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## Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector

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## COMMENTS

### Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector

In recent years, a number of states have enacted legislation providing collective bargaining rights for public employees.<sup>1</sup> Almost invariably these statutes have reaffirmed the traditional prohibition against strikes by government workers.<sup>2</sup> But the strike—or the threat of a strike—has been a key economic weapon for employees in the private sector, and some observers contend that without that weapon the new collective bargaining rights for public employees are illusory.<sup>3</sup>

Because of the inherent conflict in legislative goals, it is unclear at the present time whether the new statutes can achieve both the promotion of fairer employment contracts than have prevailed in the past and the prevention of *all* strikes in public employment. Furthermore, it is clear that the achievement of both of these goals

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1. Eighteen states now have collective bargaining laws for at least some public employees. Many of these statutes are very limited in scope and deal only with specific employee groups such as teachers and firemen. Teachers: CAL. EDUC. CODE §§ 13080-88 (West 1969); CONN. GEN. STAT. ANN. §§ 10-153(a), 10-153(e) to (f) (1967), §§ 10-153(b) to (d) (Supp. 1969); MINN. STAT. ANN. §§ 125.19-26 (Supp. 1969); NEB. REV. STAT. §§ 79-1287 to -1296 (1968); ORE. REV. STAT. §§ 342.450-470 (1965); R.I. GEN. LAWS ANN. §§ 28-9.3-1 to -16 (Supp. 1969); WASH. REV. CODE §§ 28.72.010-.090 (Supp. 1967). Fire fighters: CAL. LABOR CODE § 1962 (West Supp. 1968); ME. REV. STAT. ANN. tit. 26, §§ 980-92 (Supp. 1968); PA. STAT. ANN. tit. 43, §§ 217.1-10 (Supp. 1969); R.I. GEN. LAWS ANN. §§ 28-9.1-1 to -14 (Supp. 1969); WYO. STAT. ANN. §§ 27-265 to -273 (1967). These limited group statutes vary widely in the extent of rights granted. More general coverage is afforded by statutes in other states. Some such statutes permit bargaining with any employee group: ALAS. STAT. §§ 23.40.010-.040 (1962); CAL. GOVT. CODE §§ 3500-11 (West Supp. 1968); ORE. REV. STAT. §§ 243.710-.780 (1967). Other statutes provide for the election of an exclusive bargaining agent, duties to bargain, mediation, and unfair labor practice remedies: CONN. GEN. STAT. ANN. §§ 7-467 to -478 (Supp. 1969); DEL. CODE ANN. tit. 19, §§ 1301-13 (Supp. 1968); MASS. ANN. LAWS ch. 149, § 178D (1965), §§ 178F to N (Supp. 1969); MICH. COMP. LAWS ANN. §§ 423.201-.254 (1967); MINN. STAT. ANN. §§ 179.50-.58 (1966); MO. REV. STAT. §§ 105.500-.530 (Supp. 1968); N.J. REV. STAT. §§ 34:13A-1 to -11 (Supp. 1968); N.Y. CIV. SERV. LAW §§ 200-12 (McKinney Supp. 1968), *as amended*, ch. 24, §§ 1-13, [1969] N.Y. Laws 39 (McKinney Supp. April 10, 1969); R.I. GEN. LAWS ANN. §§ 28-9.4-1 to -19 (1968); VT. STAT. ANN. tit. 21, §§ 1701-05 (Supp. 1968); WASH. REV. CODE §§ 41.56.010-.900 (Supp. 1967); WIS. STAT. § 111.70 (municipal employees) (1969); WIS. STAT. §§ 111.80-.94 (1969).

2. See, e.g., CONN. GEN. STAT. ANN. §§ 467-78 (Supp. 1969); MINN. STAT. ANN. § 179.51 (1966); MO. REV. STAT. § 105.540 (Supp. 1968); N.J. REV. STAT. §§ 34:13A-1 to -11 (Supp. 1968); N.Y. CIV. SERV. LAW § 210 (McKinney Supp. 1968), *as amended*, ch. 24, § 8, [1969] N.Y. Laws 42 (McKinney Supp. April 10, 1969); ORE. REV. STAT. § 243.780 (1967); WASH. REV. CODE § 41.56.120 (Supp. 1967); WIS. STAT. § 111.70(4)(2) (1969).

Only Vermont has recognized a right to strike for situations in which the exercise of such right does not endanger the public health, welfare, or safety. VT. STAT. ANN. tit. 21, § 1704 (Supp. 1968).

3. See Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931 (1969).

by a "solution" such as simply granting all employee demands is unacceptable. Such an approach would ignore the interest of the taxpayer who, because he lacks the freedom to buy fewer government services if labor costs raise the price of those services, must generally bear such increased costs through higher taxes. Thus, any proposed solution of the basic policy conflict embodied in public sector labor legislation must seek to reconcile the employees' interest in more favorable terms and conditions of employment with two competing concerns: the prevention of public employee strikes and the avoidance of an excessive tax burden.

## I. AN EXAMPLE OF THE DILEMMA

### A. *Public Sector Labor Legislation in Michigan*

Union officials have characterized Michigan's statute on labor relations in public employment as the "best" of the recent state laws.<sup>4</sup> Michigan public employees were granted extensive collective bargaining rights in the 1965 Public Employee Relations Act (PERA),<sup>5</sup> which was drafted on the model of the National Labor Relations Act (NLRA).<sup>6</sup> It affirms the right of public employees to join labor organizations,<sup>7</sup> specifies election proceedings for the determination of an exclusive bargaining representative for an appropriate unit,<sup>8</sup> requires the governmental employer to bargain in good faith,<sup>9</sup> prohibits interference or discrimination by the employer,<sup>10</sup> and provides the employee with remedies for employer unfair labor practices.<sup>11</sup> But the Michigan PERA departed from the NLRA model by retaining the strike prohibition that had existed prior to its enactment.<sup>12</sup> The 1965 legislation did, however, repeal several sections which had been tied to the strike prohibition and which had provided specific penalties to be imposed upon those who participated in a public employee strike.<sup>13</sup>

Following adoption of the PERA, many local governmental units in Michigan were for the first time confronted by their em-

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4. Government Employee Relations Report [hereinafter GERR] No. 282, at AA-5 (Feb. 3, 1969).

