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LABOR RELATIONS IN PUBLIC EMPLOYMENT — CAN GOVERNMENT GOVERN ITSELF?

Public employees, as a condition of their public service and in the absence of any saving statute or constitutional provision, voluntarily surrender such part of their rights as may be essential to the public welfare. Consequently, the public employee historically has been at best a second class citizen and at worst a mere pawn almost totally subject to government fiat.

Government employees do not have the right to strike or picket in the absence of legislative authorization. A strike by public servants has been characterized as "an intolerable crime against civilization." In fact, even where employees of a private electric system had had a collective bargaining agreement with their employer prior to the acquisition of the system by a municipality, a strike and picketing by the workers to compel union recognition by their new public employer was enjoined. President Calvin Coolidge pithily summed up the prevailing view: "There is no right to strike against the public safety by anybody anywhere at any time."

Further, in the absence of an express provision to the contrary, state statutes dealing with labor relations do not cover public employees. Such employees, therefore, do not have the right to bargain

1. City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539, 542 (1947). At least part of the reason for this attitude is the time-worn assertion that "employment by the government is a privilege, not a right. . . ." Comment, The Rights of a Public Employee in Nebraska, 46 Neb. L. Rev. 884, 885 (1967).


3. For example, Alabama has attempted to require teachers to disclose all organizations of which they are members; the case of Shelton v. Tucker, 364 U.S. 479 (1960), however, invalidated this disclosure requirement. See also Elfbrandt v. Russell, 384 U.S. 11 (1966).


6. City of Alcoa v. IBEW, Local 760, 203 Tenn. 12, 308 S.W.2d 476 (1957). In the private sector a collective bargaining agreement survives a change of employer. See John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) ; Wackenhut Corp. V. Int'l Plant Guard Workers, Local 151, 332 P.2d 546 (9th Cir. 1964).


collectively and their employer does not have the authority to negotiate with their representatives. Although it has been suggested that the organization of public employees is not improper, at least prior to 1958 they usually did not possess the right to do so. In addition, public employees have not been afforded the protection of the federal Bill of Rights and state constitutional safeguards to the same extent as their fellow citizens. Under certain circumstances, such as potential subversion, they may still not receive equal constitutional protection.

In short, those who have served the public have been subject to such conditions as the public wished to prescribe. Public employees have been denied certain of their civil liberties and, in addition, have been unable to protect themselves through practices which would be acceptable in the private sector:

Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees. A strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.

**NEEDED — A NEW APPROACH**

During 1962 there were 28 strikes by public employees; there were 42 such strikes in 1965, 150 in 1966, and probably about 300 in 1967. In 1961 the public service lost 15,300 man-days as a result of

volved in a labor dispute over which the National Labor Relations Board will have jurisdiction. See Plumbers, Local 298 v. County of Door, 359 U.S. 354, 359 (1959) ("... Board jurisdiction to grant relief, far from interfering with county functions, serves to safeguard the interests of such political subdivisions... "); Baltimore Bldg. & Contr. Trades Council v. Maryland Port Authority, 238 Md. 232, 208 A.2d 564 (1965). Further, at least an argument can be made that the Federal Mediation and Conciliation Service may have some jurisdiction in public employment. 29 U.S.C. § 142(1) (1964): "The term 'industry affecting commerce' means any industry or activity in commerce... "; 29 U.S.C. § 173(b) (1964): "The Service may proffer its services in any labor dispute in any industry affecting commerce... "). It seems that a public transport workers dispute with their employer might be likely to affect interstate commerce.


10. E.g., City of Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539, 542 (1947).


strikes; in 1966, 455,000 man-days were lost. These figures indicate that strikes by government employees are no longer exceptional. The prediction that rising public employment coupled with increasing unionization would result in more strikes has been fulfilled.

Within a few years government will employ one-fifth of the work force in the United States. State and local governments are creating one out of two new non-farm jobs in the "most rapidly growing field of employment." During the last twenty years the number of unionized public employees has probably doubled. "The swelling ranks of public employees apparently became an irresistible target for the AFL-CIO." The states have been slow to respond to the new pressures. Innovation has occurred at the municipal level. This has resulted in haphazard "crazy-quilt patterns" of state and local procedures which tend to threaten fundamental due process.

Part of the problem in public employment can be traced to employee organization rivalry. The most thoroughly studied example of such rivalry is that between the National Education Association and the AFL-CIO's American Federation of Teachers. The NEA and the AFT are divided by different basic concepts concerning the

19. Id.
22. Nesvig, The New Dimensions of the Strike Question, 28 PUB. ADMIN. REV. 126 (1968). The gains which can be achieved by cooperative effort are even being recognized by the bench. Twenty-seven judges of Michigan's Third Circuit joined together to sue a county to compel it to provide them with sufficient court personnel. The judges were successful in their suit. Time, Dec. 13, 1968, at 60-62.
23. McKelvey, The Role of State Agencies in Public Employee Relations, 20 IND. & LAB. REL. REV. 179, 183 (1967). "Almost all of these developments at the municipal level have occurred without the encouragement or protection of state legislation. . . ." Id. at 184.
24. Id. at 186. See also Report of the Committee on the Law of Government Employee Relations, ABA SECTION ON LABOR LAW 333 (1965).
role of teacher organizations, collective bargaining, state legislation, unit determination and impasse resolution. These divergent views tend to heighten controversy at the local level and in state legislatures.\textsuperscript{28}

Competition between employee organizations also contributes to militancy. When a union asks for majority support from a group of employees so that it can be designated exclusive representative, it must suggest that it can do more for the employees than its competitor. If it fails to deliver, it can be voted out or, perhaps even worse from its leadership's point of view, face internal upheaval. Consequently, a public employees' organization is under virtually the same pressure to constantly make gains for its members as is a union in the private sector.\textsuperscript{29}

The Baltimore City Classified Municipal Employees Association, for example, recently removed a no-strike provision from its by-laws because many of its members felt that "we could not compete against the unions unless we did so."\textsuperscript{30}

Unfortunately, public employee organizations have found that striking is usually successful when other methods to achieve their goals have failed.\textsuperscript{31} Anti-strike laws fail to deter the public employee strike if the strikers feel that the issue is critical: "Injunctions issued under the no-strike provisions of the . . . Taylor Law are treated like confetti by all the major municipal unions except police and fire, and no one is sure how long these two will defer to the law."\textsuperscript{32} As the late Mike Quill, President of the New York City Transport Workers, remarked about the anti-strike provisions of the Condon-Wadlin Act,\textsuperscript{33} the predecessor of the Taylor Act: "Let Mr. Condon collect the tokens and Mr. Wadlin run the trains."

