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The Consent of the Governed: Public Employee Unions and the Law

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III. THE CONSENT OF THE GOVERNED—PUBLIC EMPLOYEE UNIONS AND THE LAW

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Introduction

The major development in labor relations legislation during the past decade was the veritable eruption across the country of state statutes providing for the unionization of public employees. Wisconsin led the way in 1959 by imposing the duty to bargain on municipal employers. Ten years later, by my count, 22 states had passed laws authorizing some form of collective bargaining for either state or local employees, or both. An additional ten or so states have prescribed bargaining procedures for certain specified categories of employees, such as firemen, policemen, teachers, or public transit workers. All told, over two and a half million state and local public service employees, better than a fourth of the total, are now organized.

I shall deal briefly with three important problems of public employee bargaining—the subject matter of negotiations, the use of the strike weapon, and the possible role of compulsory arbitration. But first I should like to try to set these topics in a somewhat broader perspective. Some 15 years ago I heard the philosopher Hannah Arendt declare that the concept of authority had ceased to exist in Western Civilization. At the time I couldn't really understand, let alone accept, what she had said. Now I think I understand. All the traditional lawgivers of our society—governments, churches, parents, and even, I must sadly acknowledge, university professors—have been sharply challenged and, in part at least, discredited. From now on, it seems to me, the legal regulation of large masses of persons cannot be based upon the divine right of the lawmaker. Either it will have to be based upon raw power, exercised in a way which I feel would be incompatible with life in the good society, or else it will have to be based upon the consent of the governed.

Let me be more concrete. In a period which has witnessed a nationwide flood of illegal strikes by those most docile of public servants—school teachers and postal clerks—I think we delude ourselves if we believe that traditional legislative prohibitions, backed

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up by court injunctions, fines, and jailings, can control the conduct of massive groups of persons who are convinced of the justice of their grievances, who have lost faith in the usual procedures for redress, and who are not ashamed to go outside the law, for example, through resort to forbidden work stoppages, in order to achieve their objectives. Law itself, of course, is one of the principal influences shaping a man's or a group's perception of legitimate or appropriate behavior. My point is that law is only *one* of those influences, and that law loses much of its effectiveness as a regulator insofar as it loses touch with the thinking of the persons regulated. Put baldly, law loses much of its effectiveness insofar as the persons regulated conclude that they have more to gain by flouting the law than by obeying it. Society's aim, therefore, should be to ensure that a citizen's stake in having the law maintained is always greater than his interest in having it subverted.

These comments may not sit well with many of you who suspect where I am headed. Indeed, I am not sure that all the implications of my comments sit well with me. In any event, it seems wiser to start with a candid view of an unsatisfactory reality than with a beguiling vision of a world that no longer is. And as I see it, law can serve at best as a levee to channel great social movements, not as a dam to halt the tide. With that said, I shall turn to the scope of the obligation resting on public employers to bargain with their employees.

Subject Matter of Bargaining

A typical state statute will require, or at least permit, public agencies to negotiate with the majority representatives of their employees concerning "terms and conditions of employment." Similar language of course is found in federal and state legislation regulating private bargaining, where it has generally been interpreted to include such standard items of negotiation as wages, hours, vacations, welfare and pension benefits, and grievance procedures. Public employees tend to seek the same things as their private sector counterparts. So far, however, there has been relatively little litigation over the scope of the mandatory (or permissive) subjects of bargaining in public employment.

What litigation has occurred has seemed to focus on two issues, union security and the arbitration of unresolved grievances. This is

so even though these matters are explicitly dealt with in about half the statutes containing a comprehensive regulation of public bargaining. Although court decisions are in conflict, the current trend appears to be toward upholding bargaining on both these topics, in the absence of statutory prohibitions. Michigan and New Hampshire courts, for example, have sustained the agency shop; another half dozen states have expressly authorized the check-off through legislation. An earlier judicial aversion to grievance arbitration, grounded on the notion that it represented an unconstitutional delegation of governmental power, has now pretty much disappeared.

