. The withholding of services need not be total to amount to a strike; any partial cessation of work, slowdown, or other interference is generally deemed sufficient.

In determining whether some militant action is a strike, one of the most important things to watch is whether the action in fact adversely affects the job being done by the public employees. If there is a measurable reduction in or interference with public services, then the action is probably an illegal strike. If, on the other hand, the militant actions consist of verbal complaints, peaceful picketing, joining of apparently radical associations, and the like, then the action is probably not a strike.

2. Examples of what is or is not a strike

Since strikes are generally illegal in the public sector, public employees have become adept at devising alternative and sometimes bizarre strategies to force their employers to capitulate. Some of these have been deemed "strikes," while others have not. A selection of the more common ones is examined below:

a. **Work slowdown** - In City of Rockford v. Local 413 etc., 98 Ill. App. 2d 36, 240 N.E. 2d 705, a group of firemen engaged in a work slowdown and purposefully left stations understaffed. The court held that this was a strike, even though there was no outright cessation of work, as there was a withholding of services for the purpose of realizing employee demands. This decision is in accord with decisions in similar cases.

b. **Right to resign** - In Dade County Classroom Teachers Association, Inc. v. Legislature, 269 So. 2d 684 (Fla.), the Court observed that individual teachers or groups of teachers may quit working and may resign; what they may not do is stop work as part of a plan to obtain higher wages and benefits.

c. **New assignments** - College teachers had been teaching twelve hours under a contract in Caso v. Katz 67 Misc. 2d 793, 324 NYS 2d 712. When the contract expired without a new contract being signed, the teachers were assigned three extra hours, which the teachers refused to teach. The court held that it was a strike to refuse such an assignment.

d. **Improper uniform** - Police officers appeared for duty out of uniform and refused to work in uniform in Olshcok v. Village of Skokie, 411 F. Supp. 257, aff'd. 541 F.2d 1254. The court held this was a strike, and not a proper or lawful protest.

e. **"Sickout," "Blue Flu," etc.** - Misuse of sick leave to achieve employee goals, called a "sickout" in some places, and referred to as "blue flu" in some police cases, is generally considered a strike. See Head v. Special School District No. 1, 83 LRR M 2398 (Minnesota).

f. **"Work to the rule"** - A favorite tactic of public employees has been to refuse to perform those duties which are viewed as "extra" or voluntary. If the duties are a normal part of employment and the employees are directed to do them, however, concerted refusal is usually deemed a strike. See, e.g., McGrath v. Burkhard, 131 Cal. App. 367, 250 P.2d 864, nonclass work deemed part of teacher duties, Parrish v. Moss, 200 Misc. 375, 106 NYS 577; District 300 Education Ass'n. v. Board of Ed., 31 Ill. App. 3d 550, 334 N.E. 2d 165; Marion County School District v. Salem Education Association, GERR No. 597 (Oregon), refusal to attend "open house" for parents; Bellmore etc. District v. Bellmore, etc. Teachers, Inc., 91 LRR M 2614 (N.Y.), refusal to attend back to school night.

Where "work to the rule" involves a slowdown due to observing all the rules to the letter, (e.g., "ticket blitz"), the results may be mixed; sometimes this is a strike, sometimes not, depending on the rules involved and whether there is a resulting disruption of operations.

3. **Who is a public employee?**

Generally there is little doubt whether a particular employee or group of employees are public employees, and hence subject to a no-strike ban. However, there are some gray

areas where it is more difficult to make this determination. The employees of quasi-governmental agencies such as water, sewer, and port authorities will sometimes claim that they are not government employees. Similar claims are sometimes made by employees who assert that they work for an independent contractor, rather than directly for a government agency. Courts faced with these claims have generally held that the employees of agencies formed by the governing body and performing a governmental function are public employees--port authority workers have been held to be in this category.[1] Employees of public libraries, publicly supported hospitals, and the like have been held to be private employees.[2] The distinction is sometimes made based upon a wide variety of factors. If a government administrator has any doubt on this question, his strike planning process should include careful research to determine whether the agency or group of employees in question will be deemed public or private.

4. Is a strike legal?

Once it is determined that a group of employees are public employees and that what they are doing or planning to do is a strike, the next step is to decide whether the strike is illegal. Generally, the answer is "yes." The historical background is important in understanding why this is so. Until relatively recent times, any strike by any employees, public or private, was illegal. Such strikes were often considered conspiracies, and the perpetrators were treated accordingly. There was no national authority or regulation, however, so each state had its own laws for making strikes illegal and providing for punishment, creating a great deal of diversity in the practical treatment of strikes. The National Labor Relations Act (NLRA) changed things dramatically in the private sphere,

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[1] Virgin Islands Port Authority v. S.I.U. de Puerto Rico, etc., 494 F2d 452; Tennessee Valley Authority v. Bailey, 495 F. Supp. 711; City of Wilmington v. General Teamsters Local Union, 326, 290 A.2d 8.

[2] New York Public Library v. New York State P.E.R.B., 357 NYS 2d 522.

and strikes there are now considered a normal part of business. The NLRA now regulates employee relations in nearly all private industry. However, this federal law specifically excludes political subdivisions from its coverage. The result is that strikes by public employees are still judged under the law of the state in which the strike occurs, unless, of course, federal employees are involved. Under these laws, strikes are still illegal except in a very few states which have enacted laws permitting limited public employee strikes.

Leaving public employee strikes in the states' hands has continued and even expanded the great diversity formerly found in the law applying to all strikes. While such strikes are still illegal in most states, both law and public opinion differ markedly from state to state. Some states still judge public employee strikes in much the historical manner: they are all illegal, and a wide variety of legal remedies against them are easily obtained. Other states pay lip service to the illegality of strikes, but as a practical matter remedies are scarce. Still other states have enacted legislation which permits strikes by certain categories of workers under certain circumstances, as previously noted. Some states regulate public employee bargaining through state boards, while others do not permit bargaining at all. This diversity leads to a maxim that cannot be over-emphasized: know the law of the jurisdiction involved. Each government administrator should be familiar with the law and the predilections of the courts in his jurisdiction.

CHAPTER VIII

REMEDIES FOR AN ILLEGAL STRIKE

In most jurisdictions there are a number of possible actions a public employer can take to counter illegal action by employees. The most common of these are discussed in the succeeding paragraphs. One of the most important things a government administrator and government attorney can do in developing a strike plan is to evaluate each possible government action in light of the prevailing law and prevailing conditions. For those which are chosen for possible implementation in the event of employee militant action, a detailed step-by-step plan for each will help immeasurably in achieving success.

1. Injunction

The traditional remedy for preventing or stopping a strike by public employees is an injunction. An injunction is a court order directing certain specified persons or organizations to do, or cease from doing, certain actions. An injunction is backed by the power of a court to fine or imprison those who disobey its order.

An injunction is usually obtained in a three-stage process. First, application is made to the court for what is usually called a "temporary restraining order." This is an order obtained without a hearing, and sometimes without notice to the other side, and usually requires an affidavit and supporting facts to show that irreparable injury will be suffered by the public employer if the court does not immediately issue an order to preserve the status quo and prevent or stop a strike until a hearing can be held.

Where no emergency exists, sometimes the proceedings will begin at the second step, which is the obtaining of a temporary injunction. A temporary injunction is an order issued after a hearing which may be minimal or lengthy depending upon the jurisdiction

and the circumstances. The purpose of a temporary injunction is to preserve the status quo and prevent further action pending a full trial on the question at hand.

The final stage is a trial and the issuance of a permanent injunction prohibiting a future strike. The temporary restraining order, temporary injunction, and permanent injunction go by different names in some jurisdictions, but in most places, the basic procedure remains the same.

An injunction is a drastic remedy. The court is in effect saying to those affected by it that they may be summarily jailed, fined, or both if they disobey the court's order. Because it is drastic, the issuance of a temporary restraining order, temporary injunction, or permanent injunction is a discretionary action which the court will take only if firmly convinced that there is no other way to prevent irrepairable injury. Thus, the court must be convinced at each stage that the employee action which the government wishes to have enjoined is (a) illegal, (b) immediately imminent, if not already in progress, and (c) likely to result in irreparable injury if not stopped by court order.

A threat of "irreparable injury" may generally be shown through potential damage to or interference with the government's operations. Courts will generally deem a government agency's continued normal functioning to be essential to the public, and thus any substantial interference will constitute irreparable injury. The threat of interference must be a real threat, however: a court will not enjoin employees from striking based upon vague or isolated threats of a strike. Likewise, there must be some threat of future damage. If the employees have struck, then gone back to work prior to the court hearing, the court will not issue an injunction unless it is necessary to prevent a recurrence of the strike.

In some jurisdictions consideration must be given to anti-injunction statutes, sometimes called "Little Norris-LaGuardia Acts" due to their resemblance to the federal Norris-La Guardia Act. Such statutes prevent courts from enjoining private disputes and

private strikes "involving, or growing out of, a dispute concerning the terms and conditions of employment." The statutes almost all contain wording which excepts public employee strikes, leaving the court the power to enjoin such strikes, but the wording of some statutes is such that there are some restrictions on the full exercise of the court's injunctive powers.

An injunction is the most powerful weapon a public employer has, so a strike plan is not complete without detailed plans for obtaining an injunction in the event of a strike. Further discussion of gathering evidence and presenting it in court to obtain an injunction will be found elsewhere in this book.

An injunction may be the public employer's primary weapon, but there are times when even it must be used with care. Sometimes it can backfire, as some municipalities have learned to their sorrow. Typically, these unfortunate cases have proceeded as follows:

a. Public employees go out on strike.

b. The public employer gains an injunction.

c. The employees ignore the injunction.

d. The public employer petitions the court to enforce the injunction.

e. The court jails the leaders of the strike and imposes fines for violation of the court order.

f. The jailings and fines obtain wide press coverage and the jailed leaders become martyrs to their cause.

g. Public opinion begins to swing to the side of the martyred leaders and the public employees they represent.

h. Public employees refuse to bargain or return to work until the strike leaders are freed, and total impasse results.

i. Public pressure to resolve the matter builds and builds until the public employer is forced to make sufficient concessions to persuade employees to return to work.

j. Sometimes a public employer is forced into the anomalous position of petitioning the court to release strike leaders so that some resolution can be reached.

This unfortunate sequence of events has been played out in a number of cities and counties across the country, and invariably leaves a legacy of bitterness and strained relations which can take years to heal. In the interim, employees may have gathered sufficient public backing to win the very concessions that they sought by calling a strike in the first place, so that the employer may win the battle but lose the war by obtaining the injunction it seeks. The public employer must carefully assess the political climate within its jurisdiction to determine whether the obtaining of an injunction will help it achieve its goals.

2. Declaratory judgments

A declaratory judgment is a determination made by a court where the parties are asserting conflicting rights, but neither has taken any irrevocable action. There must be a so-called "issue in controversy," as the courts will not render advisory opinions, but the dispute need not have reached the point where either side has suffered irreparable damage. In the past, declaratory judgments have seldom been sought in public employee disputes. However, it appears that they can be a useful tool to the public employer to nip in the bud a proposed militant action by public employees. To illustrate, a school district may learn that its teachers' association is advocating that the teachers "work to the rule" in an attempt to secure higher pay. The teachers' union may be advising the teachers that such action is not illegal and will not constitute a strike. (As discussed elsewhere in this

book, "work to the rule" is an action in which employees do only those things which are specifically required in their job description, and refuse to undertake additional or supplementary assignments which have in the past been routinely done by the employees, and which have been in a sense an unwritten part of their job.)

Rather than wait for the eve of the employees taking such an action and then seeking an injunction, the school district might instead decide to seek an immediate declaratory judgment from the court that such a "work to the rule" action would in fact be illegal, as it constitutes a concerted withholding of normal employee services for the purpose of coercing the employer, and hence is in fact a strike.

The advantage of declaratory judgment is that it obtains a quick decision without subjecting employee association leaders to the threat of imprisonment and fines. The disadvantage, of course, is that the school district takes the risk that anyone does that goes to court: the court's decision may not be as it wishes.

3. Dismissal and other disciplinary actions

Disciplinary action against striking employees is a matter which must be given most careful attention. Dismissal or the threat of dismissal will provoke an even greater response by employees than an injunction, and the employer who tries but fails to dismiss a group of striking employees will be left with a legacy of bitterness for many years.

The first question is whether local law requires or permits dismissal of striking employees. In some states, dismissal is required, typically by a statutory provision that striking public employees automatically forfeit their positions. Such a provision can create a real dilemma for the public employer who wishes to end a strike peacefully and yet obey the law. In many states strikes are illegal, but the specific remedy of dismissal is not mentioned; in most of these, dismissal is permitted but not required.

The second question is what procedure must be followed to dismiss striking employees? May the employer simply declare vacant the positions of all apparently striking employees, or must individual due process hearings be given to each employee who is to be dismissed? This can often be a crucial question, for the complex hearing procedure found in many states is ill-suited to handling a mass of cases. The government administrator can be sure that all employees will request hearings, and may well go to court if hearings are denied. If a large number of employees are fired without hearings, substitutes are hired, and the fired employees later establish a right either to have expensive hearings or to have their jobs back due to failure to provide individual hearings, then the government will be faced with a very difficult and expensive problem. Accordingly, careful research into the law and careful planning for dealing with dismissals are essential.

Successful disciplinary action of all kinds is especially dependent upon accurate record keeping. It is often easy to establish that a strike is in progress, but difficult to prove that one particular absent employee is on strike. When faced with dismissal, all manner of excuses can be expected. Some employees will claim that they were sick and tried unsuccessfully to call in; others may claim that they tried to come to work but were prevented from doing so by striking employees. Sometimes these excuses will be true, sometimes not. In this area as in others, one of the most important ingredients of a strike plan is the development of an accurate system for distinguishing which employees are on strike.

4. Withholding pay

An obvious employer remedy for an illegal strike is to cease paying those employees who are on strike. This remedy requires planning to implement, as well, for in the confusion of a strike the payroll department may have little idea of who is on strike and

who is not unless plans are made for the early verification of the employees on strike. An automated payroll system may not lend itself to screening each employee's paycheck before it is issued. Additionally, by deciding which employees to pay and which employees not to pay, the governmental agency is in effect making its own extrajudicial decision as to who is on strike and who is not, so it should be careful that its decision is correct.

Rather than revamp their whole payroll system during a strike, some governmental agencies may decide to issue all paychecks but require the employees pick them up from their supervisors, effectively denying pay to those who are not at work to pick up their checks. If this approach is adopted, the agency needs to be careful that its various withholding accounts are not hopelessly confused by the issuance of checks which may never be delivered.