5. MICH. COMP. LAWS ANN. §§ 423.201-254 (1967).

6. 29 U.S.C. §§ 151-68 (1964).

7. MICH. COMP. LAWS ANN. § 423.209 (1967).

8. MICH. COMP. LAWS ANN. §§ 423.211-212 (1967).

9. MICH. COMP. LAWS ANN. § 423.215 (1967).

10. MICH. COMP. LAWS ANN. § 423.210 (1967).

11. MICH. COMP. LAWS ANN. § 423.216 (1967) provides remedies for violations by the employer of prohibitions enumerated in § 423.210.

12. MICH. COMP. LAWS ANN. § 423.201 (1967).

13. The 1965 amendment repealed Law of July 3, 1947, no. 336, § 4, [1947] Mich. Acts 633, providing for automatic termination of employment for violation of the act, and § 8 providing criminal penalties for any nonemployee inciting a strike.

ployees with a demand to bargain. Since many inexperienced parties were entering the collective bargaining arena, it was perhaps inevitable that difficult disputes would arise.<sup>14</sup>

### B. *The Holland School Dispute*

In Holland, Michigan, the Board of Education began negotiations with the Holland Education Association—the teachers' representative—in March 1967. The teachers' contracts expired in June of that year, but bargaining continued beyond that time. During the negotiations, the Association requested mediation, and later, fact-finding.<sup>15</sup> On August 18, 1967, although no contract agreement had been reached, the Board of Education unilaterally notified the teachers' representative that September 5 had been set for the opening of school. On September 2, 1967, pursuant to the PERA, the teachers filed an unfair labor practice charge alleging that the Board had refused to bargain in good faith.<sup>16</sup> The parties failed to reach agreement on a contract at a negotiating session on September 4, and the Holland teachers voted to "withhold their services," until a contract had been signed. Accordingly, they did not report for work the next day.

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14. When public employee bargaining first goes into effect, negotiating problems are quite likely to arise. Many administrators tend to be uncertain of the scope of their authority to make agreements concerning expenditures of yet uncommitted public funds. For discussion, see Anderson, *Public Collective Bargaining and Social Change*, GERR No. 257, at E-1, E-2 (Aug. 12, 1968); Rehms, *Constraints on Local Governments in Public Employee Bargaining*, 67 MICH. L. REV. 919 (1969). Moreover, newly formed local bargaining units, after achieving representative status with a bare majority, are eager to produce benefits for the employees in order to avoid being supplanted by a more militant union. Hence, they tend to press for large raises in salary. See generally Hildebrand, *The Public Sector*, in FRONTIERS OF COLLECTIVE BARGAINING 125 (1967) [hereinafter Hildebrand]. But this tendency to seek large pay increases has not, at least in Michigan, resulted in the enrichment of public school teachers to the detriment of other needs in the area of public education. Indeed, the percentage of education funds spent on teachers' salaries has remained nearly constant. GERR No. 256, at B-1 (Aug. 5, 1968).

15. Michigan's Public Employee Relations Act [hereinafter PERA] specifically provides for mediation of public employee disputes by the State Labor Mediation Board. MICH. COMP. LAWS ANN. § 423.207 (1967). The fact-finding function is derived from the general mediation provisions. MICH. COMP. LAWS ANN. § 423.25 (1967).

16. The Michigan statute is silent as to whether a school board has exclusive power to set the opening of school. MICH. COMP. LAWS ANN. § 340.575 (1967) allows the school board to determine the length of the school year. But § 15 of the Michigan PERA, MICH. COMP. LAWS ANN. § 423.215 (1967), requires the employer to negotiate wages, hours, and conditions of employment. The Holland Education Association argued, apparently unsuccessfully, that the opening of school was a "condition of employment" negotiable under the statute, and that since the opening date had in fact been a subject of the negotiations, the school district could not properly set the calendar until agreement on that point had been reached. Brief for Defendant at 10, *School Dist. v. Holland Educ. Assn.*, 7 Mich. App. 569 (1967). In rejecting the argument, the decision of the court was consistent with analogous law under the National Labor Relations Act which permits employers to institute unilateral changes after impasse has been reached. See *NLRB v. U.S. Sonics Corp.*, 312 F.2d 610 (1st Cir. 1963).

On September 6, the Board of Education petitioned the Circuit Court for Ottawa County for a preliminary injunction ordering the teachers to refrain from the strike action. The injunction was granted the same day.<sup>17</sup> The Michigan Court of Appeals affirmed the issuance of the injunction.<sup>18</sup>

The Holland Education Association took the case to the Supreme Court of Michigan.<sup>19</sup> The teachers argued that since they had not signed contracts after the expiration of their old agreements in June 1967, they were not "public employees."<sup>20</sup> They reasoned that therefore their action could not be considered a strike and thus prohibited by the PERA.<sup>21</sup> They further contended that "discipline" of employees was the exclusive remedy open to employers under the new statute,<sup>22</sup> and that injunctive relief was thereby precluded. In any event, they argued, the employer should be denied use of the injunctive remedy because he had refused to bargain in good faith.<sup>23</sup> Finally, the teachers contended that an injunction was proper only when a court had found that a particular strike would cause irreparable harm to the public.<sup>24</sup> The Michigan Supreme Court accepted the last two of these arguments, dissolved the injunction, and remanded the case for consideration of whether irreparable harm to the public would result if the strike were not enjoined.<sup>25</sup>

The *Holland* decision raises many of the fundamental questions which are present whenever a statute grants collective bargaining rights to public employees without lifting the traditional ban on strikes. This Comment will examine several of those problems, and will then consider what approach to public sector labor relations might best reconcile the conflicting goals which are exhibited in statutes such as Michigan's PERA.