At least two large differences exist between the scope of bargaining in public and in private employment. First, state statutes or civil service regulations often spell out for the public servant many aspects of the employment relationship customarily left to negotiation in the private sector. Statutory mandates will ordinarily override any contrary bargaining settlements. But it is always possible a court may find a collective agreement has "supplemented" a piece of legislation—as agency shop provisions have been deemed supplemental of teacher tenure laws. The effect of conflicting civil service regulations is even less clear. A contract provision negotiated pursuant to a statutory duty to bargain, for instance, has been held to prevail over the job classification powers of a *local* commission. I assume the result would be different if the commission involved were a state body acting within its proper constitutional or statutory jurisdiction. There is a considerable area for potential conflict here, which prudent legislators and prudent negotiators will have to take into account. The future emphasis should be on resolving employment questions by bargaining, not by legislative or administrative fiat.

Public bargaining also differs significantly from private bargaining because of the disproportionately large number of professionals and semiprofessionals in public employment. Such persons consider it entirely natural that they should have a role in formulating policy on levels that, in traditional industrial relations philosophy, would probably be reserved for management. Thus, school teachers are intensely concerned about class size, choice of texts, student evaluation, and faculty qualifications. Some of these items—class size, for example—could fairly be related to working conditions. But I am persuaded the teacher's interest cuts much deeper. It is like the doctor's or the lawyer's zeal for maintaining the standards of his calling; it

reflects a regard for product output as distinguished from work input. Another element in the teacher's thinking is not so altruistic. Tightening the requirements for a teaching post will not only improve the quality of education; it will also reduce the number of competitors for jobs. (Obviously, this dual motivation for a concern about standards is a familiar phenomenon in other professions and crafts.) At any rate, the range of the teacher's bargaining interests is understandable, and it is paralleled among other groups of public employees aspiring to professional or semiprofessional status.

My hope is that bargaining law in the public sector will profit from the experience in the private sector. Sophisticated negotiators on both the union and the management sides have told me they are convinced effective bargaining would be advanced if all distinctions between mandatory and nonmandatory subjects were dropped, and if either party could insist on bringing to the table any proposal that was not unlawful. The willingness of union or employer to devote time and effort to negotiating about a particular matter should be sufficient warrant of its relevance. Some employers may be appalled at this seeming disregard of managerial prerogatives. My own hunch is that any knowledgeable union can easily hang bargaining up, ostensibly on a mandatory topic, if it feels strongly enough about something that is technically nonmandatory. It would seem far more sensible to place all the cards out in the open, and to let negotiations proceed on the matter that is really at issue. Neither union nor employer would have to agree to any given proposal, but at least there could be a full exploration of the various alternatives.

Since the dichotomy between bargainable and nonbargainable subjects has become well established, more existing legislation could probably not be interpreted as abolishing the distinction. For the time being, the most feasible compromise may be a relaxed reading of the current statutes so as to allow negotiators a wide latitude in introducing topics for bargaining. I take it I need not labor the connection between this suggestion and my underlying thesis that in today's world, viable law draws its main strength from the consent of the governed.

Public Employee Strikes

With one exception, every state that has addressed itself to the question, either through statute or common law, has forbidden public

employees to strike. The one exception—perhaps surprisingly, perhaps not—is the ruggedly individualistic old State of Vermont. There, municipal employees are prohibited from striking only where it would endanger the health, safety, or welfare of the public.*

In recent years there have been extensive studies of whether public employees should have the right to strike. Beginning with the report of New York's Taylor Committee four years ago, and continuing through the report of a Twentieth Century Fund Task Force last month, the verdict almost invariably has been that the strike ban should be retained. Various reasons have been given for this conclusion. Some seem to me plainly specious, such as the argument that one cannot strike against a "sovereign." This overlooks the fact that the age of feudal kings is over, that in today's democratic society the people are sovereign, and that the people through their chosen representatives can authorize strikes if they wish. Other arguments against strikes by public workers deserve much closer attention.

It is often contended that public employee strikes cannot be countenanced because they would deprive the whole community of essential services. Certainly, a community can hardly do without police and firefighting services, and most persons would agree that policemen and firemen cannot be permitted to strike. But apart from a few such extreme instances, strikes by public employees may have no greater effect on the community than strikes in private employment. A strike in a basic industry, like steel or autos, for example, has a substantial nationwide impact. Can anyone honestly say that it's worse to have Johnny miss a few days of school? And a work stoppage in a local transit system or electric utility is going to have the same economic consequences, regardless of whether the enterprise is publicly or privately owned. Whatever else may be said about strikes in these circumstances, there seems little sense in outlawing those which happen to involve "public" employees.