5. Withholding benefits.

Government employees typically have a wide variety of benefits. Those provided directly by the employer can include paid annual leave, sick leave, personal leave, health insurance, life insurance, accident insurance, tort insurance, retirement contributions, use of government vehicles, parking places, and many others. These benefits are established in happier times, when the government agency is trying to hire and retain good employees and the possibility of a strike is in no one's mind. As a result, there is seldom a built in easy way to cut off these benefits when employees go on strike. Part of a strike plan should include a review of all benefits to determine which the agency should and can terminate in the event of a strike.

a. **Insurance.** Insurance benefits come in a wide variety, both in terms of type of insurance (health, dental, tort, etc.) and in terms of employer participation. In some cases the government agency pays for an entire policy covering all employees, while in other cases the agency simply agrees to deduct and forward

insurance premiums to an employee's insurance company. Where the government agency is actively involved in obtaining the insurance coverage, there will usually be an agreement with the insurance company which must be considered. The net result is that there is no one answer to the question of whether insurance benefits can be suspended or terminated for striking employees. Here are some factors to be considered in attempting to answer the question in individual cases:

* Look at each type of insurance separately.
* Is the agency or the individual ultimately responsible for paying premiums?
* Is the agency or the employee the primary insured?
* Is there an agency regulation, or agreement whereby the agency has agreed to provide the coverage? Does it have a strike exception?
* Is there an established procedure within the agency for suspending or terminating coverage or benefits?
* What does the insurance policy say concerning suspending or terminating coverage?
* If "employees" are covered, does a striking employee continue to be covered until dismissed?
* Does coverage depend upon earning sufficient salary to pay the premium?
* Do any local or state laws or regulations deal with the question of suspending or terminating strikers' insurance benefits?
* If the agency were to suspend or terminate coverage and later be deemed wrong in doing so, how expensive might the error be? For example, a school district which cancelled all tort insurance for striking teachers is not likely to incur large damages if wrong, as most policies cover teachers

only while they are on the job, which they obviously are not while on strike. On the other hand, cancelling health insurance wrongfully could lead to large damages if a non-covered employee became ill and had large medical expenses which would have been covered by insurance which the agency wrongfully cancelled.

* Are employees entitled to any sort of notice prior to cancellation, either under the law of the jurisdiction involved, the insurance policy, an employment agreement, or the agency's own rules?
* If there is a collective bargaining agreement in effect, what does it say concerning termination of benefits?

b. **Leave.** A strike is a form of warfare in which the usual ideas of what is "fair" goes out the window. The public employer can therefore expect striking employees who formerly were scrupulous in their use of leave to claim that they were using annual leave, emergency leave, personal leave, or sick leave while they were infact on strike. If what the employees do is really a strike, numerous cases have held that the subterfuge of claiming to be on leave will not work. However, the governmental administrator can make his job easier by reviewing leave policies to make sure that there are no loopholes which invite such claims.

c. **Retirement.** Retirement benefits are strictly governed in most jurisdictions by a combination of federal and state laws, rules, and regulations. Typically such benefits accrue at a specified rate, "vest" at some point after which they may not be taken away, and may be drawn upon only at a certain age. The government agency should determine whether under applicable law retirement benefits may be docked when pay is docked for absent striking employees, and also whether striking employees may forfeit accrued retirement benefits.

d. **Welfare, unemployment compensation.** In addition to benefits provided by the employer, government employees may try to apply for the same types of benefits available to all workers. Nothing so infuriates employers in general, and public employers in particular, as the thought that their striking employees might be able to obtain unemployment compensation, welfare, and other similar assistance, and thus prolong a strike at the employer's and the public's expense. Striking employees have applied for such assistance, and in private employee cases in some states, they have obtained welfare assistance, though seldom if ever have they obtained unemployment compensation.

Unemployment compensation is governed by the statutes of the various jurisdictions, all of which contain provisions disqualifying persons who are unemployed due to a labor dispute. These statutory provisions have generated a large number of cases, in which courts have struggled to apply this exception in a variety of factual settings. Despite the apparent clarity of the rule, it is not always easy to determine whether a given person's unemployment is "due to" a "labor dispute." Governmental administrators should have their attorneys consult the statutes in force in their jurisdiction to determine the rules and procedures to follow in order to deny unemployment compensation to strikers.

Welfare assistance comes in a variety of forms: Aid to Families with Dependent Children (AFDC), Old Age Assistance, Aid to the Blind, Medicare, etc. The first of these, AFDC, has been the aid primarily sought by striking employees. This aid is governed by both state and federal rules. The federal agency responsible for administering the program, the Department of Health, Education and Welfare (HEW), has adopted a regulation which permits the states to determine whether employees on strike may obtain AFDC benefits.[1] This regulation has been upheld by the United States Supreme Court.[2]

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[1]Subsection 5 CFR subsection 233. 1 DO (a)(1)(1976).

[2]Batterton v. Francis, 432 U.S. 416, 97 S. Ct. 2399, 53L, Ed. 2d 488.

Some states have passed laws denying benefits to striking employees, while others have not. Where state statutes have been silent on the subject, some state courts have held striking applicants eligible, on the theory that welfare benefits are designed to aid the needy, without regard to the origin of the need, unless there are specific statutory disqualifications. The governmental administrator will have to determine from the law of his own jurisdiction whether striking employees will be eligible for welfare benefits.

The governmental administrator should not stop with a determination of the local rules concerning eligibility for unemployment and welfare assistance. He should also give some thought to how, in practice, he can prevent striking employees from obtaining any more assistance than that to which they are legally entitled. He may wish to consider giving a list of striking employees to the local welfare and unemployment compensation offices, together with citations to the pertinent eligibility laws. Caution and judgment are required in making these decisions, as there might be repercussions under the law of this jursidiction, especially if the government could not prove that all of the employees on the list were in fact on strike.

6. Damage suits

One of the reasons that public employees are not permitted to strike is that it is not the employer who suffers the most damage but rather the innocent public which both employer and employee are supposed to serve. When police strike, crime goes unchecked; when firemen strike, houses burn down; when teachers strike, children are not educated. Members of the innocent public have begun to retaliate by filing suits against the striking unions and employees to recover damages for their losses. Damage suits differ from suits for injunctions in that they seek monetary compensation for actual damages, rather than a court order enjoining a strike and possible fines for disobedience of the court order. Such

suits must surmount several obstacles, as noted below, but the damages involved can be very large, and the possibility of damages can be a real deterrent to a union considering a strike.

In a case involving a police or firefighter's strike, typically a citizen will suffer damage which he or she claims could have been prevented if there had been no strike. With a police strike, this can be hard to prove, as crime occurs whether police are on strike or not. Proving that the strike caused the damage is thus one big hurdle in citizens' cases. The family of a bus driver killed in a robbery on his bus during a police and municipal strike lost their case on just this point in Maidlow v. City of Toledo (Public Employee Bargaining Paragraph 373721). The Court held that the damage was too "remote," and the cause not sufficiently proven, to hold the union liable. The family had also sued the city; the court held the city to be immune from suit.

A second big hurdle is choosing a proper legal ground for imposing liability. When a firefighters' union calls a strike and a house burns, is the union liable because of one or more of the following:

a. strikes are illegal and the union is responsible for damage caused by illegal action;

b. strikes are prohibited in the union's contract, and the citizens are third party beneficiaries to the contract;

c. the union is negligent in calling the strike, causing damage; or

d. the union created a common law nuisance by calling an illegal strike?

In Fulenwilder v. Firefighters (IAFF Local 41784), Public Employee Bargaining Paragraph 36956, a Tennessee case, the court considered alternatives b., c., and d. in a suit by a homeowner whose house had in fact burned to the ground during a firefighters strike. The court ruled that b. and c. did not apply, as the agreement was not relevant or enforceable, and the union owed no duty to an individual homeowner, and so could not be negligent.

The court ruled that the union could create a nuisance by endangering the public by an illegal act, and so may be liable for the consequences to individuals who suffer unusual damages. The rules and required proof in nuisance cases differ substantially from those in negligence cases, so the legal theory upon which the court permits a citizen to proceed can make a big difference.

A third hurdle can be presented by the question of "standing" and the related question of exclusive jurisdiction. These questions arise principally in states which have comprehensive public employee bargaining laws which provide for enforcement action by a particular officer and for a particular punishment for strikes. When someone besides the designated officer, e.g., a private citizen, sues in court for the additional punishment of damages, a question inevitably arises whether the bargaining law was intended to provide an exclusive remedy, precluding other court actions seeking other remedies. In Caso v. State, County and Municipal Employees, District Council 37, Public Employee Bargaining, Paragraph 10367, a union struck a municipal sewer plant, which as a result ceased to function and dumped raw sewage which fouled the beaches of an adjoining jurisdiction. The adjoining jurisdiction brought suit for the costs of cleaning up its beaches, and the court was required to decide whether New York's Taylor Law provided an exclusive remedy. The court ruled that it did not, where there were allegations that the injury complained of was alleged to be "direct," that is, an inevitable result of the strike, and also was alleged to be willfully and maliciously caused.

A contrary result was reached in Burke & Thomas, Inc. et al. v. International Organization of Masters Mates & Pilots, PERR. 84 2:83, 12-31-79, a class action suit brought by merchants who lost business as a result of a municipal ferry operator's strike. In that case, the Supreme Court of the State of Washington considered three questions: whether the merchants were third-party beneficiaries to the no-strike clause in the union contract, whether the merchants could sue for "tortious interference with business

relationships," and "whether courts should fashion a new remedy which would allow private parties incidentally injured by strikes of public employees, prohibited by contract or laws, to recover damages for their injuries, and thus enter the arena of public employee labor relations?" The court answered "no" to each question. Similarly, in Lamphere Schools v. Lamphere Federation of Teachers, 400 Mich. 104, 252 NW 2d 818, the Michigan Supreme Court refused to let the school district itself sue the teacher's union for damages. The decisions of the courts in each state will govern whether a suit for damages against a union is likely to be successful.

7. Union decertification; loss of dues checkoff

The usual remedies against a union which sponsors or sanctions an illegal strike are injunctions and fines. In certain states, unions are certified under the state's bargaining laws and also may have a dues checkoff privilege under which dues are automatically deducted from employees' paychecks. In these states, loss of certified status, loss of dues checkoff, or both can be a potent additional remedy.

Decertification will be governed by the law under which certification is made. Generally, a petition to the employment relations board is required with subsequent hearings to determine whether decertification is appropriate.

Dues checkoff is sometimes governed by statute as well but sometimes exists only as a result of a negotiated union contract. New York's Taylor Law is an example of a state law permitting the New York Public Employment Relations Board to suspend the employee union's right to have dues deducted. The right to impose this sanction was upheld in two related federal cases, arising out of strikes by New York City and Buffalo teachers. The New York City strike had been a nine-day strike in Septmeber 1975, involving the United Federation of Teachers, while the Buffalo strike had been a 14 day strike in September 1976. Albert Shanker et al. v. Robert D. Helsby, et al., No. 592,

Docket No. 81-7402; Buffalo Teachers Federation, Inc. v. Robert D. Helsby et al., No. 765, Docket No. 81-7405, both decided April 1, 1982 by the United States Court of Appeals for the Second Circuit.

8. Special legal problems

The legal considerations previously discussed will be present in almost all jurisdictions. Other considerations are found in some but not all jurisdictions; some of these are discussed below.

a. **Effect of public bargaining laws.** In those jurisdictions with public employee bargaining laws, and particularly those with comprehensive laws which create local or state boards which oversee government employee relations, the government administrator will need a good working knowledge of the applicable law. These laws may change or limit some of the options available to combat employee militancy. For instance, under such laws sending a letter to all employees outlining the employer's position on pay raises and threatening to fire any employee who strikes over pay raises might be an unfair labor practice through negotiating directly with employees. Similarly, an employer who unilaterally changes leave policies out of concern that employees might abuse leave policies during a strike may be guilty of refusing to bargain in good faith. An employee union will be quick to spot and take advantage of any employer misstep, so careful review of the strike plan in light of any applicable bargaining law is essential. Rules and procedures for employee dismissal and discipline may also be governed by the bargaining law.

b. **Effect of collective bargaining agreement.** Collective bargaining agreements will usually have a "no-strike" clause which may justify the government employer in treating the agreement as breached and of no effect if employees

do go on strike. However, an employer must undertake a careful review of the agreement and the background law in its jurisdiction before coming to this conclusion. It may be that some parts of the agreement will remain in force, notwithstanding the strike.

The employer needs also to consider the effect of allowing striking employees to return to work without a new agreement. Will the employees remain subject to the old contract, or will they have no contract? This will depend in part upon the law of the jurisdiction and in part upon the employer's actions.

c. **Freedom of information.** The government administrator may naturally wish to keep at least part of his strike plan a secret. Once the union learns of its existence, the union may seek a copy under an applicable Freedom of Information Act. Part of a strike plan should, therefore, include research into whether and how the plan may be kept confidential. If confidentiality is uncertain and early publications of the plan might prove damaging or embarrassing, it may be best to amend the plan, if possible, to eliminate the damaging features.

d. **Role of the governing body.** The governing body of a jurisdiction which is developing a strike plan or actually dealing with a strike has a difficult role to play. On the one hand, as a final decision maker this body must make the policy decisions in how to deal with employee militancy and so must involve itself to a certain extent in planning and taking action against militancy. On the other hand, too much personal involvement by individual members or the body as a whole can precipitate the very militancy which a strike plan seeks to avoid. This is so because too much personal involvement breeds too much personal feeling between members of the governing body and the employees who feel

they have grievances, and, whether the feelings are ones of sympathy or hositilty, the result can be the same. If the governing body is perceived as personally hostile to employee grievances, then a strike may result from the resulting employee hostility. If the governing body is perceived as personally sympathetic, on the other hand, the employees may call a strike to by-pass the administration, hoping that the governing body's sympathy will cause it to give in and grant the benefits the employees want. The PATCO airline controllers' strike has been attributed in part to a mistaken belief on the part of union leaders that the President would be sympathetic to the strike. This belief was apparently engendered by an off-hand remark during a campaign meeting with a union leader. The moral for governing bodies: be careful what you say, especially in private meetings, for it is hard to win and easy to say things which will ultimately damage the government's position.

What the governing body and the government administrator should do is to make policy decisions, then appoint a single spokesman to do all negotiating and make all statements, as detailed elsewhere in this book. Freedom of information laws must be scrutinized before meetings are held to make these decisions.

The government administrator should also bring to the governing body those rules, regulations, ordinances, policies, etc. which need to be changed in order to deal effectively with a strike or other militant action.

CHAPTER IX

PICKETING

Picketing is one of the few militant actions which public employees may legally undertake, so it is naturally a favorite tactic. Because of its popularity and because of the separate rules which govern whether it is legal or illegal, picketing merits special attention.

1. What is picketing?

Picketing is commonly thought to be patrolling or parading with signs by employees or others in support of employee objectives. Picketing is not always so narrowly defined, however, and interpretations of the word as it appears in the National Labor Relations Act have included distributing handbills, placing out signs, placing groups of dissident employees displaying the union sign near the employer's entrance, and placing a menacing group of men in a manner to intimidate employees. These may not always be deemed "picketing" when done by public employees, but any time groups of employees gather publicly to air their grievances, thought should be given to whether their conduct amounts to picketing.[1] If so, the rules applicable to picketing will apply.