## II. SOME PROBLEMS INHERENT IN THE STRIKE BAN

### A. "Strikes" Are Prohibited—What Is a "Strike"?

In *Holland*, the teachers argued that they were not on "strike" within the meaning of the Michigan statute. They contended that

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17. *School Dist. v. Holland Educ. Assn.*, No. 1238 (Mich. Cir. Ct. for Ottawa County Sept. 6, 1967). The temporary injunction was phrased as an order to refrain from unlawful activity—striking—rather than as a mandatory order to return to work.

18. *School Dist. v. Holland Educ. Assn.*, 7 Mich. App. 569 (1967).

19. *School Dist. v. Holland Educ. Assn.*, 380 Mich. 314, 157 N.W.2d 206 (1968).

20. 380 Mich. at 322, 157 N.W.2d at 208.

21. 380 Mich. at 322, 157 N.W.2d at 208.

22. 380 Mich. at 324, 157 N.W.2d 209; see MICH. COMP. LAWS ANN. § 432.206 (1967).

23. 380 Mich. at 327, 157 N.W.2d at 211.

24. 380 Mich. at 326, 157 N.W.2d at 210.

25. 380 Mich. at 327, 157 N.W.2d at 211.

since they had not yet signed contracts with the school district, they could not be "employees" subject to the PERA.<sup>26</sup> Although two of the justices favoring reversal accepted that contention,<sup>27</sup> the remainder of the majority found a continuing employment relationship which was substantial enough that absence from work constituted an illegal strike under the comprehensive definition contained in the Michigan statute.<sup>28</sup> In this respect, *Holland* is analogous to National Labor Relations Board decisions holding that even though a particular collective bargaining contract has expired, the parties to that contract remain subject to the provisions of the NLRA. The emphasis in those cases is on the continuation of the employment relationships, not merely on the existence of a contract.<sup>29</sup> The *Holland* majority supported its interpretation by reference to its earlier decision in *Garden City School District v. Labor Mediation Board*.<sup>30</sup> In that case, the court held that school teachers who were between contract periods were "employees" and thus qualified under state law to utilize the statutory mediation procedures available to public employees.<sup>31</sup> A holding in *Holland* that the teachers were not "employees" with respect to the no-strike provisions of the PERA would have presented at least an apparent inconsistency. Hence, the court rejected the teachers' argument.<sup>32</sup>

In *Holland* there was a concerted refusal to work; consequently,

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26. MICH. COMP. LAWS ANN. § 340.569 (1967).

27. These were Justices Souris and Kavanagh. 380 Mich. at 327, 157 N.W.2d at 211 (concurring opinion).

28. MICH. COMP. LAWS ANN. § 423.201 (1967) defines "strike" as "the failure to report for duty, the wilful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, or compensation, or the rights, privileges or obligations of employment."

29. See, e.g., NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938).

30. 358 Mich. 258, 99 N.W.2d 485 (1959).

31. 358 Mich. at 262, 99 N.W.2d at 487. Those procedures are provided by MICH. COMP. LAWS ANN. §§ 423.207, 423.25 (1967).

32. 380 Mich. at 323, 99 N.W.2d at 209. This interpretation is supported by statutory provisions granting teachers tenure protection [MICH. COMP. LAWS ANN. § 38.91 (1967)] and by provisions requiring teachers to give sixty days notice of termination of employment in order to retain tenure benefits (§ 38.111).

Yet the opposite conclusion would not necessarily be "inconsistent" with the overall intent of the act. The decision in *Garden City School Dist. v. Labor Mediation Bd.*, 358 Mich. 258, 99 N.W.2d 485 (1959), was inescapable if the statutory mediation services were to be of any use at all; if they were not available until a contract had been signed, there would presumably never be any need for them. Hence the *Garden City* decision might be viewed as necessary to extend to future employees the protection of the Michigan labor mediation statute. MICH. COMP. LAWS ANN. § 423.25 (1967). Such an interpretation would be consistent with the analogous provision of NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1964), which provides protection from antiunion activity to certain nonemployees. See MICH. COMP. LAWS ANN. § 423.210(c) (1967) for the parallel provision of Michigan's PERA, forbidding employer discrimination with respect to hiring or settling terms and conditions of employment.

once the employment relationship had been established, the court did not have to interpret the facts liberally in order to hold that the refusal was a "strike." But in other cases, employee activities short of refusals to work under an unexpired contract have been broadly construed as strikes. For example, National Education Association "sanctions" have been held to constitute a strike,<sup>33</sup> as have fire fighters' "partial staffing" campaigns.<sup>34</sup> Greater definitional problems arise, however, when the alleged strike consists of "working by the rules" or, in the case of policemen, strict enforcement of the law.<sup>35</sup>

This readiness on the part of the courts to find that a strike exists can be supported on the ground that it effectuates the legislative purpose in continuing the strike ban. But the technical arguments advanced in *Holland* and the resort to quasi-strike tactics highlight the frustration of public employees who are dissatisfied with the terms and conditions of their employment but who are prohibited from striking. Such manifestations of frustration suggest that providing a precise definition of a "strike" will not be the best way to stabilize labor relations in the public sector. Rather, it will be far more profitable to concentrate on procedures that will make the collective bargaining process more effective in avoiding disruption and in producing results which will be viewed as legitimate by employees, employers, and the public.