Perhaps the most plausible objection to strikes in the public sector is that they would constitute an inappropriate intrusion of economic force into what is essentially the political process of budget allocation and tax levying. This, as I understand it, is the basic position of the Taylor Committee. The strike in private bargaining is said to be necessary to provide employees with economic power equivalent to

* Since this paper was prepared, Hawaii and Pennsylvania have enacted legislation giving most public employees the right to strike, so long as the public health or welfare is not endangered.

their employer's. At the same time, the pressures of the marketplace are felt to impose constraints on the terms of the ultimate settlement negotiated by private parties. In contrast, it is argued, neither the state nor any other interested group of citizens can bring to bear an economic weapon akin to the strike, and the very nature of the services supplied by government makes the constraints of the marketplace inoperable. It follows, therefore, that permitting public employees to strike would give them a wholly undue advantage in bargaining.

I have two responses to this line of reasoning. First, I think it vastly oversimplifies the power relationships between public employer and employees. Balancing "economic" and "political" power is surely not like putting two clearly marked, unequally weighted bags of sand on opposing scales. The labor economists long ago made me skeptical about the capacity of unions to effect massive economic changes in the private sector, regardless of what might be our armchair expectations. I see no basis for greater confidence in our ability to predict how a complex mix of "economic" and "political" forces would interact in the public sector, until we have much more empirical data than are now available. The evidence on hand to date, indeed, tends to allay any fear that public employee strikes would dangerously alter the balance of bargaining power. In virtually every province of Canada, for example, municipal employees in nonessential classifications have been covered since the mid-1960s by general labor legislation, which includes the right to strike. In Ontario, municipal employees have operated under a Wagner-style statute for a quarter century, without even a strike prohibition for "essential" workers. And, at last reports, Toronto was alive and well.

My second comment is highly pragmatic. Growing militancy among public employees is simply a fact of life. Over the past decade, work stoppages by various classes of civil servants increased some 20 times in number and magnitude. My guess is that whatever the law may say, whatever official committees may say, public employees who feel sufficiently aggrieved over their wages or working conditions are going to strike. The law should face up to that reality. It is folly, in my opinion, to outlaw absolutely a form of conduct that is sure to be engaged in, under certain conditions, by respectable persons in the thousands.

A more realistic approach would be to adopt flexible procedures

for handling most public employee work stoppages. A blanket prohibition on strikes by policemen and firemen should probably be retained. Beyond that, I would forbid only work stoppages that have judicially been determined to endanger vital public interests. Needless to say, that will require the courts to draw some nice lines on occasion. But line drawing is the business of the courts, and I cannot understand why there has been so much fuss about the administrative difficulty of distinguishing between essential and nonessential services. Even in the case of forbidden strikes, I would keep the sanctions within credible bounds. Experience indicates that Draconian penalties—automatic discharges, jailings, loss of representational rights, a fixed scale of heavy fines—are self-defeating. Their very severity makes them politically unfeasible. Fines graduated according to the gravity of the offense, and the denial of check-off rights, are examples of more effective sanctions.

Tailoring injunctions and sanctions to particular strike situations may have another advantage. While workers are frequently prepared to disregard broadly phrased legislative proscriptions of work stoppages, they seem much readier to comply with specific court orders issued after notice and hearing. Such, at any rate, is the lesson suggested by the operation of Taft-Hartley's mandatory injunction and national emergency provisions. Perhaps the hearing itself assures the union and its members that the unique aspects of their individual case are being duly heeded, and that they are not confronting a blind and inflexible law.

Compulsory Arbitration

Policemen and firemen, it is generally conceded, cannot be allowed to strike. The consensus on this point has led to proposals for special procedures to resolve impasses in collective bargaining with these groups. Four states—Rhode Island, Wyoming, Pennsylvania, and Michigan—have now enacted statutes covering either police or firefighters or both, which provide for the compulsory arbitration of the terms of new contracts when negotiations break down. (Rhode Island and Maine also apply binding arbitration procedures to the noneconomic issues in municipal employee bargaining.)