2. Rules applicable to picketing

Public employees are citizens, and as such have certain constitutional rights, among them freedom of speech, freedom of association, and freedom to petition their government for redress of grievances. The interplay between these rights and the rights

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[1] 29 USCS subsection 158 (b)(7), 218 Am Jur 2d, Labor and Labor Relations, subsection 1287, citing NLRB cases.

of the government to maintain order and continue functioning have created a complex set of rules applicable to picketing.

a. **Picketing must be peaceful.** Numerous court decisions have held that picketing must be carried on in a peaceful, law abiding manner. The law does not tolerate the use of force by picketers to keep employees from crossing picket lines, for example, nor are threats or intimidation in words or behavior permitted. The reason that such conduct may be enjoined or made the reason for police arrest is that it goes beyond "free speech" by the picketer and impinges on the rights of others. The distinction between peaceful and non-peaceful picketing is not always clear; violence provoked by picketing does not necessarily make the picketing illegal, and occasional confrontations between picketers and non-picketers will not necessarily cause a court to enjoin the picketing.

b. **Picketing must not unduly interfere with the operation of governmental functions.** Picketers may not set themselves up in front of city hall, school board offices, etc. and obstruct the path of citizens and employees going in and out. They are also prohibited from unduly blocking public streets, sidewalks, and the like. However, the government generally may not issue an absolute ban upon picketing upon public or governmental property.

c. **Picketing may not be undertaken in pursuit of an unlawful objective.** Strikes by public employees are generally unlawful and picketing which advocates or supports an illegal strike is itself illegal. If the union is attempting by picketing to coerce the public employer to enter into a collective bargaining agreement in a jurisdiction where such agreements are not permitted, this also may be enjoined.

d. **Picketing must generally be confined to the general area of the employer's premises.** This is a very loose rule, designed to keep labor disputes from spilling over and injuring innocent parties. One manifestation of the rule is found in the private labor law prohibition on so-called "secondary boycotts," in which a labor union will picket, boycott, or otherwise harass a separate business to keep it from doing business with an employer. This prohibition can protect public employers as well as private businesses; for example, a union of car mechanics which is at odds with the car dealer that employs them cannot picket the local school board offices in an attempt to keep the school board from buying vehicles from the dealer. This is one instance in which the NLRB could exercise jurisdiction and take action against the union if called upon by a public employer.

Another manifestation of this rule is that picketing of the private homes and private businesses of government authorities is generally not permitted.

e. **Picketing must be truthful.** Courts have held that untruthful picketing is unlawful, there being no freedom of speech to tell a lie. Thus, banners bearing false statements may be enjoined, though a few false statements may not be enough to get all picketing stopped. In considering whether to proceed to court to protest picketing on this ground, the government administrator should bear in mind that "truthful picketing" may be in the eye of the beholder. Such expressions of opinion as "City Hall Unfair to Local 103" or "Teachers Aren't Even Paid Peanuts" are not likely to be enjoined, even if the government considers them to be outrageous lies.

The type of picketing which is generally deemed permissible is so-called "informational picketing." If a group of employees makes known their grievances by picketing and does so in a peaceful manner, without unduly obstructing public traffic, or interfering

with governmental activity, and without attempting to picket the private homes or businesses of governmental leaders, their action is generally considered to be constitutionally protected and may not be enjoined by a court or made the subject of reprisal by the governmental authority itself.

The general rules applicable to picketing can be very difficult to apply in particular situations. Employee actions seldom fit one pigeonhole neatly. Imagine, for example, a more or less typical situation: a group of municipal sanitation workers are parading in front of city hall carrying placards bearing the slogan, "We support local 100." Local 100 is the local bargaining representative and has previously announced an intention to go on strike. The picketers are creating some disruption in the flow of pedestrian traffic along the sidewalk itself, but this is more the result of the attention that they are getting than it is of any action they themselves are taking. They are not blocking the actual entrance to city hall itself. Under the circumstances, is the picketing unlawful? It is hard to tell, for the court could characterize the picketing as non-disruptive and not in support of any illegal objectives, while, on the other hand, there is some disruption and some indication of support for an illegal strike. As a result, the public employer should be cautious in its dealing with the picketing. If what the employees were doing was clearly violative of the rules, then the employer would be safe in taking immediate action to prohibit picketing, as by calling the police to make picketers disperse. Where there is any doubt, the governmental authority should consult its counsel before taking direct action against the picketers.

3. Other observations

A governmental authority should always bear in mind that the ultimate purpose of picketing is to secure attention. It should weigh this in detemining whether to take direct action to have the picketing halted, whether this action be by the authorities or by the

obtaining of an injunction. Under many circumstances, the best tactic in dealing with picketers is to ignore them. Without attention, they may quickly grow tired, while action against them may glorify their grievances.

a. **Dealing with picketing in the strike plan.** Because picketing is a favorite activity, it must be expected and planned for by the governmental administrator. The following are some of the items which should be considered:

* Determine in advance the specific areas in which picketing will and will not be tolerated. For those where picketing will not be tolerated, formulate and document the reasons why picketing should not be permitted, e.g., disruption of public business, impeding pedestrian or vehicular traffic.

* When reviewing policies, rules, and regulations keep in mind the possibility of picketing. For example, does the sick leave policy permit the government to require a doctor's certificate to justify the granting of leave in doubtful cases? If not, what action can be taken against the employee who calls in sick, then appears on the picket line? Perhaps none, especially if there has never before been any careful policing of the taking of sick leave for personal reasons other than sickness.

* Plan to tie picketing into strike threats. Strikes are frequently preceded by picketing. Since picketing in support of a strike is illegal, the picketers' placards seldom threaten or advocate a strike in so many words, but sometimes they can nonetheless be tied into a plan to strike. If so, court action may be possible.

CHAPTER X

GETTING READY FOR COURT

The governmental administrator knows the facts, and the government's attorney knows the law. Helping each other get ready for employees' militant action is, therefore, a cooperative effort, involving both from as early a point as possible.

Some governmental administrators are hindered in this cooperative effort by their lack of knowledge of the way that courts and the legal system operate. This is quite natural, as very few people besides attorneys have any degree of experience in the practical workings of courts and the legal system. Attorneys for governmental authorities do not always help a great deal in dispelling this aura of mystery and uncertainty, perhaps because they are so accustomed to the legal system that they have a hard time explaining it to others in a comprehensible fashion. It is, therefore, very helpful for any governmental administrator to take a few moments in preparing his contingency plans to view those plans from the point of view of the goals of the legal system. A brief example may help in this regard:

"Metropolis" is a small city located in the state of Jefferson. The clerical workers in the school system have recently been unionized and salary demands have sharply escalated. Several letters to the editor of the local newspaper from "sympathetic citizens" have urged the school employees to take some drastic action, such as a slow-down or outright walkout. Union officers have told their members to prepare for a strike and have been overheard stating that there "will be" a strike when the new school year begins if salaries are not increased to meet their demands. The new year is now due to begin in a few days and there are signs of strike preparation. The union has also recently begun picketing the school division headquarters, setting up a picket line directly in front of the main entrance and disrupting traffic in and out. The school administration, based

upon these statements and observed preparations, thinks a strike is imminent and would also like to curtail the picketing.

Given these basic facts, how does the school system administrator take off his administrator's hat and put on his legal hat? He switches hats by remembering that preparation for a legal action is a four-step process:

a. knowing enough law to discern what must be proven to win in court;

b. compiling an up-to-date file of the information which must be proven;

c. preparing and filing legal papers with the court; and

d. preparing the necessary papers and witnesses for actually going to court to prove your case.

This sounds simplistic, but the government administrator will be amazed how much easier a court case is to prepare and present if he keeps these steps in mind.

By keeping in mind the first step, "What does the law require me to prove?" the administrator can more easily sort through the great mass of information he has at hand. Turning to the "Metropolis" example, if the school superintendent intends to go to court to seek an injunction against the picketing and a proposed strike, some of the legal issues his evidence will have to address are as follows:

a. Is the picketing being carried on lawful or unlawful?

   * Is it being carried on in a peaceful non-disruptive manner?
   * Is it interfering with school district operations?
   * Is it being carried on in pursuit of a lawful objective?
   * Is there some alternative, less disruptive place, or manner where lawful picketing is possible?
   * Is this a proper case for an injunction, i.e., if the picketing is unlawful, is it likely to continue or recur if not prohibited?

b. Should an injunction against striking be issued?

* Is a strike really imminent?
* Who, specifically, is planning to strike?
* What specific action is being threatened which will constitute a strike, and is such action an illegal strike in the jurisdiction involved?
* Is this a proper case for an injunction, i.e., are unlawful action and irreparable injury likely if an injunction is not issued?

For purposes of obtaining an injunction, the superintendent knows that he does not have to worry so much about rebutting such typical employee claims as racial or sex discrimination, "unfair" treatment, low pay, and the like, for these claims are not as likely to be deemed relevant by the court.

The second step, compiling information, is directly affected by the first, for the information needed depends upon the proof needed in court. In the "Metropolis" example, evidence of the of the strike's imminence and paralyzing effect will be crucial. In addition, the school official will need to know the names, titles, and addresses of all of the persons who he thinks may go on strike so that they, as well as those on the picket line, can be served with suit papers and later with a copy of the injunction. Without proof that such persons had notice of the issuance of an injunction, a court will not hold them in contempt for disobeying it.

Along with this, he should maintain a complete file of information, names, addresses, dates, events, original papers, etc., which will be needed to prove a case for other types of actions which may be contemplated such as dismissal actions, damage suits, etc. If employee organizations have written letters threatening to strike, he must know where the original letter is being kept. If verbal strike threats have been made by employee representatives or by employees themselves, he should have the persons to whom these threats were made and keep detailed records of the dates, times, and parties involved when these threats were made, together with a record of the exact words used to

the best of the person's recollection. If picketing has occurred, pictures of the picketing and the subject thereof are very helpful. The person taking the picture should be prepared to authenticate the photographs and to identify the persons in the picture to the extent possible. The overall goal of this record keeping is to maintain an organized record of first-hand or primary evidence which will be needed if legal action is necessary. A checklist to help in compiling information is found later in this chapter.

The third step, preparing and filing suit papers in court, is principally the province of the governmental attorney. However, since these papers are in effect a synopsis of what the government agency intends to prove to the court, they must be prepared working closely with the government administrator. They also form a valuable checklist for both the administrator and attorney to organize papers and witnesses to go to court. In our "Metropolis" example, the fourth paragraph of the suit papers seeking an injunction might allege as follows:

> 4. That the threatened action to cease work is a concerted action, undertaken by the individual named defendants in concert with one another, at the instance and encouragement of the Defendant Union Local 100 and the individual named officers thereof, for the purpose of influencing Plaintiff School District to grant increased pay, and that said threatened action is a strike, in violation of Section 5-101 of the Code of the State of Jefferson.

This paragraph tells the school administrator that he must prepare witnesses and collect papers which will prove not only that the employees are threatening to strike, but also that they intend to strike "in concert with one another," as part of a plan to influence the school district to increase pay.

Some government administrators have never seen suit papers and may profit from a brief description. Suit papers begin with a caption naming the court and then the party who is filing the suit, which in most cases is the political subdivision which is threatened by an employee action. The party filing the suit is generally named the plaintiff. Following the plaintiff in the caption appear the names and addresses of each defendant

whom the plaintiff seeks to have affected by court action. In employee cases, this can be quite a long and complicated list. Generally, the papers name the organization representing the employees, the individual leaders of the employee organization. The individual employees who have struck or will strike are named to the extent these are known at the time that the papers are filed, and also named are any other persons or organizations who are taking or have threatened to take an active part in the strike. In order to be prepared to file suit papers, therefore, the governmental authority needs to keep an up-to-date list of the names of the local, state, and national employee organizations, and whom to serve at such organizations, together with the names and residences of all organization leaders and of all employees. It is particularly important to have the residence address of each person who is to be served, as suit papers must sometimes be served at a person's residence in order to be effective.

After naming the plaintiff and defendants, suit papers will set forth in numbered paragraphs the facts which the plaintiff claims will justify the court in taking action against the defendants. Suit papers generally conclude with a formal request for the specific action which the plaintiffs are requesting the court to take. The facts that the plaintiff alleges in its suit papers are the same that need to be proven in court, so keeping a filing of the information needed to file suit is an integral part of preparing for court itself.

The fourth step, getting ready for and going to court, consists first of reviewing and organizing the items which have been developed as part of the first three steps, together with preparing any new material and new witnesses as a result of recent events or union claims. A "dress rehearsal" of the principal government witnesses is often a very good idea, to give them a feel for the manner in which their evidence will be presented in court.

On the day of court itself, the judge will first listen carefully to the evidence presented by the school district to see whether the evidence is sufficient upon the various legal issues involved. The law pertaining to evidence is complex but familiarity with some of the broad rules is helpful. Some of the evidence which might be offered in a case of this sort follows.

1. Evidence

Witnesses with first-hand knowledge of the relevant facts. A number of people may well have first-hand knowledge of relevant facts and part of the job of the school district attorney and administrator is to talk with such persons and determine what they can add and testify to in court which will help the city's cause. Again, the first question is "what do we need to prove to win?" As to curtailing the picketing, the ultimate issues are whether it was carried on an unlawful manner or for an unlawful objective (see Chapter IX on picketing). Important persons who could be called to prove these facts are those who personally observed the behavior of the picketers and read the slogans on their signs. Other persons who have observed pictures taken of the picketing and who can identify the individuals who actually carried the signs and, if possible, which picketers carried which signs, can also add a great deal. Likewise, those who have overheard specific threats of a strike can be called to testify to this fact. Other persons will have personal knowledge of union activities, prior militant actions by union officers or representatives, etc.

Admission and other statements by the union officers or members. As noted, courts will sometimes permit testimony about admissions made outside court by union officers or members. Thus, statements by the union members who are parading up and down on the picket line that they are going on strike may be taken by the court to be an admission that they are in fact intending to go on strike. Likewise the statements on the placards themselves may be taken to be an admission. There are a number of rules applicable to

admissions which will not be gone into in detail here, but such statements are of a valuable source of proof in a case and anyone who has personal knowledge of such an admission should be interviewed and asked to make a record of what he saw or heard.

2. Business records

The records of a school district which are kept in the ordinary course of its business may be another valuable aid in proving the district's case. The so-called "custodian" of these records can be called upon to bring them into court, identify them, and prove that they are in fact kept in the ordinary course of business; whereupon, they may be ruled admissible by the court, subject to certain exceptions. The school district attorney should review the sorts of records kept to determine whether they will be admissible in his jurisdiction. The person who brings the records into court and introduces them does not necessarily have to have first-hand knowledge of the matters which are contained in the records. These records can be very valuable, for often they contain information which no one person could prove from his or her own personal knowledge. Work attendance records, payroll records, and the like often fit into this category.

3. Documentary evidence

Many court cases involve all sorts of documentary evidence, including letters, contracts, photographs, tape recordings, etc. In the "Metropolis" case, there may well be photographs of the persons carrying placards, prior letters from the union threatening job action of some sort, copies of the personnel policy of the school district, copies of notices sent to the workers, and so forth. The principal thing to be kept in mind in planning for the use of the documentary evidence is that it must be formally introduced in court by a person who has first-hand knowledge of the background of the document and who can properly authenticate it to the court's satisfaction. In the case of a photograph, this will require either the person who took the photograph or a person who was present at the

scene and can testify that the photograph accurately depicts the event which appears in the photograph. Similarly, a copy of a school district rule or regulation may have to be authenticated in some manner under the law of the jurisdiction involved, and must be introduced in court by someone who can positively state that this is in fact the rule or regulation which is currently in force.