#### B. *Limitations on Judicial Enforcement of a Statutory Strike Ban*

Assuming that the employees' conduct in a particular situation is held to constitute a strike for purposes of the statute, the question then arising is what remedial measures a court should provide. Although the issuance of an injunction immediately upon finding that a strike has occurred is consistent with the legislative intent manifested in the strike ban, inflexible adherence to such a pattern may only aggravate already strained labor relations. Moreover, while that consideration is substantial in itself, there are, in addition, limitations on the power of courts to issue injunctions against

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33. *Board of Educ. of Union Beach v. New Jersey Educ. Assn.*, 53 N.J. 29, 247 A.2d 867 (1968) (blacklisting of school district by National Education Association). See also *Board of Educ. v. Shanker*, 54 Misc. 2d 941, 283 N.Y.S.2d 548 (Sup. Ct. 1967) (purported mass resignation).

34. GERR No. 271, at B-9 (Nov. 18, 1968). "Partial staffing" is a refusal by the fire fighters to engage in routine or administrative work.

35. See Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 935 (1969). For a general discussion of the use of "strike substitutes" as negotiating weapons in the public sector, see Wortman, *Collective Bargaining Tactics in the Federal Civil Service*, 15 LAB. L.J. 482, 489 (1964). Another example of such tactics was shown recently in the "sick-out" by airport traffic controllers, which resulted in a traffic slowdown and delays. GERR No. 302, at A-9 (June 23, 1969).

striking public employees. Even if an injunction is constitutionally permissible,<sup>36</sup> it may be as difficult to enforce as would be a positive order to work—an order that courts of equity are traditionally loathe to issue.<sup>37</sup> How can a court ensure that a group of professional teachers is performing adequately rather than continuing to engage in illegal concerted activity through failure to fulfill their duties? Furthermore, in situations involving skilled public employees, the public may be harmed more by slipshod performance than by a temporary suspension of services. Indeed, a delay in the opening of school may be more desirable than an extended period during which “teaching” occurs under judicial coercion.

The most serious practical effect of a stringent injunction policy is that it can breed distrust of the legal process. When labor relations have deteriorated to a point at which employees will violate the antistrike law, those employees may also be prepared to take the final step of disregarding a court order. If they do so, the limits of judicial enforcement have been reached, and the underlying respect crucial to the judicial process is gone. A court faced with a wholesale refusal to obey its order has no recourse but to use contempt citations. Subsequent fining or incarceration of violators may serve only to reinforce public employees’ beliefs that any law which denies them rights enjoyed by other workers is fundamentally unfair.<sup>38</sup>

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36. It is sometimes argued that use of the injunction in public employee labor disputes both violates the constitutional prohibition against involuntary servitude and abridges freedom of speech. The involuntary servitude argument stems from the fact that the injunctions have the effect of ordering persons to work, even though they are phrased in a nonmandatory fashion, that is, as an order to cease illegal activity—strikes. The argument is typically countered by the observation that the employees remain free to resign at any time. *In re Block*, 50 N.J. 494, 236 A.2d 589 (1967). Under an injunction of “illegal concerted activity,” however, the employees are not free to resign in concert, and such an injunction may be worded broadly enough to make any resignation suspect. *See Board of Educ. of Union Beach v. New Jersey Educ. Assn.*, 53 N.J. 29, 247 A.2d 867 (1968) (submission of resignations by teachers as part of sanctions held concerted action to illegal end and enjoined). *See also Board of Educ. v. Shanker*, 54 Misc. 2d 941, 283 N.Y.S.2d 548 (Sup. Ct. 1967) (purported mass resignation held to be an illegal strike).

The argument that an injunction in the public sector abridges freedom of speech is countered by the “illegal ends” doctrine—that when the exercise of speech is incident to a course of illegal activity, its suppression is valid. *See, e.g., City of Pawtucket v. Pawtucket Teachers Alliance, Local 930*, 87 R.I. 364, 141 A.2d 624 (1958), in which the court held that there was no violation of freedom of speech when a union leader was held in contempt of an antistrike injunction for giving a public speech calling for a strike. *But cf. In re Colin Scott Berry*, 68 Cal. App. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968), in which the court held that an order enjoining all strike activities including informational picketing was unconstitutionally broad.

37. *See, e.g., Arthur v. Oakes*, 63 F. 310 (7th Cir. 1894); *Wakeham v. Barker*, 82 Cal. 46, 22 P. 1131 (1889).

38. For discussion of New York City’s painful experience in this regard see Kheel, Report to Speaker Anthony J. Travia on the Taylor Law, with a Proposed Plan to Prevent Strikes by Public Workers (Feb. 21, 1968) [hereinafter Kheel Report]; Kheel,

These problems confronted the Michigan Supreme Court in the *Holland* case. The strike, on its face, was illegal; that illegality was the sole basis upon which the lower court had issued the injunction. The supreme court, however, refused to allow the injunction merely upon proof of a strike ban violation. Instead, it accepted the teachers' argument that the injunction could not issue unless the traditional prerequisites for equitable relief were established.<sup>39</sup> Thus, an employer-plaintiff seeking an injunction against striking public workers in Michigan must now enter court with "clean hands," that is, the employer must first have bargained in good faith.<sup>40</sup> In addition, the employer must show that irreparable harm to the public will result from the strike.<sup>41</sup> In effect, the *Holland* court applied the same standards for enjoining strikes by public school teachers that it has applied to strikes by employees in the private sector.<sup>42</sup> While that approach appears reasonable, it requires further analysis.