\textsuperscript{27} Note 26 supra.
\textsuperscript{28} This rivalry affects all government employee relations because teachers account for roughly one-third of all government employees. The relative strength of either of the two organizations is reflected in the legislation which has been passed by the states covering teachers and other employees. Particularly interesting are the typically teacher-like euphemisms which the NEA uses to describe various aspects of labor relations. See note 26 supra.
\textsuperscript{29} This poses a basic question concerning the appropriateness of unionization in the public sector. This question, however, is moot. See notes 50–53 infra and accompanying text. Nonetheless, a few states have attempted to prevent government employees from joining labor organizations. North Carolina, for example, prohibits membership in labor unions by statute. In the section immediately following this prohibition, North Carolina tacitly admits to the futility of such a prohibition by further providing that agreements between labor organizations, which could of course not exist if the employees obeyed the prohibition of the immediately preceding section, and units of government are void. N.C. GEN. STAT. §§ 95–97, 95–98 (1965). Section 95–97 was, however, declared unconstitutionally overbroad in Atkins v. City of Charlotte, 37 U.S.L.W. 2517 (W.D. N.C. Feb. 25, 1969).
\textsuperscript{30} Interview with Mr. Harry Deitchman, President, Classified Municipal Employees Ass’n, Dec. 5, 1968.
\textsuperscript{31} Statement by the President of the New York City United Federation of Teachers in Posey, The New Militancy of Public Employees, 28 PUB. ADMIN. REV. 111, 114 (1968): "Perhaps it is a bad lesson to learn but the city has convinced us that striking brings us gains we need and cannot get any other way."
\textsuperscript{34} Ch. 790, § 108, [1958] N.Y. Laws 1007 (McKinney).
\textsuperscript{35} Ch. 392, [1967] N.Y. Laws 393 (McKinney).
Even more disruptive and difficult to resolve than the economically motivated strike is the strike clouded by issues of race, religion or public policy. In addition, strikes in disregard of an employer's inability to pay the wages demanded or resolve the issues presented will perhaps become endemic in public employment. In private industry, if worker demands are unreasonable, the employer can, at least, theoretically, either raise prices or go out of business. The option of raising prices for the public employer is at best difficult and at worst impossible. Further, government cannot go out of business. This is why the distinction between so-called proprietary and governmental functions is valueless in terms of labor policy. No legitimate differentiation between the two functions, in terms of employee rights, is possible because certain proprietary activities may be more vital to the public health or safety than certain purely governmental functions. The public, for example, would certainly be more disturbed and inconvenienced by a two week strike of transport workers than it would by a two week strike of tax collectors.

In addition to the problem of the strike, there are fundamental questions concerning the establishment and role of employee organizations. The first problem is unit determination. This may be the subject of future litigation between the Classified Municipal Employees Association and Baltimore City. The applicable Baltimore City ordinance provides that personnel who receive cash payments for overtime shall not be considered supervisory personnel for the purpose of unit determination. Certain city employees who do receive such overtime payments are arguably supervisory personnel. Their exclusion by the City Labor Commissioner from an election for exclusive representation between the Classified Municipal Employees Association and...

36. A good example is the 1968 New York teachers strike. See Time, Nov. 29, 1968, at 89; Time, Nov. 1, 1968, at 20; Time, Oct. 25, 1968, at 34, 52; Newsweek, Nov. 25, 1968, at 98; Newsweek, Oct. 28, 1968, at 84. See also Tentative Plan—Parents Community Council, a racist hate sheet which the UFT alleged was being distributed by their Negro opposition. The American Federation of Teachers has apparently also become involved in the college student unrest. AFT picket signs were being carried during the San Francisco State uprising. CBS News Broadcast, Dec. 12, 1968.

37. "The union leaders knew when they called the [1966 New York subway] strike that their wage demands could not be met within the existing revenue structure of the transit system." Posey, The New Militancy of Public Employees, 28 Pub. Admin. Rev. 111, 112 (1968). On Sept. 7, 1967, nearly 90% of the police and firemen in Youngstown, Ohio, struck after their demand for a $1,200 across the board salary increase was refused. Id. at 113. Ohio prohibits public employee strikes by statute. Ohio Rev. Code Ann. §§ 4117.01-4117.05 (Page 1965). An organizer for AFL-CIO Laborers International Union Local 1228 in Baltimore told the author that the city paid under $4.00 an hour for certain jobs which in the private sector were worth $5.00 to $8.00 an hour. The organizer observed that "you can’t make gains by striking" but that "if there was no alternative, we would strike." He concluded, "if you go about things the right way, there is no need for . . ." the strike. Interview, Dec. 5, 1968.

38. "The type of bargaining unit which is established will have a profound impact on whether or not the collective bargaining process will work." Anderson, Selection and Certification of Representatives in Public Employment, 20 N.Y.U. Conf. on Labor 277, 296 (1968).

39. Interview with Mr. Harry Deitchman, President, Classified Municipal Employees Ass’n, Dec. 5, 1968; Interview with Mr. Edward Gutman, Baltimore City Labor Commissioner, Dec. 5, 1968.