Predictably, these statutes have been attacked as unconstitutional delegations of legislative power. So far, however, the legislation has

been sustained by the highest courts of Rhode Island, Wyoming, and Pennsylvania, and I doubt that Michigan will prove the holdout.

The more serious question is the practical impact of compulsory arbitration on collective bargaining. As yet I do not think we have enough evidence to judge, although Chairman Robert Howlett of Michigan's Employment Relations Commission feels compulsory arbitration's cousin, fact-finding, has had some "enervating effect" on bargaining. There has been a tendency, he says, for both union and employer negotiators to "save one for the fact-finder."

Chauvinism compels me to add that the first major arbitration award under Michigan's new law was released last week by a panel chaired by Professor Russell Smith of my law school. Observers had previously voiced concern that it would probably be much harder for the impartial chairman to secure a majority vote of a tripartite panel in the case of a complicated new-contract arbitration than in the case of a simple grievance arbitration. At least on this first outing, Chairman Smith confounded the pessimists by coming up with a 71-page decision that commanded the unanimous assent of union and employer panelists. Possibly we have here something like the famous bumblebee, which goes right on flying despite the experts who say it can't.

Conclusion

Bills recently introduced in Congress would establish federal standards for collective bargaining by state and local employees throughout the nation. I think such federal legislation would be premature at best. The proposals overlook the significant value of experimentation by many states and cities with a variety of bargaining models. We have a good deal to learn yet about public unionism, and I feel it is too soon to freeze ourselves into a single pattern. Moreover, it is a mistake to assume that federal labor law will always be "better" labor law. States like Wisconsin, New York, and Michigan are usually more progressive. There is also a tendency toward the "least common denominator" approach in federal thinking, as is attested by the retrogressive recommendation of the Intergovernmental Relations Advisory Commission that public employee unions be granted only "meet and confer" rights and not genuine collective bargaining rights. At some point, naturally, opinion may crystallize on the optimum form

of public unionism, and then the question of federal controls, at least for the laggard states, could be revisited.

It may be that collective bargaining in the public service should be left permanently to local regulation. One of the principal merits of uniform federal law in the private sector is the curbing of regional prejudices that could Balkanize the nation's economy by giving either unions or employers undue advantages in different areas. Many if not most state and municipal activities are necessarily localized, however, and therefore may harbor less potential for interfering with the free flow of commerce. This is a problem I haven't thought through. But in keeping with the underlying theme of my remarks, I suppose I could suggest that the consent of the governed is probably most meaningful when both the governed and the governor are close to home. Until the persuasive Jerry Wurf can persuade me otherwise, then, I'll take my stand with Bob Howlett in favor of state bargaining law for state and city employees.

IV. STATE EXPERIENCE

ROBERT G. HOWLETT*

Since the first public sector explosion of the early '60s, 33 states have legislated to authorize all or some public employees to participate in determination of working conditions beyond the constitutional right to petition the legislature.[1]

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[1] Alaska (all employees); California (state and local; firemen; teachers); Connecticut (teachers; local); Delaware (local; state and county; transit); Florida (teachers; county firemen); Hawaii (state and county); Idaho (firemen); Illinois (state; transit; university); Kansas (teachers); Kentucky (state); Louisiana (public transportation); Maine (local; firemen); Maryland (teachers); Massachusetts (state and local); Michigan (local); Minnesota (state and local; teachers; nonprofit hospitals); Missouri (state and local, except police and teachers); Montana (nurses); Nebraska (state and local; teachers); Nevada (local); New Hampshire (city; state); New Jersey (all employees); New Mexico (mass transit); New York (all employees); North Dakota (state, local, and teachers); Oregon (state and local; teachers; nurses); Pennsylvania (police; firemen); Rhode Island (local; firemen; police; state; teachers); South Dakota (all employees); Utah (state and local); Vermont (state and city); Washington (state and local; teachers; public utilities); Wisconsin (state and local, except police); Wyoming (firemen). The Supreme Court of Georgia held the Georgia statute, covering only one city and one county, unconstitutional because of its limited application. Local 574, International Association of Firefighters v. Floyd, 225 Ga. 625, 170 S.E. 2d 394, 72 LRRM 2504, 320 GERR B-5 (1969).