4. Prepare a checklist

As part of a strike plan, a government administrator and government attorney may find it convenient to develop a checklist of items to be done in developing, maintaining, and updating a strike plan. Some items which could be incorporated are listed below, with particular emphasis on those needed to prepare for court.

I. Directory information

A. Union

1. Local Unions/Employee organizations (If different employees have different organizations, prepare separate lists.)

2. State or Regional Branch (if any)

Name

Mailing address

Business address, if different

Person to be served with papers

Address to be served, if different

3. National Union (if any)

Name

Mailing address

Business address, if different

Person to be served with papers

Address to be served, if different

4. Officers of local union

President

Employment - job location and telephone number

Residence - address and telephone number

Vice President

Employment - job location and telephone number

Residence - address and telephone number

Other Professional representative (if any)

Employment - job location and telephone number

Residence - address and telephone number

5. Copies of Union charter, certification, etc., if any

6. Roster of members

B. Employees

1. Complete, up-to-date list of all employees by name, job, job location, address, telephone number, etc.

2. Beside each employee, note supervisor or other person familiar with employee who can identify employee and assist process server, if necessary

II. Background information

A. Union history prior to onset of present situation

1. Date and circumstances of formation

2. Documented escalation in threats, demands, militant behavior (letters, logs of phone calls, notes of conversations, newspaper articles, etc.)

3. If there have been prior strikes or strike-precursor activity, maintain complete file, document similarities to current situation

B. Overall history of dealing with employees by government-dates and amounts of pay increases, leave and benefit policies, etc.

III. Strike-precursor activity

A. Union statements - keep log with citations to names, dates, conversations, persons involved, location of original documents

B. Other events of employee unrest - draft a standard form

IV. Strike

A. Form for recording incidents

B. Photographs

C. Documentation of disruption of government business

D. Log of events in chronological order, with citation to location of original documents, incident reports, telephone logs, witnesses, notice to employees, etc.

E. Index and cross-reference material so that it can be found quickly

V. Legal documents (names may vary with jurisdiction)

A. Complaint and any accompanying affidavits

B. Temporary restraining order/preliminary injunction

C. Memorandum of authorities

D. Notice to absent employees to report for work, indicating consequences if disobeyed

E. Notice of disciplinary action or intent to take disciplinary action following hearing

F. Notice to union of penalty (if authorized by statute)

G. Rule to Show Cause for violation of injunction and Motion for Issuance of Rule

H. Order holding in contempt imposing penalties

CHAPTER XI

SOURCES OF INFORMATION

The law which is relevant in dealing with strikes can come from a wide variety of sources. Below are some of the sources listed which may yield information on the law applicable to developing a strike plan.

a. State statutes governing public employees
   * Strikes and strike penalties
   * Labor organizations
   * Employee tenure rights
   * Dismissal procedures
   * Employee benefits

b. Administrative agency rules, regulations, and decisions
   * This source will be most important in jurisdictions where there is a labor board of some type.
   * Other administrative agencies may have some input, e.g., a State Board of Education in educational matters.

c. Published court cases, state, and federal
   * In states with substantial strike history, there will often be a number of published case decisions by the state appellate courts. These are often very instructive, for they give insight both into the interpretation of state laws and into the courts' predispositions when faced with a public employee strike.
   * Federal court decisions, including those of United States Supreme Court, are often relevant, especially in the areas of picketing, free speech, tenure rights, and other questions involving constitutional issues.

d. Periodicals, pamphlets, and reports

* There are a number of publications which discuss public employee strikes and militancy. These include the Bureau of National Affairs (BNA) Government Employee Relations Report and the Commerce Clearing House, Inc. (CCH) Public Employee Bargaining, both of which are excellent sources of national, state, and local laws, administrative rulings, and court decisions. Numbers of other more specialized publications discuss employee relations within particular fields or particular states. Law libraries, university libraries, and large public libraries may carry these.

* For those who wish to learn more about the process of negotiations, Inside Negotiations (EFR Corporation, Box 649, Luray, Virginia 22835) is an excellent journal. For those with a special interest in collective bargaining in public education, "Educators Negotiating Service" (EFR Corporation) is an excellent newsletter.

e. **Attorney General opinions.** In some jurisdictions, published opinions of the attorney general can give guidance on particular questions or interpretations of the law.

f. **Local ordinances.** Some large cities have established their own labor relations procedures by ordinance. Even in those jurisdictions which have not, however, local ordinances can sometimes play a surprisingly large role in public employee strikes. Picketing, demonstrations, "sit-ins," and acts of vandalism, as well as arrests for loitering, use of profanity, destruction of public property, obstruction of a police officer, resisting arrest, and numbers of other legal matters may well be judged under the municipal or county ordinances relating to these matters. Local ordinances are not always kept up-to-date or worded artfully, and are seldom challenged until some large controversy such as a

strike causes them to be scrutinized. This can lead to some awkward results; for example, a city fire chief who calls in the police to arrest the city's striking firemen for "loitering" on the picket line will be very embarrassed if it later develops that the city's loitering ordinance is unconstitutionally broad and the arrests are, therefore, invalid. The resulting publicity and litigation can be just what the strikers are looking for. Accordingly, local ordinances upon which the government agency may have to rely should be reviewed.

CHAPTER XII

PREEMPTIVE MEASURES

In addition to managing an agency according to enlightened practices and conducting a labor relations program according to expert standards, there are a number of specific actions which an employer can take to preempt a strike or mollify the impact of a strike should one take place.

1. Contracting out

Many government agencies contract with private firms to carry out certain functions of the government agency. Usually, this is done because some government functions require expertise that the agency does not have (e.g., the repair of copy machines) or the agency has concluded that a private firm can provide the services (usually under competitive bidding) less expensively than the agency itself could provide. Also, some government agencies simply wish to shed the headache of certain operations. For example, a government agency may contract out to provide security personnel to keep agency buildings and grounds secure, rather than taking unto itself all of the administrative and logistical burdens associated with building security.

Aside from the possible advantages of financial savings and reduced administrative burdens, there are several advantages associated with subcontracting, as far as public employee strikes are concerned:

a. Should there be a strike by the employees of a private subcontractor, there is less direct political pressure on the private employer than would be the case if the function were being performed by employees of the government agency. Consequently, the government agency is in a better position not to make unnecessary concessions as a result of the strike.

b. Where subcontracting takes place, especially if there are several subcontractors, there is less likelihood of a general agency strike because several employers are involved instead of only one.

c. Should there be a strike by the employees of a subcontactor, the government agency can be more neutral than would be the case if the strike was by agency employees.

d. A private contractor is usually better prepared and equipped to handle labor relations problems, including strikes. In the event of a strike, a private company has more options to keep services operating than does a government agency. For example, a private company is better equipped to hire strike breakers than a government agency.

Some states require negotiations over contracting out. In 1981, the Rhode Island State Labor Relations Board (the agency which administers the state's bargaining law) ruled that while "it is within management's prerogative to take upon itself the right to make inherent decisions for the proper and efficient running of its school department," a school board could not unilaterally decide to subcontract out the school bus service "unless and until it has discussed the effect of same with union, in addition to showing the union the reasons and the necessity for its original decision to subcontract out the work."

The Rhode Island State Labor Relations Board said that such negotiation was necessary "in order to allow the union to show that it can or cannot achieve similar economy with union employees or to provide the employer with a mutually acceptable alternative." As a remedy for the school board's failure to negotiate over these items, the school board was ordered to pay the employees who were discharged as a result of the subcontract back pay and benefits from the date of their discharge until the parties negotiated a new collective bargaining agreement.

This Rhode Island case is just one example of why a government agency may not be able to contract out unilaterally. Therefore, before subcontracting is seriously considered, the advice of legal counsel should be sought.

2. Use strike breakers

The purpose of a strike by public employees is to achieve some important concession by the employer. The union reasons that by going on strike the agency will be deprived of its employees and will therefore be unable to continue operations. As a result, citizens are denied essential governmental services, causing them to exert pressure on the governing body to settle the strike--at any cost, which usually means capitulating to the union's demands.

To avoid this scenario, the public employer should have a strike plan which is based on the overall strategy of continued operation of the agency. In other words, the strike plan should provide for having sufficient workers available to keep the agency running during the strike, ~~even if~~ this provision requires the employment of strike breakers. The authors worked with a large midwestern city school district where, when faced with the real prospect of a strike by the teaching staff, a call went out for substitute teachers, with an announcement that the normal substitute pay would be doubled for substitutes. Once the union realized that it could not close down the school system, it decided not to go on strike.

3. Publish salaries and benefits

In the public sector the union and management often compete for the support of the public, because the public becomes the final arbitrator in labor conflicts in government service. In this competition for public support, the union will often attempt to convince the public that the employees are mistreated and exploited. Although in most situations this is not true, the public may not know it. Therefore, management may need to

undertake a public information program to enlighten the public about the true working conditions of employees.

One tactic which can be used in such an information program is to publicize the salaries and benefits (compensable and non-compensable) of employees, as well as a description of their working conditions. In most cases, when this is done, members of the public will conclude that public employees are fairly treated and compensated and, therefore, the public likely will be unsupportive of a strike.

4. Expand automation

Did you ever notice how the American telephone system continues to operate, even when the employees (including the telephone operators) go out on strike? There are two basic reasons for this. First, a relative high proportion of telephone company employees are classified supervisors, which means that these persons remain on the job during a strike. Second, and more important, the American telephone network is automated. As a result, it can run for some time with rank and file employees absent. Therefore, where practical, automation should be considered as one of several strategies to emasculate a labor strike.

5. Expand the supervisory staff

As mentioned previously, American telephone companies employ a relatively large number of supervisors. During a strike these supervisors can take over much of the day-to-day work normally performed by those on strike. For a temporary period of time these supervisors can delay their own nonessential supervisory tasks. They can work overtime (which means extra pay), and they can forgo their vacation leave. Additionally, supervisory personnel are sometimes loaned from other companies to enhance the workforce. As a result of a strong management staff, telephone companies are often able to weather a labor strike with minimal deprivation to their customers.

The lesson taught by the telephone companies should be clear. Government agencies should review their job classification programs as well as the job descriptions of their employees, to assure that all potential supervisory personnel have been identified and thus removed from collective bargaining.

6. Keep negotiations open

A strike represents the ultimate breakdown in negotiations. In other words, a strike is a failure of the negotiations process. Consequently, the skillful negotiator utilizes a variety of tactics to keep discussion going, because as long as the parties continue to communicate, there is less chance that a strike will take place. Almost always a strike is preceded by an impasse, so an impasse should be dealt with as a serious precursor of a possible strike. There are many tactics to break a temporary impasse, and thus continue the process of negotiations. The management negotiators can recess negotiations, providing a cooling off period. Or, a significant concession can be made at the strategic moment. A long list of tactics for breaking temporary deadlocks in negotiations is discussed in the book, Negotiations Strategies.

7. Be willing to take a strike

When threatened with a strike, fear is often the worst enemy. Strikes create many unknowns for the employer. Although strikes should be avoided, the question must be raised, i.e., "At what expense?" In other words, should a strike be avoided at any expense? Or is there a limit as to how far the employer should (and can) go to avoid a strike? The point is this--there are times at which a strike is preferable to further concession. The governing body must be willing to make this decision. When an agency is able to make this decision it has gone a long way to not only prepare itself for a strike but also to avoid a strike. The willingness to draw the line and take a strike is communicated to the union. By so doing the union realizes that the employer can no longer be

intimidated, that further threats are useless, and that the union must now make a decision --either to accept the employer's terms or go on strike.

8. Keep the issues limited and clear

Many strikes have been caused simply because the management negotiator did not know exactly what the issues were. At all times, the negotiator must know what the issues are and what the last offers were. Every attempt must be made to restrict any new issues from emerging.

One way to progressively reduce the number of unresolved issues is to sign off on all tentative agreements as they are entered into. In that way issues are steadily disposed of during the process of negotiations. Another tactic is to agree that no new issues can be raised after the first negotiation session.

9. Do not radicalize the employees

Basic to union strategy is the "bad guys" tactic. Under this approach the governing body (and its representatives) are made out to be the "bad guys." The union then moves in as the chief defender of the "exploited" employees. Therefore, the agency should make every effort to avoid any action which gives the union an opportunity to exploit. Such action might include:

a. Inflamatory statements by management

b. Unilateral action by the agency on matters under negotiations

c. Significant changes in working conditions

d. Personnel action (such as dismissal or reduction in force) which the union could seize upon to rally employees

10. Keep public support

Many unions successfully manipulate the public to exert pressure on the governing body to capitulate to union demands. Often this is done through a successful public relations campaign. The agency should not allow itself to be upstaged by the union. Neither should the agency be drawn into a public debate on the union's terms. Therefore, the agency's approach to the public must be carefully handled.

a. Public statements by the union should be responded to only when it is to the advantage of the agency to do so. In so doing, the agency must avoid escalation of tensions.

2. The agency may need to supplement the public news media by using its own channels of communication, including direct mailing, take-homes, paid advertising, special meetings, etc. In other ways the employer can build its own support by direct appeal to the power structure in the community.

11. Gain employee support

Sometimes unions are successful in building employee support by the issuance of half-truths and even direct lies. In such cases, the agency must be prepared to set the record straight. It may become necessary for the agency to communicate directly with employees to explain in an honest manner the position of the employer. Although such strategy cannot win the unanimous support of the employees, it can weaken the control of the union over the rank and file employees. However, in communicating directly with employees, the employer should not attempt to negotiate directly with the employees, bypassing their exclusive representative. Under many bargaining laws, such action could be an unfair labor practice.

12. Build support among administrators

Administrators and supervisors are the executive arm of the governing body. Without them, the agency is powerless. Therefore, beginning with the appointment of advisory councils, there should be a concerted campaign (free of threat or intimidation) to win the loyalty of the administrators and supervisors. This can be done in a variety of ways. Meetings can be held where the issue of strikes is discussed. The agency can issue a statement on its expectations for administrators. Management personnel can be involved in preparations for a strike. They can be warned of the possible consequences of participating in a strike.

Should a meeting be held for management personnel, the chief executive should deliver a presentation of the nonacceptability of public employee strikes, as an educational presentation designed to discourage management personnel from supporting a strike by any group of employees.

CHAPTER XIII

ASSESSING THE POWER BALANCE

Ideally, labor negotiations should be conducted on the basis of mutual benefit. However, due to the general hostility of unions to employers and the one-way nature of the collective bargaining process, relationships between the parties are not always conducted in a cooperative manner. In most labor negotiations both parties subconsciously or consciously evaluate their chances for winning in a showdown of strength. Since the outcome of such a showdown is determined by the **relative** power balance between the parties, a careful assessment should be made of the union's power and the employer's power.