40. Baltimore, Md., Ordinance No. 251 (1968).
Local 44 of the American Federation of State, County, and Municipal Employees has been challenged by the C.M.E.A., which lost the election by three votes.\(^4\)

The unit determination issue is only part of the larger problem of union recognition.\(^4\) Exclusive recognition "... runs into strong contrary traditions of individual employee rights, civil service protectionism, and representation by varied organizations with minority support or specialized interests."\(^4\) Even recognition which is not exclusive presupposes at least tacit agreement by government to consider employee viewpoints to a greater extent than they would be considered without recognition. This practice is implicitly antagonistic to time-honored concepts of sovereignty and the democratic process.\(^4\) The fundamental basis of representative democracy is the election of representatives by the people to formulate public policy. Union recognition and the negotiation which is recognition's natural concomitant removes from electorate control matters which are the subject of bargaining.\(^4\) While government has the responsibility of determining which areas of policy control it is willing to surrender to bilateral negotiation, unionization in public employment has, unfortunately, proceeded with minimal government direction. Government has rarely considered this responsibility beyond the slogan stage.\(^4\)

In any case, once the decision is made to replace electorate control in certain areas with bilateral negotiations, stress may occur in the bargaining process over the basic question of negotiability.\(^4\) In New York City, for example, the unions have proposed the elimination of the Civil Service Commission's Career and Salary Plan which is part and parcel of the city merit system and which is, thus, not supposed

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\(^{41}\) Evening Sun (Baltimore), Nov. 27, 1968, § C, at 24, col. 1.

\(^{42}\) Between 1960 and 1965, strikes for recognition were the second largest cause of work stoppages in public employment. Anderson, Selection and Certification of Representatives in Public Employment, 20 N.Y.U. CONF. ON LABOR 277, 278 (1968).


\(^{44}\) See generally Nigro, The Implications for Public Administration, 28 PUB. ADMIN. REV. 137 (1968).

\(^{45}\) See Dade County v. Amalgamated Ass'n of Street Employees, 157 So. 2d 176, 182 (Fla. App. 1963) (quoting with favor lower court opinion):

> The courts have said that as a general rule collective bargaining has no place in government service. The employer is the whole people. This is a government of law, not men. For the courts to hold otherwise ... would be to sanction control of government functions not by laws but by men. Such policy, if followed to its logical conclusion, may inevitably lead to chaos.

Public control would be virtually eliminated if binding arbitration were used to resolve disputes in government employment. See Sullivan, Binding Arbitration in Public Employment Labor Disputes, 36 U. CINN. L. REV. 666 (1967): "It is the control of these areas that the electorate in a democratic form of government will not and should not relinquish."

\(^{46}\) Notes 23 & 24 supra and accompanying text. Recent state legislation and discussion, however, is encouraging. See pp. 50-57 infra. See also Report of the Committee on the Law of Government Employee Relations, ABA SECTION ON LABOR LAW 175, 182-86 (1967). Nevertheless, even the report of the New York Taylor Committee merely "... flatly states that it is against the policy of the State for public employees to strike." Id. at 176 (1966). "The Taylor Act ... within weeks flunked its first test: the big New York City school strike [of 1967]." Nesvig, The New Dimensions of the Strike Question, 28 PUB. ADMIN. REV. 126, 131 (1968).

\(^{47}\) Notes 62-63 infra.
to be negotiable.\textsuperscript{48} The conflict between bilateral negotiations and merit systems is a very real one. It will continue under any scheme of employee organization recognition.\textsuperscript{48}

Nonetheless, political and practical realities in public employment now pose the question of how to channel unionization, not whether it can be avoided.\textsuperscript{50} Organized public employees are becoming increasingly powerful.\textsuperscript{51} Union leaders recognize that "... if the labor movement is to grow, it must look to government employment as a prime source of new members."\textsuperscript{52} Because of this, as former Secretary of Labor W. Willard Wirtz remarked, "... some effective method of bilateral and representational negotiations is 'inevitable, proper, and desirable in public employment ...'"\textsuperscript{53} Unhappily, "[t]he success of belligerence in America has set the stage. ..."\textsuperscript{54} If labor peace is to be realized in public employment, the states must now by legislative action minimize the danger of labor belligerence by establishing procedures for a dialogue and perhaps even a satisfactory conclusion.

**THE FEDERAL PROGRAM**

**Executive Order 10988**

On January 17, 1962, President John F. Kennedy signed Executive Order 10988, entitled "Employee-Management Cooperation in the Federal Service."\textsuperscript{55} The Order established a basic outline for government employee relations. Three levels of union recognition are authorized: informal, formal and exclusive. Employee organizations granted formal or exclusive recognition have certain guaranteed rights to participate in the formulation of personnel policies. The Order does not permit recognition of any organization which asserts the right to strike or is subversive or corrupt. Employee-management agreements within each agency may contain provisions for the resolution of impasses and grievances. Advisory but not compulsory arbitration is permitted in unit determination disputes. Each agency is to formulate rules and regulations to control its employee relations. The

\begin{itemize}
\item \textsuperscript{50} The situation in public employment today is strikingly parallel to the private employment problems of the 1930's. As in the private sector: "If the states do not perform well ... they may face the prospect of federal legislation in this field," McKelvey, *The Role of State Agencies in Public Employee Labor Relations*, 20 IND. & LAB. REL. REV. 179, 196 (1967). See also note 8 supra.
\item \textsuperscript{51} Goldberg, *Labor-Management Relations Laws in Public Service*, 91 MONTHLY LAB. REV. 48 (June, 1968) : "[T]he total of organized public employees is a potent and growing factor in the pluralistic structure of American society."
\item \textsuperscript{52} Donoian, *The AFGE and the AFSCME: Labor's Hope for the Future?*, 18 LAB. L.J. 727 (1967).
\item \textsuperscript{53} McKelvey, *The Role of State Agencies in Public Employee Labor Relations*, 20 IND. & LAB. REL. REV. 179 (1967).
\item \textsuperscript{54} Posey, *The New Militancy of Public Employees*, 28 PUB. ADMIN. REV. 111, 117 (1968).
\end{itemize}
agency heads possess almost unlimited discretion in matters of labor policy. Federal employees, regardless of any negotiated agreement, may bring matters of personal concern to the attention of their superiors and may choose their own representatives in any grievance action.