First, private sector precedent restricting the use of injunctions in labor disputes is inapposite to the public sector in which strikes are not otherwise legal.<sup>43</sup> A strike by public employees is a direct violation of a statute, even when there is no violence or irreparable injury to the public. Therefore, by applying the irreparable-harm

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*Points for Consideration by the Governor's Conference on Public Employment Relations*, GERR No. 267, at H-1 (Oct. 24, 1968); Montana, *Striking Teachers, Welfare, Transit, and Sanitation Workers*, 19 LAB. L.J. 273 (1968).

39. Many courts, however, have rejected this argument in the case of an illegal strike by public employees. The Supreme Court of New Jersey, for example, in an action to enjoin teachers' sanctions against a school district, recently held that absence of present injury from the threatened sanctions and the lack of "clean hands" by the employer would not prevent an injunction from issuing. *Board of Educ. of Union Beach v. New Jersey Educ. Assn.*, 53 N.J. 29, 43, 247 A.2d 867, 875 (1968). That decision was reached under a collective bargaining statute similar to that in force in Michigan. N.J. REV. STAT. §§ 34-13a-1 to -11 (Supp. 1968). On the other hand, under a present New York statute—N.Y. CIV. SERV. LAW § 211 (McKinney Supp. 1968)—a public employer is unconditionally obligated to seek an injunction of an illegal strike, and the court is required under N.Y. JUDICIARY LAW § 751(2) (McKinney 1968) to grant it. But in this connection, the Michigan court in the *Holland* decision indicated that a legislative attempt to compel a court of equity to issue an injunction in every instance of a public employee strike would be "to destroy the independence of the judicial branch of government." 380 Mich. 314, 325, 157 N.W.2d 206, 210 (1968).

40. 380 Mich. at 327, 157 N.W.2d at 211.

41. 380 Mich. at 326, 57 N.W.2d at 210.

42. Unlike some states, Michigan has no "little Norris-LaGuardia Act" restricting the use of injunctions in labor disputes. But Michigan courts have in the past developed a public policy against issuing injunctions absent a showing of violence or irreparable harm. See *School Dist. v. Holland Educ. Assn.*, 380 Mich. 314, 326, 157 N.W.2d 206, 210 (1968); *Cross Co. v. Local 155, UAW*, 371 Mich. 184, 123 N.W.2d 215 (1963).

43. In fact, federal labor policy, as embodied in the NLRA and the Norris-LaGuardia Act, considers the right to strike as fundamental to private sector employees. 29 U.S.C. §§ 101-15, 163 (1964).

standard of the private sector to public sector strikes, the court appears to have disregarded the legislative intent expressed in the anti-strike statute. That disregard suggests that the decision was prompted by other factors not specifically mentioned in the opinion. For example, a resolution which favored the issuing of an injunction on the mere showing of a strike could present the severe enforcement problems already discussed,<sup>44</sup> and, more seriously, could erode the employees' confidence in the legal system.<sup>45</sup> Still more important is the possibility that a decision which made injunctive relief universally available against public employee strikes would render illusory the collective bargaining rights granted under the PERA, because the employer could then invariably depend upon the injunction to enforce his bargaining position, regardless of whether he had bargained in good faith. Accordingly, although the *Holland* court relied on a questionable analogy to private sector strikes, its decision can be supported on the ground that it comes closest to effecting judicially what must be the central legislative intent of the Michigan PERA—to provide an effective bargaining system. Indeed, by rendering uncertain the availability of injunctive relief, the court probably promoted prestrike settlements. Since neither the employer nor the union can depend upon the injunction or the strike to enforce its demands, each party is encouraged to use the bargaining process in order to reach a settlement.

It is apparent that much of the benefit stemming from the uncertainty created by the *Holland* decision will be only temporary. As subsequent case law develops standards concerning the conditions under which an injunction will issue in public employee strikes, parties will incorporate those standards into their respective bargaining positions. Hence the bargaining will not differ substantially from the pre-*Holland* situation. Moreover, in cases in which, according to the standards developed, an injunction will not be issued, those employees will then have, in effect, the right to strike.<sup>46</sup> While such a result may or may not prove to be a public evil, it is clear that the result is not consistent with the intent of no-strike legislation.<sup>47</sup>

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44. See notes 36-37 *supra* and accompanying text.

45. See note 38 *supra* and accompanying text.

46. The *Holland* decision has apparently been interpreted by local courts as effectively removing the injunction from many public employee labor disputes. Board of Educ. v. Chippewa Valley Educ. Assn., No. S68-4660 (Mich. Cir. Ct. for Macomb County, filed Oct. 28, 1968), reprinted in GERR No. 272, at B-5 (Nov. 25, 1968). Moreover, *Holland* would not affect the right employers have under MICH. COMP. LAWS ANN. § 423.206 (1967) to discipline striking employees subsequent to the strike. But that power is ordinarily of little practical value, since a public employer confronted with labor strife is generally reluctant to disturb a freshly achieved settlement by disciplining the individuals involved.

47. See Taylor, *Impasse Procedure—The Finality Question*, Remarks at New York

In the final analysis, then, the *Holland* decision seems, at best, a temporary expedient necessitated by a judicial perception of the inherently conflicting aims of strike prevention through legislative prohibition on the one hand and collective bargaining on the other. If the conflict is ever to be adequately resolved, it is incumbent upon the legislature to devise more appropriate means by which the dual goals of meaningful bargaining and strike prevention may be achieved.