I. The union's power

As far as the union is concerned, a number of factors need to be investigated to determine the union's ability to succeed, should it initiate a strike:

a. How long can the strikers hold out financially? Even though a strike may start out as a political competition, it can become an economic competition, if it lasts long enough, meaning that the strike will end when the strikers run out of money. To anticipate the financial hold-out power of the employees, a number of considerations need to be examined:

* Does the union have a strike fund? If so, how large is it? How much is available to each striker? Is the strike fund supplemented by a state or national fund? How long will the fund last?
* Are strikers entitled to unemployment compensation? In the public sector the answer to this question is "no."
* Is there other employment which strikers can obtain during the strike?

* What type of health and life insurance coverage do employees lose while they are on strike?

b. How much control does the union have over its members? Is there blind loyalty to the union, or are there independent voices within the union? Although employees may enjoy the elation caused by the union rhetoric early in the strike, the union's heroic image may rapidly fade as the strike wears on and the money runs out.

c. Is the union facing an election? If so, who are the contesters for union leadership? Are they more moderate or are they more militant than the current leadership? A serious contest between moderates and militants is a signal of a divided union and one which is not likely to survive a long strike.

d. How much public support is there for the union, its members, and its cause? This is an important uestion to answer since the final arbitrator of a strike by public employees is the public.

e. How many other fights is the union involved in? The authors dealt with one union which threatened a strike while it was entering into a contested election, being sued by some of its members, and being audited for possible misuse of members' dues. Needless to say, there was no strike--only threats.

f. How important is the strike cause to the union? Is the strike one of national significance or is it just a local argument of an insignificant matter? If the issue can take on regional or national controversy, the union will likely obtain outside aid to continue the strike.

g. What are the weather conditions? Strikers can find little joy or comfort in picketing in freezing rain and few citizens are on the street in such weather to observe the picketers.

h. What is the relevance of the employer's operational (production) cycle? For example, a strike by school teachers at the opening of school is more effective than at any other time of the year. Similarly, a strike by postal workers just prior to Christmas is more effective than a strike in August.

i. Are there picketing sites which are in easy public view or which would be prone to confrontations? To the extent possible, management should deprive the union of publicity and any opportunity to create a confrontation. Therefore, the absence of favorable picketing sites can be a factor in the success of a strike.

j. How skillful and experienced is the union in conducting a strike? Usually, a union which has conducted several successful strikes will continue that record.

k. How many employees will cross the picket line? In many government agencies the agency can continue operations on a temporary basis with less than half of the workforce present, especially if supervisors perform unit work, work overtime, and forgo vacation leave.

2. Assess the power of management

As far as management is concerned, a number of factors should be examined to determine the agency's power to withstand a labor strike. Some of those factors are:

a. How united is the governing body? In the opinion of the authors, the single most important cause of public employee strikes has been the lack of unity within governing bodies. Such disunity is an open invitation to strikes. Since most governing bodies are composed of persons who got into public office through a political process, it's to be expected that political factors will be of prime importance when public employees threaten to strike or actually go on strike. Some persons on the governing body may actually owe their jobs to the

public employees who voted for them. In such cases, those members of governing bodies may be unwilling to take a strong stand against the union.

b. How useful would the supervisory staff be in the event of a strike by rank and file employees? In some states, managers are allowed to organize and engage in collective bargaining. In other states supervisors have no right to collective bargaining. In either case, however, managers have no right to collective bargaining, but have an overriding obligation to serve their employer, and the governing body should expect to look to its supervisory staff as the first line of defense in the event of a strike.

c. Will the agency gain or lose financially in the event of a strike? Whereas a private company may lose money during a strike due to loss of sales, a government agency may save money because its payroll is reduced while employees are out with no corresponding decrease in tax revenue. Consequently, government is somewhat relieved of the burden which labor strikes impose on private companies.

d. How many subcontractors does the agency have and will the employees of the subcontractors cross a picket line of public employees? (The answer is usually yes.) The value of subcontracting as a means of weakening the union has been discussed earlier in this chapter. There are numerous advantages to subcontracting other than those related to countering strikes, so subcontracting should be a serious consideration of management as it plans its overall labor relations program.

e. Can agency property and equipment be protected from sabotage? Although most public sector strikes are not violent, cases of sabotage are on record and the employer must take appropriate precautions to safeguard the agency from damage to its property and to safeguard itself from other acts which might

interfere with the legitimate functions of the agency. Despite the fact that most unions will not officially sanction sabotage, there is always the risk that a few emotionally unstable strike zealots will take independent harmful action against the employer's property.

f. Is the agency prepared to win the battle of the press? As discussed earlier, a strike in the public sector can be viewed as a struggle to win the support of the public, and winning this support is largely dependent upon the use of the media. Therefore, the employer must be able to present its side of the dispute in such a manner that the public will not support the strike. In order to persuade the public to support the employer, there is one fundamental rule which must be followed: **The employer's position on the issues which are the cause of the strike must be reasonable from the public's point of view.** The employer must be able to explain to the public why it cannot, in the public interest, concede to the union's demands.

g. Does the employer have a sufficient workforce to keep the essential services of the agency operating? The answer to this question may detemine whether or not the union "wins" the contest. If the employer can continue to operate at least at a minimal level during the strike, the union will have lost its leverage and will eventually capitulate. There are various ways to produce the manpower needed in the absence of regular employees. The supervisory staff can be used, as explained previously in this chapter. Furthermore, some regular employees will not go on strike and will report for work. These workers can be worked overtime and given extra duties. Also, if there are other bargaining units not on strike, these employees, under the right conditions, can be assigned different duties on a temporary basis. Or, temporary substitute workers can be hired. One way to assure that such persons come forward is to offer premium

pay rate during the strike. In extreme situations where labor strike threatens the health and welfare of the community (a strike by firefighters), the state guard, the national guard, or regular U.S. military service personnel may be called upon to fill in for the strikers.

h. How automated is the agency? Wherever automation exists there is the potential for continued service during a strike, assuming there is someone available to operate the automated equipment. The best example of automation as a counter to the labor strike is found in the American telephone network, as has already been discussed.

i. Is the timing of the strike to the advantage or to the disadvantage of the employer? For example, a strike by school teachers during the summer would be pointless; whereas, a strike by postal workers for a month prior to Christmas would be a serious problem.

j. What is the general attitude of the public? For example, during the late 1960s and into the 1970s, there seemed to be more tolerance for public employee strikes than was the case in the early 1980s when the public appeared less patient with public employees who flaunted the law by going on strike. Economic conditions, political shifts, and changing power structures can impact significantly on the outcome of a strike, or even determine whether or not there will be a strike to begin with.

3. <u>The role of the governing body</u>

Pertaining to strikes, a school board, a city council, or other similar governing bodies should have three objectives:

a. Avoid a strike but at an acceptable price

b. Keep the government agency operating if there is a strike

c. Settle the strike but at an acceptable price

Some of the relevant considerations in achieving these objectives are:

a. The governing body should authorize the development of a strike plan. The advantages of a strike plan have been discussed in considerable detail elsewhere in this book and require no additional elaboration at this point.

b. The governing body should resolve to avoid a strike by encouraging continued negotiations. However, the governing body must know in advance to what limit it will go to avoid a strike. Beyond that limit the governing body must be willing to take a strike, even a protracted one.

c. The governing body should resolve to keep the agency operating at almost any price. Not only are citizen and taxpayers entitled to the services they have paid for and need, but also the strike will collapse sooner if the agency continues to operate.

d. The governing body and individual members thereof should stay out of negotiations. The governing body is a policy-making body and should conduct itself accordingly. All negotiations and strike activities should be delegated to the management staff. This means that during the period of the strike (or preparatory to the strike) all actions related to the strike should be carried out by the chief executive and his staff.

e. The governing body should authorize expenditures to obtain whatever legal advice is necessary to assure that the actions of the agency are within proper legal limits. If a budget revision is necessary to provide such funds, then a budget revision should be made. Incidentally, only one person should be authorized to seek legal advice pertaining to the strike. That one person should be the chief executive or his designee, such as the chief spokesman for negotiations.

f. The governing body should authorize the employment of temporary workers as needed and as available to carry out essential governmental services during the strike. If necessary, premium rates of pay should be offered, even if this means a budget revision.

g. The governing body should know exactly what its bargaining limits are and these limits should be realistic. Ultimately, it is the governing body which must decide what is an acceptable contract. Therefore, it must know to what extent it will go to preclude a strike or settle a strike.

h. Only one spokesman should give out official public statements regarding the strike. This technique forces the agency to speak as a unified body.

i. Members of the governing body should be prepared for personal attacks, as presures mount. Members should understand in advance that collective bargaining and strikes create intense personal conflicts. By understanding in advance that such pressures usually are generated for the sole purpose of forcing the governing body to take actions favorable to the union which it would not take in otherwise calmer circumstances, the governing body is more equipped to put such pressure tactics in their proper perspective.

j. The governing body must be willing to take harsh actions where justified. When a union engages in an illegal strike and attempts to deprive citizens of essential services to which they are entitled, that union has made itself an outlaw. as such, the employer must be willing, if called for, to send warnings to employees, dismiss employees, seek an injunction, bring criminal charges, and generally take any other stringent actions to maintain the integrity of the agency.

CHAPTER XIV

COPING WITH THE STRIKE

Most strikes evolve into three stages:

a. The final preparation for the actual strike

b. Operating the agency during the strike

c. Bringing the strike to a close

In coping with a strike, there are a number of important and fundamental decisions which must be made:

a. A decision must be made to keep the agency running, even if at a minimal level.

b. The essential services of the agency must be identified.

c. Provisions must be made to provide these essential services by obtaining sufficient workers, obtaining sufficient supplies, arranging adequate security, and establishing communications.

d. Tentative plans must be made for the punishment of strikers.

e. A strategy should be developed for bringing the strike to a close.

f. A plan needs to be devised for what to do after the strike is over.

In order to survive a public employee strike and return to normal operations after the strike, a number of specific actions must be taken:

a. An ad hoc strike committee should be organized.

b. Legal counsel should be placed on call.

c. A strike headquarters should be established.

d. Internal and external communications should be planned for.

e. Agency insurance policies should be reviewed.

f. Establish a priority of essential services. (Reduce and consolidate services)

g. Review personnel policies.

h. Evaluate transportation needs.

i. Warn employees.

j. Orient management.

k. Make specific plans for hiring temporary workers to replace strikers.

l. Make specific provision for obtaining supplies.

m. Take specific precautions to safeguard agency property and personnel.

n. Make tentative plans to punish employees.

o. Have special plans for handling picketing.

p. Make specific provision for how to handle employee benefits during the strike.

q. Have a strategy for ending the strike.

r. Know what to do after the strike.

Each of these actions will now be discussed separately.

1. Organize a strike committee

When a strike appears to be a reasonable possibility, the chief executive should appoint a special task force to:

a. Assist in heading off a strike

b. Prepare for a strike should one be likely

c. Assist in the direction of the agency during the strike, and

d. Assist in bringing the strike to an end

This committee should be chosen carefully and should consist of the agency's most capable and loyal managers. The chief negotiator, representatives from the chief executive's cabinet, and a few select first line supervisors would be an adequate team for most situations. For the duration of the strike (or threatened strike) this special team should operate under the direct authority of the chief executive, which means that other members of the management force should not be allowed to interfere with the efforts of

the committee to fulfill its duties. Specifically, it is the function of the strike committee to coordinate the implementation of the strike plan described in this book.

2. Legal counsel should be available

As discussed elsewhere in this book good legal counsel is imperative in the face of an employee strike or threatened strike. From the outset the attorney should be considered a member of the management team and made at least an ex-officio member of the strike committee. If adequate counsel is not already available to the agency, then such counsel should be obtained.

In searching for a competent attorney to assist in matters related to an employee strike, certain questions should be raised and answered:

a. Does the attorney have any special knowledge regarding public sector labor reations?

b. Is he familiar with public sector law?

c. Has he had any specific experiences with public employee strikes?

d. Has he had any experience as a trial or appellate lawyer?

e. Does he maintain a close professional relationship with other attorneys who have expertise in public sector labor law?

f. Does he keep himself informed of labor matters of interest to the agency?

g. Is he instantly available when needed?

3. Establish a strike headquarters

As a strike appears likely, the strike committee should arrange for a place to operate from--a strike headquarters. In creating such headquarters, a number of factors should be considered:

a. The location of the headquarters should be central to the agency's operation, usually close to the office of the chief executive.

b. The headquarters should be of sufficient size to accommodate the many activities associated with a labor strike.

c. The headquarters should contain at least two typewriters, a copy machine, and sufficient telephone service, including a "hot line," discussed elsewhere in this book. Additionally, there should be adequate desks, chairs, and tables, and in extreme situations it may be necessary to provide sleeping arrangements.

4. Establish a communications system

The success or lack of success for management's anti-strike strategy plan often depends upon the ability of management to communicate with its many audiences, internally and externally. During a strike it is urgent that management be able to communicate with all employees, those who stayed on the job, as well as those who went out on strike. Management must have the ability to communicate rapidly with its supervisory staff. Externally, the employer must be prepared to communicate with its clients, as well as the public-at-large, in some instances. The agency must be ready to deal with the media of radio, press, and television. Suppliers and others who do business with the agency need to be contacted. And finally, the union responsible for the strike must have an open communications line. How to do all of this is discussed in the chapter on communications.

5. Agency insurance policies should be reviewed

Most government agencies have various insurance policies to protect the agency from large liability payments. For example, fire insurance is a common protection which many school districts and other government agencies have. Such a policy should be reviewed even though there may be no immediate threat of a strike in order to verify under what conditions the policy will pay the agency in the event of damage by fire. After all, a few public employee strikes have escalated to the point that acts of sabotage

have been engaged in by over-zealous strikers. Many government agencies provide their employees full or partially paid accident and medical insurance. Whether or not these employees remain protected during a strike could be a significant factor in whether or not the employees would be willing to go on strike. In summary, the agency should determine to what extent a strike by its employees changes the liability status of the agency, and the agency should take any necessary action to modify its insurance program so that its liability is not increased during a strike.

6. Establish priority for essential services

Every government agency and school district has functions which can be dispensed with temporarily. However, most agencies have services which are essential and must be continued to avoid harm to those for whom the services are designed. For example, although a school district can operate without custodians for a period of time, it cannot operate without teachers in the classroom. A municipal sanitation department can continue to operate for a short period of time even if the truck mechanics are on strike, but that same department could not operate without truck drivers.

Almost every goovernment agency has a primary function. Fire departments put out fires. Police departments protect citizens against crime. The highway department keeps roads in operating condition. But in all of these examples, the agency has levels of essentiality. For example, some fires are more important to extinguish than others. A fire in a trash can has one level of essentiality, while a fire in a hospital is of maximum essentiality. While the highway department may forgo cutting the grass along the highway, it cannot ignore a bridge on the verge of collapse. Although a police department may be able to ignore moving and parking violations for a period of time, serious crimes against the innocent cannot be ignored.

In maintaining the highest level of essential services during a strike, the agency will find that the temporary elimination of some functions and the consolidation of others is necessary. For example, during a strike by public school teachers, it may be necessary to eliminate all extra-curricular activities and consolidate a number of classes into one large class. Simply stated, it is the obligation of the agency being struck to identify its essential services in priority order and then to set about to do whatever is necessary to deliver those essential services to the maximum extent possible.