Problems Under the Order

As of August, 1966, 1,054,417 employees of the Executive Branch, or approximately 38 per cent of the total employment of that branch, were in exclusive bargaining units. One hundred and eleven employee organizations are informally, formally, or exclusively recognized by the federal government. Although the federal experience is not an exact parallel of the state and local situation, the problems which have arisen under the Order are indicative of similar difficulties at other levels of government.

One of the earliest controversies arose from union objections to the requirement, imposed by the President’s Temporary Committee on the Implementation of the Federal Employee-Management Relations Program, that sixty per cent of eligible employees participate in elections for exclusive representation. Because federal agencies schedule elections so that employees can conveniently vote, the sixty per cent rule is not as significant as it might be. Nonetheless, there are still instances of minority unions urging employees not to vote in order to prevent the vote from reaching sixty per cent, and the controversy appears to be continuing.

There were early fears that negotiations would not be meaningful due to the limited scope of negotiable matters. These fears have proved unfounded. On many occasions, however, unions have attempted to


58. Id. at 176.


61. Report of the Committee on the Law of Government Employee Relations, ABA Section on Labor Law 130, 136–37 (1966). The unions urge that the 60% rule is inequitable because it creates “... inconsistencies in procedures dealing with elections in the private and governmental sectors.” The 60% requirement has caused problems in two run-off elections and has been eliminated in the run-off situation by Civil Service Commission Regulation. Statement of Louis P. Poulton, Id. at 140. The ABA Committee recommends the complete abolition of the rule, Mr. Donald H. Wollett, national counsel of the NEA and a member of the Committee, opposes the elimination of the 60% rule and believes that the “inconsistency argument” is not persuasive. Statement of Donald H. Wollett, Id. The 60% rule has been upheld in the courts. Manhattan-Bronx Postal Union v. Gronouski, 350 F.2d 451 (D.C. Cir. 1965).

bargain on non-negotiable matters. Further, many impasses have occurred because of agency determination that an issue is not negotiable. Resolution of impasses creates perhaps the most difficulty:

The problem of impasses in the process of negotiations has apparently created a great deal of frustration for all parties concerned. The absence of the right to strike has left unions with the feeling that they are at the mercy of the agencies in pressing their bargaining demands. In addition, very few collective bargaining agreements make provision for deadlocks in negotiations.

Consequently, some unions have suggested that binding or advisory arbitration be substituted for the strike. Nevertheless, the Presidential Task Force on Employee-Management Relations in the Federal Service took the position that "... arbitration of negotiation impasses is not an appropriate technique for general adoption by the Federal Government at this time." The Task Force instead recommended that each agency by negotiation devise impasse resolution techniques to fit its own circumstances. This recommendation has not been implemented. In addition, "... most of the government agencies still will not allow an outsider to be involved in collective bargaining negotiations."

The most critical problem in the early days of the Order was unit determination. Agency heads tended to substitute their own judgment for that of their negotiators. They have the power to indulge in this kind of second guessing because Section 7 of the Order provides

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64. Id. at 134. One member of the Committee, Robert G. Howlett, Chairman of the Michigan Labor Mediation Board, does not feel that unions are at the mercy of management, noting that under the Michigan Act local employees do not feel at the mercy of their employers. Id. at 138. The Committee recommends that Civil Service Commission guidelines and Secretary of Labor publications urge the inclusion of impasse resolution procedures in negotiated agreements.
65. Report of the Committee on the Law of Government Employee Relations, ABA Section on Labor Law 362 (1964). There has been a reluctance on the part of some unions, however, to make use of advisory arbitration as a final impasse resolution procedure as provided in Section 8b of the Order. Since the inception of the program, there have been only eighteen cases of advisory grievance arbitration. The arbitrators have supported the employee position eight times and the management viewpoint the other ten. Report of the Committee on the Law of Government Employee Relations, ABA Section on Labor Law 180 (1967).
67. Report of the Committee on the Law of Government Employee Relations, ABA Section on Labor Law 362 (1964). The few impasse procedures which have been adopted provide for mediation, fact-finding, and higher level discussion. Id. at 363.
68. Note 64 supra and accompanying text.
69. Report of the Committee on the Law of Government Employee Relations, ABA Section on Labor Law 178 (1967). An outsider has a very difficult job in mediating disputes in federal employment because he must become familiar with a wide range of federal, agency and installation regulations. Id. at 180. See e.g., text accompanying notes 77-78 infra.
that they must approve "[a]ny basic or initial agreement." 72 Even though the Order does provide for ad hoc arbitration in unit determination cases, this advisory arbitration has not been a uniform success. 73 Most of the arbitrators feel that decisions of the National Labor Relations Board in similar cases should be taken into consideration but should not be controlling. Because the arbitrators are not required to follow any precedent, "no body of authoritative law on unit determination has developed." 74 Certain kinds of units can be established in most agencies without arbitration. Some agencies, however, will not grant recognition to any type of unit, except an overall unit, without arbitration. 75 Contributing to the unit determination dilemma is the yet unresolved issue concerning the participation of supervisory employees in employee organizations. 76

Because each agency is responsible for conducting its own employee relations, "pyramids of regulations" 77 have developed. The Department of Defense, for example, would issue a regulation. The Navy Department would issue an interpretative regulation. Then the Navy Bureau of Personnel would issue an interpretative regulation on the interpretative regulation, and then each installation under the Bureau of Personnel would issue another interpretative regulation. "The fact of the matter is that you would not recognize the original regulation issued by the Department of Defense." 78

The "Code of Fair Labor Practices" for federal employment is similar to private labor standards except in the area of enforcement. 79 The "... first unfair labor practice case where the charges of a union were found meritorious and some of the recommendations of the hear-


What is most remarkable about the Executive Order is its emphasis on decentralization and agency autonomy. With the exception of Section 11, ... the individual agencies are free of independent regulation in their dealings with employee organizations, their relationships being guided only by the Standards of Conduct, ... and the Code of Fair Labor Practices suggested for voluntary adoption.