### III. APPROACHES TO RESOLVING THE CONFLICT

As is indicated by the foregoing discussion of the *Holland* decision, even the more "progressive" of the new public employee statutes have failed to resolve the problems of labor relations in the public sector. At least, however, the statutes have served to illustrate the nature and extent of the conflict which exists in the area. The following discussion will consider four possible remedial approaches which have traditionally been used or which could be used for resolving the conflict: the punitive approach, recognition of a limited right to strike, the aid to bargaining approach, and the unfair labor practice proceeding.

#### A. *The Punitive Approach*

The punitive approach is based on the theory that the imposition of penalties for striking will deter future strikes. The pattern for punitive statutes was set by New York's Condon-Wadlin Law<sup>48</sup> which provided for the automatic dismissal of striking employees, with the provision that any striker subsequently rehired could not receive higher pay for three years following the strike, and would remain on probation for five years.<sup>49</sup> Punitive provisions of this sort have not been very effective in preventing public employee strikes, for several reasons. First, when enforcement is at the discretion of the employer, sanctions are rarely invoked, because employees dismissed on account of strike activity may be hard to replace. Moreover, when union organization is strong, a public employer is not likely to dismiss striking employees, because such measures would probably only exacerbate an already delicate situation. Mandatory sanctions have been only slightly more successful, because the same

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*Governor's Conference on Public Employee Relations*, in GERR No. 267, at G-1 (Oct. 10, 1968).

48. Law of March 27, 1947, ch. 391, [1947] N.Y. Laws 842, *as amended*, Law of April 23, 1963, ch. 702, [1963] N.Y. Laws 2432 (repealed 1967).

49. Law of March 27, 1947, ch. 391, § 1, [1947] N.Y. Laws 842, *as amended*, Law of April 23, 1963, ch. 702, § 1 [1963] N.Y. Laws 2432 (repealed 1967). The antistrike provision of the Minnesota collective bargaining law is substantially similar to the Condon-Wadlin Law in that respect. MINN. STAT. ANN. § 179.55 (1966).

considerations which prevent management from invoking discretionary sanctions also encourage it to evade required sanctions whenever possible.<sup>50</sup>

Since statutory sanctions against striking employees have proved largely unsuccessful in preventing strikes,<sup>51</sup> such provisions have generally been omitted from the newer public employment relations acts. The Michigan PERA, for example, removed all the statutory sanctions except the employer's discretionary right to dismiss a striking employee, and the impact of that remaining sanction is diminished by the statute's provision of procedural safeguards for the employee.<sup>52</sup> When New York's Taylor Law<sup>53</sup> was enacted, provisions for sanctions against individual employees were removed in favor of sanctions directed against the union organization itself.<sup>54</sup>

Another aspect of the traditional punitive approach which contributes to its ineffectiveness in producing stable labor relations relates to its after-the-fact nature. Sanctions are not applied until the labor relations have degenerated into a strike situation, and when punitive measures are introduced at that late stage, the effect may be to make the employees more militant and less amenable to rational settlement.<sup>55</sup>

Even more fundamentally, it may be suggested that the traditional punitive approach is inherently productive of instability in labor relations. When its impact is not offset by any grant of bar-

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50. Thus, when New York City vehicle drivers went on strike in 1962, the employees "dismissed" under the Condon-Wadlin Law were simply shifted to re-employment in other city departments following the strike. Montana, *supra* note 38, at 274.

51. From 1947 to 1959, for example, there occurred over 450 strikes by public employees. See Note, *Labor Relations in the Public Service*, 75 HARV. L. REV. 391, 407 (1961).

52. MICH. COMP. LAWS ANN. § 423.206 (1967). It was removal of the statutory sanctions from the Michigan law which prompted the Holland teachers to argue that the substituted provision for employer "discipline" was intended to be an exclusive remedy and that therefore the court was precluded from issuing an injunction. School Dist. v. Holland Educ. Assn., 380 Mich. 314, 324, 157 N.W.2d 206, 209 (1968). The court, however, rejected that argument, and construed the statute as not affecting the "historic power of courts to enjoin strikes by public employees." 380 Mich. at 325, 157 N.W.2d at 210, *citing* Annot., 31 A.L.R.2d 1142 (1953).

53. N.Y. CIV. SERV. LAW §§ 200-12 (McKinney Supp. 1968), *as amended*, ch. 24, §§ 1-13, [1969] N.Y. Laws 39 (McKinney Supp. April 10, 1969). The Taylor Law replaced the Condon-Wadlin Law.

54. Under the Taylor Law, penalties for violating the strike prohibition included fines against the union, loss of dues check-off privileges, and, ultimately, withdrawal of recognition. However, in March 1969, the Taylor Law was amended to reinstate penalties against individual employees. Ch. 24, § 8 [1969] N.Y. Laws 42-43 (McKinney Supp. April 10, 1969), *amending* N.Y. CIV. SERV. LAW § 210(2) (McKinney Supp. 1968). For each strike day, the individual employee must have the equivalent of two days pay deducted from his paycheck. The provision for strike penalties has been recently criticized by George W. Taylor, who recommends repeal of those provisions. GERR. No. 317, at B-9 (Oct. 6, 1969).

55. See note 38 *supra* and accompanying text.

gaining rights—as has been the case until recent years—the punitive approach produces a severe imbalance of bargaining power. Employees are faced with the choices of taking whatever the employer offers, quitting, or striking and facing the penalties. Under such circumstances, it may reasonably appear to the employees that they have little to lose by striking. A stringently punitive approach may be functional as long as employees are unorganized and jobs are scarce. But as the relative affluence and strength of employee organizations increase, the obvious inequity of the purely punitive approach may encourage public employee strikes rather than prevent them.