7. Review the personnel policies

Few government agencies write personnel policies and regulations with the thought that the employees for whom the policies are intended will go on strike. But, public employees do go out on strike in large numbers, as discussed earlier in this book. Consequently, when a strike appears likely, the strike committee should review the agency's personnel policies and regulations to identify any provisions which might weaken management's ability to counter the strike. For example, the policies and regulations (as well as the applicable law) governing the dismissal of employees should be reviewed carefully to assure that the agency may dismiss striking employees, should the agency choose to do so. The agency policy on sick leave should be examined to determine if the agency can require a physician's certification of illness from absent employees who claim to be ill. All regulations governing the actual work of employees should be reviewed carefully to assure that management can demand a good day's work from each employee should there be a "slow-down" strike. In other words, the agency should review its own policies and regulations to assure that they do not stand in the way of the agency taking appropriate actions against the striking employees. In some cases, the governing body may justifiably decide to rescind all such policies and regulations.

8. Evaluate transportation needs

Transportation is an essential function in some government operations. An obvious example is school bus transportation in a rural school district, where children must be transported long distances from home to school and back. Practically every government operation requires some level of transportation in order to carry out its full operation. In most strikes, however, transportation needs can be minimized or alternative means can be found. Even in the event of a strike by school bus drivers, the public schools need not necessarily close. A communication from the superintendent of schools to the parents announcing the continuation of schools should be enough encouragement for parents to organize their own car pools. Granted, some students will lack sufficient motivation to find transportation, while others may be unable to find transportation, but that's not justifiable reason to close a school to those who are able and willing to attend.

9. Warn employees

As the strike deadline approaches, management should communicate with the employees to discourage them from striking. The communication can be in writing, or a special meeting of employees can be called, naturally on company time. Whichever method is used, the following points should be made:

a. Review the event which led to the possibility of a strike.

b. Explain that the dispute is not worth the risks of a strike.

c. Explain clearly the agency's position of the disputed issues. Naturally, the agency should have a defensible position.

d. Convince the employees that a strike will not cause the employer to change its position.

e. Be sure the employees understand that the agency will continue to operate during the strike. Do not, however, reveal the strategy.

If a meeting is used to communicate the points made above, do not allow outsiders in the meeting, and take other appropriate precautions to keep the trouble-makers quiet. One way to do this is to station supervisory personnel in obvious view of the employees. Also, employees loyal to management should be encouraged to speak out at this meeting. If a written communication is used, in lieu of a meeting, loyal employees should be encouraged to express their views to other employees.

10. Orient management personnel

As discussed elsewhere in this book, a loyal management force is crucial in handling a labor strike. When it appears that a strike is likely, the chief executive (or superintendent, in the case of public schools) should meet with the management staff to explain their responsibilities generally in labor relations, as well as their specific role in the event of a strike. The topics which should be addressed are:

a. The role of the supervisory staff in distributing temporary restraining orders among employees, should the employer seek, and the court grant, an injunction against the strike.

b. The right of the employer to dismiss illegal strikers.

c. The nature of illegal public sector strikes.

d. The limited help which striking employees can expect from their union.

e. The penalties which strikers might experience as a result of the illegal strike.

f. The specific duties that supervisors will assume in the event of a strike.

After all of the above points have been discussed, the management staff should be encouraged to discuss the same issues with rank and file employees assigned to them.

11. Make specific plans to hire temporary workers to replace strikers

The key to the strategy to breaking a labor strike is found in keeping the agency operating at the highest level of effectiveness possible under the circumstances of a strike. The key element in this strategy is the availability of temporary employees to replace strikers. Although the need for such employees is greatly determined by the size of the management staff and the degree to which automation exists in the agency, the typical government agency will need to make a special effort to seek out temporary employees to work during the strike. These temporary employees can be obtained from various sources, among which are:

a. In many strikes not all members of the bargaining unit will cooperate in the strike. Consequently, these loyal employees are a source of needed labor during the strike. By increasing their workday and rearranging their assignments, the effective work of these employees can be increased considerably.

b. In many public sector strikes, not all bargaining units will be on strike at once. In other words, although the custodians may be on strike, all other employees (clerks, secretaries, tradesmen, etc.) may remain on the job. Given such a situation, those who remain on the job can be used, to some extent, to absorb the work of those on strike. However, because those who remain on the job may also be union members or work under fixed job descriptions, there may be limited flexibility in assigning these workers to other jobs.

c. In many strikes the employer may need to aggressively recruit temporary employees. Although some available workers might be unwilling to enter a struck agency, there are always some people who will cross a picket line. Housewives, applicants, college students, and the general public are all possible

sources of temporary help. In some cases, the employer may wish to offer premium pay to attract these potential workers.

d. Volunteers, in some exceptional situations, may be available. Although volunteers may not normally be available and may not be the best type of persons to have on the job, there have been some instances when volunteers have helped out during a strike, especially in public school strikes.

e. In many public agencies there is a classification of employees referred to as "paraprofessionals." For example, many public school districts have "instructional aides." These are noncertified or nondegreed employees who assist the classroom teacher, but who are not primarily held accountable for actual pupil instruction. In the event of a strike by school teachers, these aides can provide a rich source of help while the regular teachers are absent. Naturally, an aide who continues to work during a strike, may encounter hostility from striking teachers when they return to the classroom. However, that's one of the prices that must be paid for keeping the public schools open.

f. In the event of a protracted strike, the employer should consider the viability of contracting out. For example, in the event of a strike by custodial and maintenance personnel for a long period, the agency should consider hiring a company from the private sector to perform essential duties during the strike.

g. In the private sector a number of industries have entered into mutual aid pacts. For example, most of the large interstate airlines have agreements to help each other out in the event of a strike, at least financially. When the state national guard is called in to collect trash and garbage during a strike by sanitation workers, this, too, is a form of a mutual aid pact. By seeking help from other government agencies, the struck agency has one more source of temporary help to see it through the period of the strike.

h. No plan for replacing strikers could be complete, however, without considering the use of supervisory personnel. This tactic has already been discussed, but some repetition is in order. Every government agency has employees who are considered "management," and in most cases these persons are precluded from collective bargaining, and can be expected to remain on the job during a strike. By extending the work hours of these employees, by denying as many leave requests as possible, and by rearranging their duties, one supervisor can do the work of several rank and file employees, at least for a short period of time. Therefore, the supervisory staff should be looked to initially as management's chief aid during a strike.

12. Make provision for obtaining necessary supplies

It is not uncommon among private industries accustomed to periodic labor strife to "stock up" for the period when they can no longer produce. For example, the steel industry will often produce ahead of demand, especially as major union contracts come up for renegotiations. Such a procedure is only common sense strategy, and all employers threatened with the possibility of a labor strike should carefully consider their needs during a strike and follow through with appropriate preparatory measures. As a strike becomes a reasonable possibility, the government agency should review its needs for food, fuel, and other supplies necessary to keep the agency running. By having such supplies on hand during a strike, many problems are avoided, the major one being the crossing of picket lines by outside private suppliers.

13. Take specific precautions to safeguard agency personnel and property

In extreme situations a labor strike can create the environment for damage to agency property and harm to agency personnel through acts of sabotage and violence on

the picket line. The first step in safeguarding the agency during a strike is to inventory the security needs of the agency with regard to both property and personnel. As far as property and equipment are concerned, the agency should give special attention to protecting crucial equipment such as computers and data processors, telephone centers, power controls, energy sources, valve stations, transportation equipment, and any other equipment which if damaged would be a serious impediment to the continued operation of the agency.

In order to protect agency property, a number of actions should be taken:

a. The local police should be contacted and told that a strike is likely. Representatives of the agency and the police should meet to discuss their respective roles. Many police departments are aware of their responsibilities during a strike and can be of considerable assistance to the agency, particularly when faced with disorderly picket lines.

b. The local fire department should be contacted and alerted to the fact that a strike is imminent or that a strike is underway.

c. Members of the supervisory staff should be assigned to guard entrances to agency property. In some cases, the number of entrances to agency buildings should be reduced in order to better manage pedestrian traffic.

d. Roving patrols of supervisors, or others under special assignment, can be delegated to periodically monitor conditions on agency property, particularly vulnerable property and crucial equipment.

e. When a strike is in progress, particularly if there is any threat of sabotage, extra lights should be turned on at night, especially outdoor lights.

f. In large agencies not all employees are known to all members of the management staff. There is always the possibility in large agencies that unauthorized persons with ill will against the agency will enter the employer's property. To

minimize this risk, the strike committee should consider the possibility of issuing identification cards to persons who are allowed to be on agency property during a strike. As a matter of fact, identification cards are often advisable on a routine basis, even without a strike.

14. Make tentative plans to punish employees

No illegal public employee strike should be allowed to take place without some appropriate punishment for the employees. The punishment may be as slight as loss of pay for days on strike, or the punishment could be as great as loss of pay, imposition of fines, loss of employment, and incarceration. More than likely, however, the punishment for strikers (and their union) will be influenced by the final settlement to return to work. In any case, though, all types of punshment should be reviewed, among which are these:

a. The least that an employee should suffer for engaging in an illegal strike s the loss of a day's salary for each day on strike. One state has gone beyond this (New York) and requires that a public employee forfeit two days wages for each day on strike. Not only that, but the loss in wages is not deductible from the federal income tax payment of the employee!

In public education, the issue of loss of pay is complicated by the fact that all states require that students be in school a minimum number of days each year, say 180 days. When teachers go out on strike and the schools consequently are closed, reducing the school year to less than 180 days, most states require that the days be made up, thus guaranteeing the teacher at least 180 days pay, regardless of how long the strike goes on. In the case of public school strikes, the local school board should consult with its attorney and with the state superintendent of schools, in order to decide the issue of make-up

days. There is no one rule which the authors can offer which would be applicable to all situations.

b. In a number of public employee strikes, there have been dismissals of strikers, the most notorious such case of dismissals being that of the federal air controllers in the summer of 1981. The dismissal of public employees for engaging in an illegal strike can range from easy to difficult, if not impossible in some cases. In cases where public employees are working with no contract and there are no local or state restrictions on dismissals, the termination of an employee can be quite easy. However, where employees are protected by contracts and state tenure laws, as in the case of most public school teachers, their dismissal can be quite difficult. Regardless of the public employees involved, however, a public employer considering dismissal of its employees for striking should seek the advice of competent legal counsel. For more information on this topic, the reader should consult the section in this book which discusses the legal aspects of punishing strikers.

c. In addition to other strike penalties, the employer may wish to impose suspension from duty with a corresponding loss of pay. Again, however, legal counsel should be sought before such action is taken.

d. A number of public employees can be employed only as long as they possess some required certification, such as a nurse's certificate or a teacher's certificate. In such cases the employer may wish to consider petitioning the appropriate authority to revoke such certificates. This is an extreme punishment, in that the employee could be deprived forever of making a living in his field of training. Therefore, revocation of such certificates should be attempted only in extreme situations.

e. Written reprimands can be another form of punishment. Such written reprimands are normally placed in the employee's permanent personnel jacket and serve notice that any repetition of the offense will result in harsher penalty.

f. When probationary employees participate in a strike the employer should determine if their unexcused absence constitutes a break in probationary service. If that should be the case, the employee would be required to re-serve the probationary period.

g. In order to punish strikers and break up a group of troublemakers at the same time, the public employer should consider the viability of reassigning strikers to other jobs or transferring strikers to jobs at different locations.

h. Under a number of state bargaining laws, as well as the executive order governing collective bargaining among federal employees, a union that participates in an illegal strike can be decertified, which means that the union no longer represents the employees who went out on strike. As far as the union is concerned, such a move is an act of capital punishment; consequently, the union can be expected to respond accordingly. In any attempt by the employer to decertify the union, however, the employer should seek the assistance of competent legal counsel to be sure that the legal provisions for decertification are followed correctly.

i. In a number of public employee strikes, the employer (or taxpayer in some instances) has attempted to sue the striking union, as well as the individual employees who struck. Such suits generally arise from the fact that a strike not only deprives citizens of services which they pay for through taxes, but may in some instances result in actual damages. In a number of strikes nonstriking employees have sued the union responsible for the strike, as well as individual strikers, for injury sustained while trying to cross a picket line. In other cases,

the courts have imposed fines on both the union and its members. For a legal examination of this topic, the reader should refer to the section in this book on the legal ramifications of public sector strikes.

15. Develop special plans to handle picketing

Picketing consists of a union posting members at approaches to the work site for the purpose of observing and reporting those who report to work and for the purpose of discouraging other workers from entering the workplace. Picketing is also used to demonstrate to the public the disputes which the unionized employees have with the employer. Picketing is an experience that most people are not accustomed to, and therefore sets into motion uncertain behavior on the part of those associated with picketing. As a result, conflicts often arise where picketing takes place, particularly when workers attempt to cross a picket line. The crossing of a picket line is a primary threat to the union's strike strategy. Understandably, picketers might, under those conditions, become more aggressive than they would in more normal situations.

Whenever a strike takes place, management should assume that picketing will follow. Management should also assume that it should take some action in response to picketing to the continued operations of the agency.

a. Picketing should take place where it will do the least harm to the continued operation of the agency. Generally, this means that picketing will take place on public property around the employer's property. Where public property is used, the picketers come under the jurisdiction of the local police. Where picketing is allowed on agency property, the employer and the police should have clear understandings regarding who has jurisdiction in the event disciplining of picketers is necessary. If a private police force is used to protect agency property, there should be a clear understanding of the powers of such a group.

Where both the local police and private police are involved, both should have face-to-face understandings regarding their respective roles.

Frequently, picketers will engage in behavior which cannot be tolerated, but a full arrest may be too extreme an act to carry out. In some such situations the police may wish to remove the culprit from the picketing area and "take him in" for questioning. During the questioning, the picketer can be reasoned with in an effort to correct his behavior. However, in cases where a picketer blatantly defies the law, prompt arrest is the only appropriate answer.

In some cases, the employer and the union will have an agreement on how picketing shall be carried out. This is not to suggest necessarily that management should feel compelled to reach an agreement with the union on the manner in which the union will picket. If the union will not agree to reasonable requests of the employer that picketing be carried out peacefully, then management should take appropriate steps to counter the unacceptable actions of the picketers.

b. Supreme effort should be made to avoid confrontations of any type on the picket line. Nonstriking employees should stay away from strikers. Supervisors should not allow themselves to be baited by comments from strikers. Managers should not attempt to "rap" with picketers. In other words, no action should be allowed to take place which might provide grounds for an acrimonious event.

c. Special care should be taken where vehicle traffic is near picketers, especially if vehicles are used to cross a picket line in order to enter the place of work. This is where "accidents" occur most often. That's why it is important to find a way to get people into the agency without crossing a picket line.

d. Irrespective of whether people enter the place of work by foot or by vehicle, a "clear path" must be kept open, if a picket line is in the way. If nonstrikers

cannot enter the work site without abrasion with picketers, then careful consideration should be given to alternative strategies. The authors are reminded of one particularly violent strike against one of the nation's largest newspapers, where the owners were taken to and from their newspaper building roof by helicopter, because it was impossible to enter the building otherwise without the clear danger of bodily harm. In some strikes it is advisable to have available workers assemble at a location removed from their place of work, where they can be transported in a bus through the picket line. Often the police can assist in this maneuver.

e. A camera which instantly self-develops its film can be useful during a strike, particularly on the picket line or where violence and sabotage has taken place. If a regular camera is used, it is difficult to associate the picture which is eventually developed with the event in question. With an instant camera, the photographer can write on the back of the developed picture exactly what took place and who the persons are in the picture. Such pictures can be valuable evidence should the strike end up in court. Persons taking such pictures, however, should be warned that picture taking on a picket line might incite hostile action by picketers. Therefore, appropriate evasive tactics should be employed to minimize the risk of a confrontation.

f. When an injunction against a strike is requested and granted, the serving of temporary restraining orders will be necessary, but in some cases, the officials of the union cannot be located in order to serve the orders. In such a case, quantities of the temporary restraining orders may be served among picketers. Exactly who does this, and how, should be a subject of clear understanding between the employer, its legal counsel, and those who serve the orders.

g. In the event that improper action takes place on the picket line or acts of violence and sabotage are perpetrated, there may be witnesses to such acts. In such cases, an immediate written deposition may be called for. A deposition is a form of an "affidavit" or "oath." Specifically, however, a deposition is the testimony of a witness taken upon interrogatories, reduced to writing, duly authenticated, and intended for use in court at a later date. Without such documentation testimony before a court may be less credible.