77. Id. at 137.

78. Id. at 138.

79. See note 56 supra. The unions have objected to the Code of Fair Labor Practices because in their view the Code procedures make each agency the prosecutor, defender, and judge. They feel that the agencies will not be objective. As the ABA Committee on the Law of Government Employee Relations has suggested, "These attitudes cannot be discounted." Report of the Committee on the Law of Government Employee Relations, ABA SECTION ON LABOR LAW 355, 364 (1964). See also Report of the Committee on the Law of Government Employee Relations, ABA SECTION ON LABOR LAW 130, 132-33 (1966), which makes a number of recommendations addressed to this problem.
The dispute began in November, 1964, when the union began to seek recognition. The Comptroller delayed recognition until March, 1966. Shortly thereafter two of the union officers were transferred from New York to distant parts; six months later recognition was revoked. The Secretary of the Treasury accepted the findings of the hearing officer, transferred the officers back to New York, and restored recognition. In other cases in which unfair labor practices have been charged, there has been either informal settlement or complete rejection of the charges by management without meetings or hearings.

Tension between civil service concepts and collective negotiations has also been a problem: "Some of the unions have in effect pushed for seniority as the major consideration in promotions, and this cannot be reconciled with merit." An accommodation of the merit concept with the principle of bargaining will require at the federal level, as in the states, mutual good faith and probably much more. In short, although the structural defects of the federal program have caused problems in and of themselves, the federal experience, if used as a guide for similar action on the state level, indicates that a resolution of these structural defects must be accompanied by a willingness on the part of both labor and management to appreciate the other's position.

STATE PROGRAMS

Florida, in spite of several strikes within recent years, clings to the traditional approach: employee organizations and their relations with government are not regulated. By statute, government employees may belong to organizations which do not assert the right to strike and such organizations may present proposals. This type of

81. Id.
82. Id. at 178. Legislation has been proposed in Congress to establish a Federal Employees Relations Board, but it has not made any progress. Report of the Committee on the Law of Government Employee Relations, ABA Section on Labor Law 137 (1966). The ABA Committee has suggested that the lack of such a board is a "fundamental deficiency" in the Order. See Report of the Committee on the Law of Government Employee Relations, ABA Section on Labor Law (1964).
84. Notes 47-49 supra and accompanying text.
86. For example, a teachers strike occurred recently in Ft. Lauderdale and a mass resignation took place in Miami. See Nesvig, The New Dimensions of the Strike Question, 28 Pub. Admin. Rev. 126, 131 (1968).
87. The most traditional approach of course would be not to permit employees to join labor unions at all. Alabama, with certain exceptions, takes this view. Ala. Code tit. 55, §§ 317-317(4) (1960 & 1967 Supp.). This legislation is probably in violation of the federal Constitution. See notes 11 & 29 supra.
statute does not provide procedures for even minimal dialogue between employees and government.\textsuperscript{88}

Delaware recently enacted legislation vesting authority in its Department of Labor and Industrial Relations to regulate state and local employer-employee relations.\textsuperscript{89} The Department may make regulations to administer the program,\textsuperscript{90} which, among other things, establishes procedures for exclusive recognition. Public employers are required to engage in collective bargaining\textsuperscript{91} and, if an agreement cannot be reached, either party may submit "... any matter in dispute, except matters of wages and salaries ..." to the State Mediation Service "... or, by agreement of the parties, to arbitration. ..."\textsuperscript{92} The statute fails to provide for a run-off election if no employee organization receives a majority of the votes cast in a secret ballot for exclusive representation. In fact, if no employee organization receives a majority, "no election to determine representation within the unit shall be held within 1 year thereof."\textsuperscript{93} Delaware also prohibits strikes,\textsuperscript{94} and the merit or personnel system, where applicable, controls over any demands for seniority treatment by employee organizations.\textsuperscript{95}

The 1968 Session of the Maryland General Assembly enacted procedures for state labor relations with teachers.\textsuperscript{96} The statute provides that the public school employer in each county "shall designate ... which, if any, employee organization shall be the exclusive representative. ..."\textsuperscript{97} Only two employee units are permitted in each county,\textsuperscript{98} probably to avoid the possibility of having to negotiate with a number of employee units. An employee organization may request certification if it has a membership of at least thirty per cent of the total employees in a specified unit.\textsuperscript{99} Interestingly enough, elections to determine representation are to be held only between June 1 and June 15. The organization which receives the largest number of votes — there is apparently no majority requirement — is to be the exclusive representative.\textsuperscript{100}

\begin{itemize}
\item \textsuperscript{89} \textit{DxL Ann. Codx tit. 19, ch. 13, §§ 1301-13} (Supp. 1965). Teachers are not included. \textit{Id.} at § 1301(e)(b).
\item \textsuperscript{90} \textit{Id.} at § 1308.
\item \textsuperscript{91} \textit{Id.} at § 1309.
\item \textsuperscript{92} \textit{Id.} at § 1310.
\item \textsuperscript{93} \textit{Id.} at § 1307.
\item \textsuperscript{94} \textit{Id.} at § 1313: "No public employee shall strike while in the performance of his official duties."
\item \textsuperscript{95} \textit{Id.} at § 1312.
\item \textsuperscript{97} \textit{Md. Ann. Code art. 77, § 175} (Supp. 1968). The statute required that the county public schools make their designation before June 15, 1968. Baltimore City was given until June 15, 1969, to designate exclusive representatives, probably because Baltimore City already had a program for teacher organization, Baltimore, Md., Ordinance 1031 (1967), which the state act superseded.
\item \textsuperscript{98} \textit{Md. Ann. Code art. 77, § 175} (Supp. 1968).
\item \textsuperscript{99} \textit{Id.} at § 175(e)(1). Another employee organization with a 10% membership in the unit may request an election. \textit{Id.} at § 175(e)(2). The State Board of Education is responsible for adopting rules and regulations to verify the number of certified employees. \textit{Id.} at § 175(e)(5).
\item \textsuperscript{100} \textit{Id.} at § 175(e)(5).
\item \textsuperscript{101} \textit{Id.} at § 175(e)(5).
\end{itemize}
Under the Maryland arrangement, the employer is required to meet with and negotiate with the exclusive representative of the employees. The impasse resolution procedures, however, are minimal. If an impasse in negotiation occurs, both parties must request the assistance of the State Board of Education if they wish that body to mediate. If both parties do not consent to such a request, then, at the request of either party, what is essentially a panel of mediators may be named. One mediator is to be chosen by each party and the third is to be selected by the other two within ten days. The problem with this type of mediation is that the employee organizations may feel that the State Board of Education is somewhat biased. In addition, because in Maryland the local boards of education establish educational policy while the county councils set the budgets, negotiations between employees and school boards are meaningless on any financial matter unless the county councils are willing to appropriate the funds. The statute and its impasse resolution procedures do not meet this problem.