### B. *The Limited Right To Strike*

One of the main difficulties in public employee collective bargaining stems from the prohibition of strikes. If that prohibition did not exist, it might be assumed that bargaining would proceed much as it does in the private sector with both parties negotiating in a mutual effort to avoid work stoppage. Negotiations would be more effective and would arguably result in fewer strikes. Some observers have therefore advocated the recognition of a limited right to strike. That approach has been recommended by the Pennsylvania Governor's Advisory Commission,<sup>56</sup> the New York Kheel Report,<sup>57</sup> the Maryland Governor's Report,<sup>58</sup> and various labor groups.<sup>59</sup> It would grant the right to strike to all public employees except those engaged in areas crucial to the public safety, such as police and fire fighters, for whom impasses could be resolved by compulsory arbitration.<sup>60</sup>

While the concept of the limited right to strike has an undeniable appeal, it does not appear to offer the best solution to the

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56. Governor's Commission To Revise the Public Employee Law of Pennsylvania, Report and Recommendations, June 1968, reprinted in GERR No. 251, at E-1 (July 1, 1968) [hereinafter Pennsylvania Report].

57. Kheel Report, *supra* note 38. Kheel recommends that if a strike situation should develop, and if the public services involved are critical, there might be a provision for a Taft-Hartley style "cooling-off" injunction. Kheel Report, *supra* note 38, at 32.

58. Governor's Task Force on Public Employee Labor Relations, Report and Recommendations, Dec. 23, 1968, reprinted in GERR No. 278, at AA-3 (Jan. 6, 1969) [hereinafter Maryland Report]. This report of Governor Agnew's task force is particularly illustrative of the sharp differences of opinion over the strike question. Five of the seventeen members dissented from the committee recommendations—an unusual occurrence since such committees are notorious for their unanimity. See generally Lehman, *Crime, the Public, and the Crime Commission: A Critical Review of the Challenge of Crime in a Free Society*, 66 MICH. L. REV. 1487, 1499-509 (1968).

59. See, e.g., Address by Jerry Wurf, President of the American Federation of State, County, and Municipal Employees [hereinafter AFSCME], GERR No. 266, at F-3 (Oct. 14, 1968).

60. See Pennsylvania Report, *supra* note 56, at E-1.

problems of public employment.<sup>61</sup> Moreover, advocacy of a limited right to strike is likely to be a mere academic exercise because implementation of that approach will probably remain politically impossible. It has been said that the "public will tolerate the fact of strike in public employment to the point of extremis; but will not accept the principle of the right to strike."<sup>62</sup> The political obstacle to recognizing that right was recently demonstrated in Pennsylvania when the governor, in submitting the Commission's recommendations to the legislature, omitted the provisions which favored the limited right to strike.<sup>63</sup>

It might be argued that, as a practical matter, explicit recognition of the right to strike is not necessary for that right to exist as an element in collective bargaining. Since the strike prohibition means little without enforcement machinery, a legislature can give tacit recognition to the strike power simply by removing punitive sanctions. To some extent, that is now the case in Michigan, where the statutory sanctions have been removed<sup>64</sup> and the availability of injunctive relief has been limited by *Holland* to situations involving violence or irreparable harm.<sup>65</sup>

Tacit recognition of the right to strike when the statutory prohibition remains has been criticized as fostering disrespect for law;<sup>66</sup> but tacit recognition might be a lesser evil than the present public

61. Some have denounced the idea of a limited right to strike as illusory in that it would apply to relatively few employees. For instance, according to an Address by George W. Taylor at the New York Governor's Conference [GERR No. 267, at G-1, G-4 (Oct. 21, 1968)], only 1.3 million of 6.4 million local government employees are engaged in activities that are clearly nonessential.

62. Speech by Arvid Anderson, GERR No. 257, at E-1, E-3 (Aug. 12, 1968), quoting Saul Wallen, arbitrator on the New York Board of Collective Bargaining.

63. GERR No. 267, at B-1 (Oct. 21, 1968). A similar example occurred in New Jersey when Democratic Governor Hughes vetoed the Republican legislature's public employment bill on the ground that it was not explicit enough in outlawing the public employee strike. However, the legislature enacted the bill over the veto, and in a subsequent court test, the original wording proved to be adequate to maintain the strike prohibition. *Board of Educ. of Union Beach v. New Jersey Educ. Assn.*, 53 N.J. 29, 47, 247 A.2d 867, 877 (1968).

64. The 1965 Act repealed sections providing criminal penalties (Law of July 3, 1947, no. 336, § 8, [1947] Mich. Acts 633), loss of employment and retirement rights (§ 4), and restrictions on re-employment (§ 5). The employer is left with a rather obscure power to discipline strikers [MICH. COMP. LAWS ANN. § 423.206 (1967)]. But the severity of that power is tempered by the inclusion of procedural safeguards in the disciplinary process (§ 423.206), and by the fact that as a practical matter employers are not likely to invoke sanctions which can be applied only after employees have returned to work. After the employees have returned, the employer is likely to be more interested in preserving newly cemented relations than in punishing strikers and thereby risking further strife.

65. 380 Mich. 314, 326, 157 N.W.2d 206, 210 (1968). See note 42 *supra*.