16. Keep a log of strike activities

When a strike occurs, careful records should be kept of all events associated with the strike. This should be done for several reasons:

a. The agency may face another strike by the same group or a different group again in the future. This record of events will help prepare for the next strike.

b. The strike may end up to be a dispute in court, and in that event, a detailed written documentation of the strike should help the employer win its case.

c. The strike log provides a source of information for the management team to handle other emergencies.

d. All strikes end eventually, and as efforts are made to end the strike, a detailed record of the union's activities is helpful in defining the terms for settling the strike.

Generally speaking, the strike log should be a running daily summary of all significant events which transpire during the strike and should be accompanied by the following documentation:

a. A copy of each deposition taken during the strike. Depositions have been discussed earlier in this chapter.

b. Written eye witness accounts of significant events which took place during the strike, such as violence on the picket line.

c. Copies of photographs which have been taken relative to the strike.

d. Attendance records of employees. These records will be necessary to document the absences of strikers.

e. Press clippings. Public employee strikes are usually covered carefully by the press. Not only will these clippings be of use to the strike log, but they will provide information about what the union is doing that would not otherwise be known. Surprisingly, the union will often reveal vital information to the press which it would not reveal to the employer.

f. Copies of all correspondence related to the strike. All types of written correspondence take place during a strike: letters to the court, communications to the union, letters to employees, memoranda to supervisors, etc. All of these documents should be retained as a part of the strike record.

g. Telephone calls. During a strike crucial information is exchanged by telephone. A summary of what was communicated in these telephone calls should be retained.

h. During a strike various types of meetings will be held: meetings with the union, meetings with the attorney, meetings with the governing body, etc. Minutes of all of these meetings should be made a part of the strike log.

17. <u>Make specific provision for how to handle employee benefits during the strike</u>

To the extent administratively and legally possible, all benefits whatsoever which accrue from one's employment should be discontinued during a strike. Use of leave, accumulation of leave, payment of all insurance premiums, payroll deductions, accumula-

tion of probationary credit, and payment of wages are all examples of benefits which should cease the moment that a public employee engages in an illegal strike.

a. **Insurance coverage.** Many public employers make full or partial payment toward premiums on various employee insurance policies, such as medical insurance, disability insurance, pension funds, dental insurance, life insurance, etc. To the extent possible all such premium payments should cease as soon as a strike takes place. Where premiums are paid in advance, as is usually the case, the employer's attorney should be asked to determine if payment on any such policies can be denied while an employee is absent without approval engaging in an illegal strike. If this is not possible, then the employer should refuse to pay any such premiums on the net payroll for a period equal to the number of days the employees were on strike. Although many employers do not examine their various employee insurance plans from the standpoint of what to do during a strike until a strike occurs, the authors are suggesting that all employers engaged in collective bargaining look at their insurance programs now. To the extent possible, provision should be made in these programs to assure that no benefits will be paid to any employee engaged in a strike.

b. **Payroll deductions.** Many public employers will provide payroll deductions for various employee welfare programs, even though the employer does not contribute. For example, employee credit unions are frequently supported by an employer by providing payroll deduction for credit union members. In the event of a strike all such deductions should be terminated for strikers.

c. **Annual leave.** To the extent possible, all annual leave should be denied to all employees in the bargaining unit which is engaging in the strike. Furthermore, all accumulation of leave should cease during the strike. In the case of employees who were on approved vacation leave when the strike began, an

individual determination will need to be made. In the event of persons who were scheduled for approved leave during the strike, with minor exceptions, these persons should have their leaves cancelled.

d. **Sick leave.** Similarly, sick leave should not be granted during the strike, nor should sick leave accumulation be granted. However, sick leave payments can be given to the employee who was on approved sick leave before the strike began, if an approved physician's certification is presented.

e. **Other leaves.** To the extent administratively possible and legally permissible, all other leaves should be denied during the strike. Personal leave, business leave, bereavement leave, emergency leave, etc. are all examples of such leaves that should be voided. Disability leave and benefits should be denied to any striker injured on the picket line. Where issues of leave cannot be resolved on a blanket basis and there are individual problems, each of these individual problems should be handled on its individual merits.

CHAPTER XV

COMMUNICATIONS DURING THE STRIKE

Many public employee strikes are not settled at the bargaining table; they are settled in the arena of public opinion. In government labor strikes, where there is considerable public involvement (e.g., public school, air controllers, police, fire, etc.), the union and the employer become locked in a struggle over who shall have the support of the public and the power structure surrounding the particular government operation. Consequently, communications during a strike become decisive, in that only through communications can the employer hope to rally public support for its position on the issues which caused the strike.

But effective communications during a strike are also important in order to keep the agency operating during the strike. Without a good communications network within the agency, there is the likelihood that the workforce which remains on the job during a strike cannot be managed sufficiently well to keep the agency functioning. Following are some suggestions of proven practicality which should provide good communications (internally and externally) during a strike by teachers and other government employees.

a. **Announce to the employees and the public that the agency will continue to operate** at the maximum level possible during the strike. The announcement should make it clear that any legal limit will be sought to keep the agency operating during the strike, even if only at a minimal emergency level. It is important that this announcement be persuasive. Especially, the striking employees should have no doubt about the agency's will and ability to continue operations. This announcement should also make it clear that there will be no substantive concessions on matters in dispute and that no striker will go unpunished. The authors helped in the preparation of one such announcement

which was particularly dramatic. The announcement that operations would continue was made by the superintendent of schools outside of a classroom where the teacher was on strike. After a very convincing announcement that schools would remain open no matter what, the superintendent turned from the cameras and entered the classroom to serve as a substitute teacher. The example he set gave great encouragement to others who wanted to keep schools open. Incidentally, the schools remained open in that case and the strike collapsed.

b. **Set up a strike communications center.** In order to help assure that all necessary communications will take place during a strike, a room near the agency headquarters should be appropriately prepared. This communications center should have provisions for the following:

* Provision must be made to duplicate written communications. Ideally, this means that there should be an instant copier for small runs needed immediately. For larger quantities, an industrial type printer is better, but it must be kept in mind that the personnel who operate such equipment may be on strike. If all else fails, however, private printing can be contracted for.
* Several "hot lines" should be installed. These are special telephone lines which give out a recorded message when a certain number is called. These hot lines are very helpful in reserving other telephone lines for individual communications. The hot line message should be any information which the agency feels would be helpful to those seeking information on the status of the strike and the services of the agency.
* In some strike cases, the agency may find it necessary to have installed a few extra telephone lines for the duration of the strike. These numbers

can be publicized through the media. However, the agency should consider at least one or several "private" numbers which are known only to specified persons, such as members of the strike committee, the governing body, etc. These secret numbers assure communications between members of top management no matter how heavy traffic becomes on the other telephone lines. The authors were involved in one particularly effective union tactic where striking teachers kept all school telephone lines busy continuously to keep the school administrators from contacting needed substitute teachers. Since no other provisions had been made for telephone calls, management faced a serious obstacle in that instance. In some cases, management may wish to consider the establishment of a telephone chain. In this way vital messages can be communicated to a specified audience quickly.

* In particularly complex strikes which require round-the-clock counter measures, the agency should consider providing for sleeping arrangements in the communications center.

* Since telephones may fail due to tactics employed by the union, other means of communications should be considered. Two-way radios can be used not only for direct communications, but they can also be used to contact available telephone outlets. In the event of total breakdown in communications, "runners" can be used to carry messages where needed.

* The communications center should have access to all information needed in order to communicate with any source relative to the strike. Such information should include names and addresses of employees, their telephone numbers, where the press can be reached at all times, the

constant whereabouts of all persons vital to managing the strike, the location of the union leaders, etc.

* Naturally, the communications center should be adequately equipped with typewriters, dictaphones, desks, collators, tables, office supplies, etc.

c. **Appoint only one media spokesperson.** Just as there should be only one exclusive spokesperson in negotiations, there should be only one exclusive spokesperson for management during the strike. All other members of the management team, including members of the governing body, should be required to make no statement to the press. And, it should be made clear that anyone who violates this rule is not speaking for the agency. To the extent possible, the spokesperson should be someone who has some expertise in dealing with the media.

d. **Minimize the use of threats.** Granted, employees must understand that they will not go unpunished as a result of their illegal strike against the public employer. However, communications during the strike should not dwell on threats against the employees. To the extent possible, any criticism of employees should be directed toward their union, in an attempt to keep the pressure on the union and its leaders. In almost all public sector strikes, the employees will return to the job, and the parties should have as few unpleasant feelings about each other as possible.

e. **There should be a clear explanation of the employer's position.** Whenever an impasse is reached in negotiations, the employer should attempt to clear the table of any positions which are not publicly defensible. Otherwise, the employer's attempt to enlist the support of the public will be undermined. This fundamental rule is even more important when there is a strike. Not only must the public employer have a reasonable position on the various strike issues, but

the employer must convey its position effectively to the public and the power structure surrounding the public agency. Background briefings, news conferences, letters to patrons, advertisements, mass meetings, etc. all can be used to explain clearly why the employer will not acquiesce to the union's demands.

f. **Issue ultimatums with caution.** Although strikers must not be allowed to go unpunished when they strike, the employer should use caution in issuing an immutable ultimatum. Chances are, the employer is better off to leave some room for face-saving on the part of the union. After all, if the union is to order its members back to work, the union must have a little something to convince the workers that their sacrifice was worth it.

I. Suggestions for working with the press

Since the media plays a vital role in communicating management's position during the strike, here are some useful suggestions for working with the press:

a. **Try not to have a "press conference."** A press conference is supposed to be an opportunity for the press to engage in conference with the person who called the conference. This means that the press should be allowed to raise any question or any issue and expect an honest and full response. The trouble with press conferences is that they can easily get out of control. Most reporters are quite adept at intimidating spokespersons, especially if they are inexperienced. Rather than have a press conference, simply issue the information which is desired for release and answer questions only about that information.

b. **Have a press release only when there is important news.** In order for the media to respond with interest to management news releases, each news release must have something newsworthy in them. An announcement that management is

opposed to the strike would be useless to the press; however, an announcement that an injunction is being sought to stop the strike would be of great interest to the media.

c. **Do not play favorites.** Some employers have tried to play the press by being more helpful to one newspaper than another. This is a mistake, because the unfavored newspaper will surely embark upon a campaign to embarrass the employer for its actions. Therefore, treat all media representatives equitably.

d. **Appreciate media deadlines.** Reporters have their rigid deadlines to meet. The employer can be very helpful to the press by recognizing these deadlines and timing releases in a manner helpful to the reporters.

e. **Do not attempt to "use" the press.** Some naive public officials seem to believe that the press was established to help government propagandize the public. A government agency which distorts information in order to get its point across can expect eventually to be trapped by its own lies. If the employer cannot be honest about an issue, then the employer should have nothing to say.

f. **There are no "off-the-record" comments.** Some officials seem to think that they can establish special rapport with reporters by confiding in them. That is a mistake. Anything which anybody says to a reporter should be assumed to be information which will be reported.

g. **Don't say "No comment."** There are many questions from reporters which cannot and should not be answered, but there are better answers than "No comment." The best way to handle such a response is to explain why the spokesman is not at liberty to give a more thorough response. But almost any comment is better than "No comment."

h. **Respond promptly.** When a message is left that the media is trying to reach management's spokesperson, there should be a response as soon as possible;

otherwise, the reporter will seek other sources to obtain the needed information. Should the reporter contact someone who is not authorized to comment on the strike, that person should offer to put the reporter in contact with the proper person who is authorized to speak on the matter.

i. **Background briefings are helpful--sometimes.** Sometimes strike issues are very complicated, and the press may not adequately understand the issues, and, as a result, report incorrect interpretations to the public. In such cases, the employer may wish to consider a "background briefing" session for the press. The purpose of such a briefing is to help the media understand the background of the issues which caused the strike. The danger of such a meeting, however, is that the reporters may take over and get into matters not contemplated by management.

j. **Keep the press out of negotiations.** Except for a few states, labor negotiations can be conducted in private sessions. This rule should not be broken if negotiations continue during the strike. No worse mistake can be made than to open negotiations sessions to the press, especially when relationships are tense between the parties.

k. **Don't use jargon.** Every special field of endeavor seems to have special language indigenous to that field. Such language is referred to as "jargon." Jargon is technical terminology or characteristic idiomatic speech of a specialized activity. To the average lay person such language is often obscure in meaning and pretentious; therefore, jargon should be avoided. All press releases should be phrased in language which is easily understood by the typical person on the street.

l. **Attributions are important.** Reporters do not like to deal with "unnamed sources" or an "agency spokesperson." Reporters understandably want the

name, rank, and serial number of persons releasing information. By knowing exactly who said what, the news release carries much more credibility. Incidentally, be sure that all names and titles are spelled correctly.

m. **Keep your team informed.** Members of the management team, especially those on the strike committee, should not have to read the local newspaper in order to find out what the employer is doing about the strike. Consequently, all pertinent members of the management team should be informed of all information released to the public, preferably as far in advance of the release as possible. The authors remember one especially trying situation where after an all night impasse session in a hotel and being on the verge of a settlement, the morning newspaper was brought into the room where we were ready to reach agreement. The headlines carried a statement by the chairman of the governing body stating that no further concessions would be approved. Obviously, there was no agreement that morning.

n. **Don't be on the defensive.** The press should be viewed as a valuable aid in resolving a strike, rather than a hindrance. Consequently, the spokesperson for management should not feel threatened by the media representatives and recognize that their questions are an expression of a sincere attempt to perform an important job.

o. **Avoid editorial comments.** Although the press presents a temptation to editorialize about the strike, press releases should be used to release facts and not opinions. Leave the editorials to the newspaper owner and editor.

p. **Exchange telephone numbers.** During a strike, news does not develop just during business hours. Therefore, both the spokesperson for the employer and members of the press should exchange telepone numbers where they can be reached at all times.