California provides separately for teacher representation and for representation of other government employees. The most unusual

102. Id. at § 175(h)(1): The employer must meet with the exclusive employee organization "upon request" and discuss "salaries, wages, hours, and other working conditions." Id. at § 175(h)(2): "The term 'negotiate' as used herein shall include the duty to confer in good faith, at all reasonable times, and to reduce to writing the matters agreed upon as the result of such negotiations."

103. Id. at § 175(i).

104. Id. Either the State Board of Education or the mediators must make a report within 30 days from the date of the request for mediation. Costs of mediation are to be shared. The 30-day requirement seems to be an inordinately short length of time particularly if the two mediators representing the parties cannot agree on a third. No alternative procedure for choosing the third mediator is provided in cases in which the party-appointed mediators fail to agree.

105. There is already a great deal of frustration in Maryland as a result of this divided educational policy making and budget making authority. A county commissioner in one Maryland county in a private conversation with the author suggested that "The Superintendent of Schools is doing his best to bankrupt the county." The statute recognizes this divided authority in its provision that school boards shall have the final determination over all matters which have been negotiated, "But this final determination shall be subject to the fiscal relationship between the public school employer and the county commissioners." Md. Ann. Code art. 77, § 175(k) (Supp. 1968). If an employee organization should become frustrated by this bifurcated authority and call a strike, its designation as exclusive representative would be revoked. Id. at § 175(l). What this revocation would really accomplish in terms of assisting harmonious employer-employee relations is questionable.


Experience under this statute, if it survives for any length of time, will put to a severe test, in the educational context, some of the cherished private sector notions concerning the necessity for exclusive representation, the need for impartial establishment and adjudication of rules and procedures for determination of representation and conduct of bargaining, and the wisdom of bargaining units limited to rank and file membership. However, as of this writing, the legislation is under strenuous attack from the AFT and its supporters; several court cases are pending to test various aspects of the law. Evidence to date on the operation of the law in school districts in California is inconclusive. Negotiating councils (with little AFT representation) are operating throughout the state. However, no bilateral, written agreements of any consequence between teacher organizations and boards of education have been negotiated, and none are required by the statute.

feature of the educational employees provision is its establishment of proportional representation on "negotiating councils." The provisions for other employees are somewhat similar to the federal model. Public employees are granted the right to join employee organizations in the interest of strengthening "... merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication. ..." The statute applies to all levels of government. Upon request, public agency officials "... shall meet and confer... with representatives of recognized employee organizations... and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action." Recent amendments to the California statute provide for collective bargaining, permit exclusive recognition, and attempt to supply a mechanism for impasse resolution. However, these amendments are not applicable to state employees.

Although Connecticut, like California, provides different procedures for teachers than for other public employees, it provides explicit procedures for certain other government labor relations. The Connecticut statute permits exclusive representation of educational personnel in units composed of employees below the rank of superintendent. Supervisory personnel may be represented by their own organization or included in a unit composed of other employees. The statute is unusual in its provision for binding arbitration in one area: "Any dispute as to the eligibility of personnel to vote in an election, or the agency to conduct the election... [for exclusive representation] shall be submitted to a board of arbitration for a binding decision with respect thereto."

108. CAL. EDUC. CODE § 13085 (West 1969): An employee organization representing certificated employees shall be entitled to appoint such number of members of the negotiating council as bears as nearly as practicable the same ratio to the total number of members of the negotiating council as the number of members of the employee organization bears to the total number of certificated employees of the public school employer who are members of employee organizations representing certificated employees. Although the statute states that employee organizations may represent their members on "all matters relating to employment conditions," id. at § 13084, there is no provision for exclusive representation for teachers.

110. Id. at § 3500.
111. Id. at § 3501 (c).
112. Id. at § 3505. "The scope of representation shall include all matters relating to employment conditions..." Id. at § 3504.
114. Id. at § 3510.
116. CONN. GEN. STAT. ANN. § 10-153b (Supp. 1969). In the absence of exclusive recognition of a majority organization, all employee organizations are to receive equal treatment. Id. at § 10-153d.
117. Id. at § 10-153b (b).
118. Id. at § 10-153c. The board of arbitration is to be composed of persons named by the employee organizations and the school board so that each side has an equal number; an impartial member is then selected by the already selected arbitrators. Such a procedure, particularly the selection of an impartial member, may prove to be unworkable.
Each school board is required to negotiate any issues which an employee organization wishes to discuss. The secretary of the state board of education is to mediate any disagreements, and, if the secretary fails to resolve any dispute, it is to be submitted to a board of three arbitrators (one chosen by each side and the third impartial) for advisory arbitration. No further impasse resolution techniques are provided.

Connecticut prohibits strikes by its teachers in a most interesting manner: "No certificated professional employee shall, in an effort to effect a settlement of any salary disagreement with his employing board of education, engage in any strike or concerted refusal to render services." The italicized limitation on the strike prohibition indicates that strikes not concerning salaries are not prohibited. Consequently, without violating the statute, Connecticut teachers apparently can strike over any number of issues, such as school decentralization, length of lunch periods, and perhaps even hours of work required.

Although Connecticut makes no provision for state employees, it does provide for municipal employee relations. Municipal employees "... shall have ... the right ... to bargain collectively through representatives of their own choosing ... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. ..." The State Board of Labor Relations is given broad powers under the statute, including the power to designate exclusive representatives, following secret elections if necessary, to resolve unit determination disputes, and to hold hearings on complaints of prohibited practices. In prohibited practices cases the Board may issue cease and desist orders.

At the request of both the municipal employer and the employee organization the State Board of Mediation and Arbitration may mediate impasses and grievances. Either the employer or the employee organization, however, may petition the State Board of Mediation and Arbitration for a fact-finding if, "after a reasonable period of negotiation over the terms of an agreement," a dispute has not been resolved.

Under the Connecticut scheme, all negotiated agreements must be reduced to writing. A request for funds necessary to implement an

119. Id. at § 10-153d; [S]uch duty shall include the obligation of such board of education to meet at reasonable times, including meetings appropriately related to the budget-making process, and confer in good faith with respect to salaries and other conditions of employment, or the negotiation of any agreement ... but such obligation shall not ... require the making of a concession.

120. Id. at § 10-153f(a).

121. Id. at § 10-153f(b).

122. Id. at § 10-153e (emphasis added).

123. CONN. GEN. STAT. ANN. §§ 7-467 to 7-478 (Supp. 1969).

124. CONN. GEN. STAT. ANN. § 7-470 (Supp. 1969). One of the prohibited practices is refusal to bargain in good faith.

125. Id. at § 7-468(a).

126. Id. at § 7-468(b).

127. Id. at § 7-471.

128. Id. at § 7-472. The state board of mediation and arbitration is required to submit its report at least 20 days prior to the budget adoption date.
agreement is to be submitted by the municipal negotiator to the municipal legislative authority within fourteen days after the agreement is reached. Furthermore, if the public employer has "sole and exclusive control" over its employees, then it is empowered "... to enter into collective bargaining agreements ... and such agreements shall be binding on the parties thereto, and no such agreement or any part thereof shall require approval of the legislative body of the municipality." The statute also provides:

Where there is a conflict between any agreement reached by a municipal employer and an employee organization ... on matters appropriate to collective bargaining ... and any charter, special act, ordinance, rules or regulations adopted by the municipal employer or its agents such as a personnel board or civil service commission, or any general statute directly regulating the hours of work of policemen or firemen, or any general statute providing for the method of covering or removing employees from coverage under the Connecticut municipal employees retirement system, the terms of such agreement shall prevail.

Massachusetts makes separate provision for state and local employees. In 1967, the statute covering state employees was completely revised. Employee organizations and agency heads, by mutual agreement and subject to the approval of the Director of Personnel and Standardization, now may establish collective bargaining units "based upon community of interest." An employee organization is required to show "written evidence" that more than fifty per cent of the employees in a unit wish to be represented by it. The organization is designated as the exclusive representative unless another group challenges its designation. If there is a challenge, the Labor Relations Commission conducts an election. A run-off election is held if no organization receives a majority.

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130. Id. at § 7-474. Section 7-474(c) provides:
Notwithstanding any provision of any general statute, charter, special act or ordinance to the contrary, the budget-appropriating authority of any municipal employer shall appropriate whatever funds are required to comply with a collective bargaining agreement, provided the request called for in subsection (b) of this section has been approved by the legislative body of such municipal employer.

131. Id. at § 7-474(d).

132. Apparently the only items not the subject of collective bargaining are civil service exams and ratings. Id. at § 7-474(f). Also, a collective bargaining agreement presumably could not include a right to strike because "strikes are prohibited." Id. at § 7-475.

133. Id. at § 7-474(f).

134. MASS. ANN. LAWS ch. 149, § 178F (Supp. 1968).


136. MASS. ANN. LAWS ch. 149, § 178F(3) (Supp. 1968). If a unit agreement is not reached within a "reasonable time" and in no case longer than 60 days after request, such lack of agreement constitutes a dispute and "... the parties involved shall use the services of the Labor Relations Commission to resolve such dispute."

137. Id. at § 178F(4). The 50% requirement is unusually high. The usual percentage of interest requirement is 30%. See, e.g., DEL. CODE ANN. tit. 19, § 1305 (Supp. 1966).

138. MASS. ANN. LAWS ch. 149, § 178F(5) (Supp. 1968). Like most other state statutes, once an employee organization receives recognition it is binding and not subject to challenge for one year. Id. at § 178F(4).
The Commonwealth has the duty of bargaining in good faith in negotiating written agreements, but the statute provides that “... neither party shall be compelled to agree to a proposal or to make a concession.” Further: “If, after a reasonable period of negotiation, a dispute exists between a department or agency head and an employee organization over the terms of an agreement, either party or the parties jointly may petition the director of personnel and standardization to initiate procedures for fact finding.”

The Massachusetts statute delineates prohibited practices of both labor and management. The Labor Relations Commission is authorized to investigate any complaint of prohibited practices and issue findings of fact. The Director of Personnel and Standardization, subject to the approval of the Commissioner of Administration, makes the necessary rules for the administration of the statute.

Sections 178G–178N of the statute establish a program for Massachusetts municipal labor relations. Municipal employees are granted the right to bargain collectively over wages, hours and other conditions of employment. Prior to employee organization recognition, the State Labor Relations Commission holds a hearing to determine whether or not “there is a controversy concerning the representation of employees.” If a controversy exists, the Commission conducts an election or arrives at another “suitable method” for determining representation. The Labor Relations Commission is also responsible for deciding “in each case ... the appropriate unit for purposes of collective bargaining.”