2. Suggestions for preparing press releases

The chances of a press release being used as submitted are increased if the release is prepared in the accepted manner. Here are some suggestions:

a. Type the release on standard 8½ x 11 white paper.

b. Leave the top third of the page blank, except for information describing the source, such as name and address of the organization releasing the information, the author's name, title and telephone number where he may be reached.

c. Double space all text.

d. End each page with a complete paragraph. This helps the editor prepare the story for print.

e. Make the release short and to the point. If more than one page is needed, type "More" at the bottom of the page.

f. At the end of the release use one of these signs to indicate that there is no more to the release: ###, XXX, or ***.

g. Use wide margins so the editor can make notations.

h. Identify every person named in the release, spelling all names and titles correctly.

i. Avoid adjectives. Just stick to the facts.

CHAPTER XVI

ENDING THE STRIKE

There never has been a public sector strike which has started that has not ended. They all end eventually, and they end as the result of a number of factors:

a. Sometimes the parties continue to negotiate during the strike, with the result that the parties find grounds upon which to settle.

b. Mediation may be employed to help resolve the issues.

c. Fact finding may be used to encourage the parties to reach agreement.

d. Interest arbitration (discussed previously in this book) may be agreed to between the parties.

e. A court order may end the strike (but it may not end the dispute).

f. Public pressure may force the parties to make needed concessions.

g. Legal, economic, and psychological pressures which accompany a strike may force the parties to make needed concessions to each other.

I. The agreement to settle

Before the strike ends, the union may raise a number of questions regarding the terms for returning to work. This assumes that the substantive issues which caused the strike to begin with have been resolved. Quite often before the union will order its members back to work, the union will make a number of demands, and state that the results of such demands should be included in the labor contract. If management is willing to discuss the terms for settling the strike, management should demand that any terms for settling the strike be included in a separate agreement. Before it will order its members back to work, the union may demand that:

a. There be full amnesty for all strikers.

b. No entries regarding the strike will be placed in the employee's personnel file.

c. There will be no mention of the strike in the employee's evaluation.

d. There will be no salary loss.

e. There will be no reprisals.

f. All benefits will be restored.

In response to these demands the employer may maintain that:

a. There will be no use of the term "amnesty," but the conditions for return to work will be entitled, "Return To Work Agreement."

b. There will be no restoration of pay lost as a result of the strike.

c. There will be a loss in all applicable benefits equivalent to the time lost during the strike.

d. No grievances will be lodged as a result of the strike.

e. All legal suits by the union against the employer will be withdrawn.

f. A specific return date will be designated.

g. There will be no reprisals by the union or its members against any unit member who did not participate in the strike.

Because the strike itself introduces these new disputes, the end of the strike can introduce continued strike, unless the terms of the strike settlement have been developed and written with the full understanding of both parties. No strike should be permitted to end, unless the following subjects have been considered and put into a written agreement where applicable:

a. The final agreement on the issues which caused the strike to begin with. For example, if a dispute over salary caused the strike, what is the salary which has been agreed to? If there was more than one issue which caused the strike, each of these issues must be finally resolved. If the resolution of any of these

disputes involved referring them for further study, or some other deferring action, the terms of such actions should be spelled out clearly.

b. If there are any pending legal suits between the parties, there should be an agreement as to their future status. In some cases, the appropriate action might be to terminate all such suits.

c. The terms for resumption of operations must be spelled out clearly. An exact date and time for the return of all strikers must be specified. The manner by which employees are to be notified should be agreed to between the union and the employer.

d. If the union has requested pay or benefits for any period during the strike, this request must be resolved in writing along with all other issues covered in the return-to-work agreement.

e. The parties should agree that neither will engage in reprisals. Although such an agreement could take many forms, here is a sample: "The Union agrees that neither it nor its members will take any action, directly or indirectly, against any employee or person for non-participation in the strike and strike-related activities, and will actively seek to discourage any actions against such people. This no-reprisal clause shall, in no way, preclude the withholding of direct and indirect compensation for non-performance of service during the strike. Nor shall this clause apply to management employees or to any legal action against employees who committed acts of sabotage, violence or violations of the law."

2. After the strike

In planning for the employees to return to their jobs after the strike, a number of points need to be considered in advance:

a. **Hearings may be necessary.** Strikes raise many questions which are never faced by a government agency unless it experiences a strike by its employees. Although as many as possible of these questions should be resolved in the "Agreement To Return To Work," there are bound to be individual questions about individual employees which can be answered only on their individual merits. In such instances, each case must be examined separately. For example: Was John Doe actually sick at the beginning of the strike, or was he on strike? Was Jane Smith forceably kept from returning to work by the union? Questions such as these must be dealt with on an individual basis.

b. **Keep strikers separate from nonstrikers.** When it is agreed that strikers are to return to work at a specific time, every effort should be made to minimize contact between those who went on strike and those who replaced them. Otherwise, the return to work may turn out to be a free-for-all.

c. **Do not hold reconciliation meetings.** Before the striking employees return to work, supervisors should be warned not to hold meetings in an attempt to bring strikers and nonstrikers together. Such reconciliation meetings almost always fail, if not making the return to work even worse than it otherwise would have been.

d. **Do not discriminate.** Once it has been decided how strikers shall be punished, that should be the end of such discrimination between strikers and nonstrikers. Continued harassment of employees who struck will simply lead to grievances, strife, and maybe another strike later.

e. **Prepare a joint press release.** Ideally, when the strike is over, the parties should issue a press release mutually agreed to. This approach to ending the strike minimizes misunderstandings, and conveys to the employees and the public that the parties have reached a final agreement.

f. **Notify employees of strike settlement terms.** To avoid confusion among rank and file employees as to what is expected upon their return, management should draw up a clear communication specifying exactly the terms of the strike settlement. For those employees who have questions, they should be given the name of the person to contact for assistance.

g. **Deal with reprisals quickly.** Should there be acts of reprisals against nonstriking employees by the union or other employees, swift and strong corrective measures should be taken. In other words, management should treat reprisals in the same manner as it would treat any other infraction of agency regulations.

h. **Hold a post-strike strategy session.** Once the strike is over and the employees are back to their normal routine, the chief executive should convene the strike committee and instruct it to analyze the strike. Some of the questions which the committee should attempt to answer are:

* What caused the strike?
* What could management have done to remove the causes of the strike?
* What weaknesses existed in the strike plan?
* What changes need to be made?
* What contingencies arose for which management was not prepared?
* What lessons were learned from the strike?
* What recommendations should be made for future labor relations?

APPENDIX

ELEMENTS OF STRIKE CONTINGENCY AND RESOLUTION PLANS[1]

Despite all the positive steps management may take, the distinct possibility exists that strikes or other militant group actions may occur. Because of this possibility management must be prepared. Management should develop a strike contingency plan in order to be able to carry out the following:

- To meet such commitments as:
  - -- Providing uninterrupted service to the public.
  - -- Assuring availability of supplies and materials.
  - -- Continuing jobs performed by contractors.
  - -- Establishing ultimate limits to which the agency can go, using its own resources, to assure continual service.
- To maintain security (plant, personnel, equipment).
- To meet maintenance requirements.
- To assure that the rights of employees who work during the strike are maintained.
- To maintain effective communication throughout the organization.
- To assure that appropriate legal action can be taken.
- To maintain public protection and safety. Protection of managers, working employees and agency property.
- To establish critical needs and their priorities.

PREPARATIONS BEFORE THE STRIKE OCCURS

- Develop training programs to instruct key people in the techniques needed to man production operations, the legal rights of the employees during strikes, and other pertinent matters.
- Prepare a strike plan showing the who, what, when, where, and how of organizational activity in the period prior to the job action.
- Select the communication channels with managers and non-striking employees.
- Select the means and methods of communicating with employees prior to the job action, during the job action, and after the job action.

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[1]Document No. RN IV-6, U.S. Civil Service Commission (now Office of Personnel Management), Bureau of Training, Labor Relations Training, Washington, D.C. 20415.

- Determine the extent and nature of the information needed in decision making and communication processes. This is exploratory for time changes both the and quantity of information desired.
- Evaluate the union or community group and its leadership. This should probe financial, leadership, and organizational strengths to analyze the union's or other group's ability to resist agency demands.
- Appraise key people in managerial ranks to determine who can and will perform specific tasks during job actions.
- Explore the use of temporary employees.
- Determine the availability of assistance from nearby cities and agencies.
- Inestigate the possibility of contracting out to continue services.
- Determine steps to assure delivery of essential supplies and materials.
- Establish position on continuation of work by contractors.
- Develop initial relationships with various news media to feel out their general position and to suggest ways of overcoming negative reactions.
- Consider the following methods of communication and how they might be utilized during a strike: direct letters to homes, agency meetings with taxpayers, press releases, press conferences, community telephone "hotline" or "rumor control" center.
- Develop a timetable for actions during the course of a strike.
- Announce, in advance, agency policies with respect to strikes.
- Establish a climate for effective labor relations so that strikes can be avoided.

THE CONTINGENCY PLAN AND ITS IMPLEMENTATION

Carrying On Services

- Determine whether services should be carried on or not, depending on the nature of the strike.
- Determine essential jobs and work that has to be done.
- Determine deployment of non-striking employees and supervisors.
- Initiate procedures for enlisting outside employees if necessary.

THE NEGOTIATING TEAM

- Determine actions of negotiation team during the strike.
- Determine whether negotiations will continue during the strike.
- Determine use of mediators and fact finders.

COMMUNICATIONS WITH THE PUBLIC OR PUBLIC RELATIONS

- Determine how much and what information will be released.
- Decide how to present the management story in the best way.
- Establish public information officer as sole contact on agency position.
- Make sure all community leaders are aware of the issues and the agency's position on the issues.
- Make sure that taxpayers and community leaders are kept up to date on the strike.

INTERNAL COMMUNICATIONS

- Keep the "management team" informed.
- Provide mechanisms for feedback.
- Present a unified front.

EMPLOYEE COMMUNICATIONS (PERSUASION)

- Make sure all employees know the issues in dispute and management's side of the issues.
- Make sure all employees know the agency's position in regard to refusal to provide services.
- Make sure all employees know they risk disciplinary action if they violate the law, or agency rules or regulations.

SECURITY

- Provide police protection against possible violence on the picket lines or against employees crossing picket lines.
- Provide protective measures for workers and equipment in the field.
- Provide security for police-fire communications.

ADMISSION TO AGENCY PREMISES

- Determine who will be admitted: employees, newsmen, union officials, etc.
- Determine the means of identification to be used.

PAY POLICIES

- Determine when pay policies relating to the strike should be announced.
- Determine whether strikers will be allowed to charge strike time to vacation or sick leave.
- Provide for payment for work done before the strike began.
- Set up methods for determining who is sick and who is on strike.
- Establish a policy on non-striking employees who will not cross a picket line.
- Determine whether there will be overtime or other premium pay for non-strikers who carry on services.
- Determine what legal steps will be taken, if any.
- Explore possible use of injunction and its possible ramifications.
- Determine action relative to strikers who violate strike orders.
- Determine penalties, if any, for strikers.
- Make a file of all statements by employee organization leaders mentioning withdrawal of services, with time, dates, witnesses, and a written account of statement.
- If a temporary restraining order is granted, notify as many of the striking employees as possible, especially the employee organization's leaders, that the strike has been enjoined and that they are required to return to work. Make a file of all such

employees contacted, setting forth who was contacted, by whom contact was made and at what time the contact was made.

- Make a file of all activities which are disruptive in nature.

SPECIAL PROBLEMS

Racial overtones.

Community implications.

Maintaining communications with union leadership.

Variables Impacting on The Resolution of the Job Action

Intra-Organizational Variables

- To what extent are management personnel available with the skills to operate the facilities and equipment?
- How many employees can be transferred from other departments not affected by the strike?
- Is there adequate security from threats, harassment and violence provided to working employees, volunteers, and the public?
- What is the impact of the strike on non-striking employees inside and outside the bargaining unit?

Legal Variables

- What penalties are available to impose on the union or striking employees?
- What are the procedures for instituting these legal sanctions?
- How enforceable are these penalties?
- Or, how do you enforce these penalties?

Labor Market Variables

- What is the availability of replacement labor in the local labor market?
- Is the local replacement labor willing to cross a picket line?

Community Group and Union Variables

- What is the union or community group's motivation for going to a strike or job action? For example, is it to show strength, to achieve legitimate gains, to save face, etc.?
- What is the percentage of union or community group membership or support in the total work force and what impact does this exert on worker attitudes?
- What are the financial resources of the local union or the community group involved in the job action?
- What can be the expected support of other unions or groups?
- What is the ability of the leaders involved in the job action?
- What is the overall ability of the organization to maintain a long-term strike?
- What is the ability of the organization to change the agency's position by community pressure?

Inter-Organizational Variables

- Can replacement labor be acquired without precipitating violence and emotion?
- Can members of the bargaining unit be induced to cross the picket line without precipitating violence and emotion?
- How effective will legal sanctions be on the union or community group?
- Will the imposition of any combination of the above three factors have a deleterious effect on bargaining and resolving the impasse?
- What will be the impact of these decisions on the post strike relationship with the union or community group?

Resolving Union Job Actions

- Secure a firm agreement from the union not to take action against or discipline those employees who refuse to participate in the strike or who returned to work voluntarily.
- Be prepared to handle such union demands as: no reprisals against strikers, return to work with full seniority and promotion rights, withdrawal of all employer legal actions, employer full pay for all welfare benefits such as insurance and pensions during the period of strike.

- Be prepared for taxpayers' suit to force management to invoke punitive features of no-strike law.
- Consider possible disciplinary action against employee organization; withdrawal of check-off privileges, suit for damages.
- Prepare a joint statement with the union announcing the end of the strike and containing brief features of the settlement.
- Inform your clients, customers, suppliers, and contractors of the end of the strike.
- Prepare a statement explaining the strike settlement, conditions of return which includes the possibility of disciplinary action against strikers.
- Consider full amnesty or limited amnesty to strikers who return by a certain date.
- Consider holding individual hearings to determine recommendations for discipline (after strike is over).
- Consider possible disciplinary actions against strikers: written warnings, pay freeze, temporary leave without pay, demotion, termination of employment.
- Deal firmly and promptly, through established legal procedures, with all forms of threats and reprisals directed against employees or agency property.
- Inform the management team that they should work to make the transition back to work as smooth as possible.
- Reduce bitterness as much as possible.
- Intensify upward and downward communications.
- Establish a policy for overtime work resulting from the loss of work during the strike.

Resolving Non-Union Job Actions

- Meet with the group to find out what it is they want.
- To the extent that demands fall under the collective bargaining agreement, direct the non-union group to union officials.
- Make union officials aware of non-union group demands that fall within the bargaining agreement or possible scope of bargaining.
- Attempt to persuade the union to take into consideration the non-union group needs that relate to it as the collective bargaining representative.

- To the extent the issues are outside the scope of bargaining of management and the union, direct the non-union group to the appropriate agent or agency.
- Refuse to bargain on those issues that fall under the bargaining rights of the exclusive representative.
- Give notice of possible disciplinary or legal action if the non-union group continues their disruptive activity.
- If necessary, take disciplinary and/or legal action to stop the job action.

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