Both sides have the duty to bargain collectively and “... in good faith with respect to wages, hours and other conditions of employment, or the negotiation of an agreement, or any question arising thereunder ...” If any provision of an agreement conflicts with

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139. Id. at § 178F(6).
140. Id. at § 178F(7). The procedures are described therein.
141. Employer prohibited practices are outlined in § 178F(8). Employee prohibited practices, including engaging in, inducing, or encouraging strikes, are designated in § 178F(9).
142. Id. at § 178F(10). Also included in this section is a prohibition against individual employees striking.
143. Id. at § 178F(11).
144. § 178G defines the terms of the statute. By a 1966 amendment, police have the same rights as other municipal employees.
145. Id. at § 178H(1).
146. The hearing may be waived by the employer and “an employee organization” so that a “consent election” is conducted by the Commission to determine a representation question. Id. at § 178H(5). This section seems to indicate that only one of several competing employee organizations plus the employer need waive the hearing for a “consent election” to be held.
147. Id. at § 178H(3). If there is no controversy, the employee organization seeking recognition is simply certified as the exclusive representative. There is provision for run-off elections.
148. Id. at § 178H(4): “... provided ... that no unit shall include both professional and nonprofessional employees unless a majority of such professional employees vote for inclusion in such unit.”
149. Id. at § 178-I. The bargaining representative of the municipality with all employee organizations except those representing school employees is the chief executive officer or his representative. In bargaining with an employee organization representing school employees, the municipal employer is to be represented by the “school committee” or its representatives. The bargaining sessions must be at reasonable times
“any law, ordinance, or by-law” then such law, ordinance or by-law “shall prevail.” If the parties cannot reach agreement after a reasonable time or “sixty days prior to the final date for setting the municipal budget, either party or the parties jointly may petition the state board of conciliation and arbitration to initiate fact finding.” The fact finder may hold hearings, request the Board to issue subpoenas if necessary, administer oaths and make written findings of fact within sixty days of appointment. The Board of Conciliation and Arbitration is also available, apparently at the request of either party, to conciliate grievances and contract disputes and to arbitrate disputes over the terms or application of an agreement.

The statute lists prohibited labor and management practices. A complaint of a prohibited practice is made to the Labor Relations Commission which, after a hearing, may either dismiss the complaint or issue a cease and desist order. The Commission may revoke the “certification of an employee organization established by or assisted in its establishment by any such prohibited practice.” Striking is specifically declared to be unlawful.

A Proposal for the States

There are many different governmental approaches to public employment. The primary interest underlying all of these labor relations

"appropriately related to the budget making process." If funds are necessary to implement an agreement, "... a request for the necessary appropriations shall be submitted to the legislative body. If such request is rejected, the matter shall be returned to the parties for further bargaining." In addition, "... neither party shall be compelled to agree to a proposal or to make a concession, and no ... written contract shall exceed a term of three years." Providing that no party shall be compelled to agree to a proposal or make a concession is a neat way of retaining sovereignty on paper. Whether it will work in practice is another matter. Further, there seems to be no good reason why the parties should be prevented from making contracts in excess of three years.

Id. at § 178J(a). The board is to submit to the parties a list “of three qualified disinterested persons” from which the parties are to select a fact finder. If the parties fail to agree on a fact finder within 5 days, the board is to appoint him. Id. at § 178J(b).

Id. at § 178J(c). The hearings are to be "conducted in accordance with rules established by the board..." The expense of fact finding is divided equally between the employer and the employee organization. Id. at § 178J(e). The fact finder may attempt to mediate the dispute if he wishes. Id. at § 178J(f). The difference, of course, between fact finding and mediation is that the fact finder attempts to determine which points made by each party are valid whereas the mediator attempts to resolve the dispute irrespective of which side is correct.

Id. at § 178K. Other arbitration tribunals are also permitted.

Id. at § 178L. The prohibited practices, which are fairly typical, are as follows: Employers cannot (1) interfere with, restrain, or coerce employees “in the free exercise” of their rights to organize; (2) dominate or interfere with an employee organization; (3) discharge or discriminate against an employee because he has complained; (4) refuse to bargain collectively in good faith; or (5) refuse to discuss grievances. Employee organizations cannot (1) restrain or coerce a municipal employer in the selection of its representatives or (2) refuse to bargain in good faith. Id. at § 178M. If a party refuses to bargain (perhaps if it refuses to bargain in good faith) the “commission shall order fact finding and direct the party at fault to pay the full costs thereof.”

Id. at § 178M: “It shall be unlawful for any employee to engage in, induce, or encourage any strike, work stoppage, slowdown or withholding of services by such employees.”
programs is to provide the public with uninterrupted government service. Provision of uninterrupted services, however, is a hope, not a reality. In fact, "[s]trikes of public employees will continue whether they are legal or illegal, whether there are sanctions or no sanctions, until such time as effective substitutes are provided as a channel for . . . " employee protest and pressure.

The ideal public employment arrangement would provide an alternative to the strike which would assure sovereignty for the government, continuation of public services and democratic control for the people, and adequate redress of grievances for public employees. Such an alternative may be the limited strike. A strike of this nature would be permitted only after attempts at mediation and/or fact-finding have failed. Such a scheme would permit strikes by a certain percentage of employees in any bargaining unit which cannot satisfactorily resolve an impasse. For example, a small percentage of the persons in any unit composed of policemen or firemen might be permitted to strike, i.e., to refuse to report for work during their normal working hours and to picket or otherwise engage in activities which normally accompany a strike. In other areas of public employment, the percentage of persons in each unit who could strike would be established on the basis of the importance of the unit to the public health and safety. Of course public employees not engaging in the limited strike would not be permitted to observe picket lines or strike in sympathy. Private sector employees, however, would have the right to observe picket lines.

The limited strike should be permitted to last only for a designated length of time, such as sixty days. At the expiration of that period, if an unresolved dispute involves municipal employees, it should be submitted to the appropriate legislative body for final solution. In the case of state employees, disputes should be submitted to the governor or state legislature for final determination. Such a dispute should not be submitted to binding arbitration or other compulsory third party solutions. While these solutions are appropriate in the private sector of employment, public labor disputes, like public election disputes, questions of public policy, and appropriations of public funds, are too crucial to the public welfare to be left to the discretion of third parties who may not be sufficiently sensitive to the public interest.

A limited strike would focus public attention on a dispute, demonstrate the depth of employee feeling, and, to a limited extent, inconvenience the public employer. Combined with its application of legitimate employee pressure, such a regulated strike might supply the necessary focus and compulsion to settle disputes without total disruption of government services.

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158. Other alternative solutions to the public employee strike, such as those of Professors Oberer and Doherty and Michigan's Romney Committee, have been proposed. See Report of the Committee on the Law of Government Employee Relations, ABA SECTION ON LABOR LAW 175, 182–86 (1967). It is submitted, however, that these procedures would not solve the strike problem without posing additional problems.