66. See Address by George W. Taylor, *supra* note 61, at G-3. Indeed, such a back-door approach to the strike question may appear particularly ill-advised at a time of public concern for law and order—a concern prompted in part perhaps by the apparent tendency of many to disregard laws that they consider personally distasteful.

employee laws which may seem to workers to be so grossly unfair that respect for "law" deteriorates to the point that the leaders will defy even an injunction. Indeed, subsequent incarceration of strike leaders raises them to martyr status, and the resulting mass movement psychology unifies employees even more strongly against the law.<sup>67</sup> In view of that consideration, tacit recognition may well result in more respect for the law than would otherwise be the case.

Even if some form of recognition of the right to strike is feasible, it may still be questioned whether granting that right will provide an adequate solution to the problems of public sector labor relations. The arguments in favor of recognition of the right to strike rest upon the analogy to the private sector. It is thought that since the strike in the private sector serves to equalize bargaining power and to encourage serious negotiations, the strike power would produce similar benefits in the public employment situation.<sup>68</sup> However, in view of the unique characteristics of public employment, the validity of an analogy to the private sector may be seriously doubted.

The fundamental factor ignored by proponents of recognition is that while the strike may be necessary to give private employees bargaining power sufficient to offset their employer's power, public employees may already possess bargaining leverage not available to those in the private area. The added leverage stems from the essentially political nature of public employment. The employer is charged with the political responsibility of regulating public services: the transit must be kept running; the garbage removed; and the schools kept open. Any prolonged cessation of such important services is likely to reflect adversely upon public servants in politically sensitive positions. Hence, there may be strong pressure on the employer to settle quickly except when union demands are highly excessive. In addition, public employee unions may have a degree of leverage stemming from direct political control. Indeed, the traditional, and only, methods by which public employees have exerted their influence have been lobbying and political redress at the polls.<sup>69</sup> Although those methods tend to be inadequate by themselves, they can be formidable when used in conjunction with a strong organization.<sup>70</sup> In light of the increasing significance of

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67. See Address by Jerry Wurf, *supra* note 59.

68. See, e.g., Note, *The Strike and Its Alternatives in Public Employment*, 1966 WIS. L. REV. 549, 557; Kheel Report, *supra* note 38, at 15.

69. See, e.g., Smith & McLaughlin, *Public Employment: A Neglected Area of Research and Training in Labor Relations*, 16 INDUS. & LAB. REL. REV. 30, 37 (1962). See also Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 932 (1969).

70. Lobbying by organized public employees has been used most effectively by postal unions. In 1960, for example, after President Eisenhower had vetoed a bill to raise the pay of federal employees and had criticized the "unconcealed political pres-

public employment, both in terms of actual numbers of employees and in terms of percentage of the total work force,<sup>71</sup> political pressure shows little indication of diminishing in effectiveness.<sup>72</sup> A possible further strengthening of the traditional political approach is suggested by the erosion of restrictions on the political activities of public employees.<sup>73</sup> As a consequence of those collateral powers, public employee unions may possess the balance of political power, and, in effect, have the power to fire their employers for failure to meet union demands. Indeed, in the extreme case, it may be possible even to replace the public official with a union representative.<sup>74</sup>

sures exerted . . . on Congress by . . . employees," Congress overrode the veto, an action accomplished only one other time in the Eisenhower administration. W. HART, *COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE* 26 (1961).

71. Between 1930 and 1960 the percentage of public employees in the civilian labor force increased from 6% to 12%. Smith & McLaughlin, *supra* note 69, at 31. Moreover, state and local governments alone are responsible for one out of every two nonfarm jobs created, with a rate of increase three times that in private employment. U.S. OFFICE OF MANPOWER, AUTOMATION & TRAINING, DEPT. OF LABOR MANPOWER, EMPLOYMENT TRENDS AND MANPOWER REQUIREMENTS IN GOVERNMENT 1, 11 (No. 9, 1963). See generally Donoian, *The AFGE and the AFSCME: Labor's Hope for the Future?*, 18 LAB. L.J. 727 (1967).

72. That a public employee union's political skills remain an important consideration was illustrated by the recent employee representation election campaign in the Internal Revenue Service. In that campaign, the ability of the contending unions to influence Congress was a central issue. GERR No. 274, at A-1 (Dec. 9, 1968). The power of political persuasion is also evidenced by organized labor's opposition to any reorganization of the Post Office which would diminish congressional control over wages. See Statement by George Meany to House Post Office and Civil Service Committee, GERR No. 308, at A-4, F-1 (Aug. 4, 1969). In light of the continuing existence of state legislative restraints on local governments' taxing power and therefore on their spending [see Rehmus, *Constraints on Local Government in Public Employee Bargaining*, 67 MICH. L. REV. 919, 921-26 (1969)], and in light of the need for political appropriation of the bulk of local governments' spending, it seems highly unlikely that resort to political pressures will become less frequent once the right to strike is accepted. But see Note, *supra* note 68, at 561.

73. The view that a public employee can be discharged for publicly criticizing his employer [see, e.g., *Meehan v. Macy*, 392 F.2d 822 (D.C. Cir. 1968), *modified*, No. 20,812 (D.C. Cir., filed Aug. 23, 1968)] or for engaging in political activities [*Adler v. Board of Educ.*, 342 U.S. 485 (1952); *McAuliffe v. City of New Bedford*, 155 Mass. 216, 29 N.E. 517 (1892)] has been placed in some doubt by recent decisions protecting public employees from such discharge. See *Pickering v. Board of Educ.*, 391 U.S. 563 (1968) (school teacher wrongfully discharged for writing public letters critical of school board); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (teacher wrongfully discharged for refusal to sign loyalty oath); *Swaaley v. United States*, 376 F.2d 857 (Ct. Cl. 1967) (federal employee wrongfully dismissed for writing letter to Secretary of Navy alleging favoritism in promotion). But cf. *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947), in which a divided Court upheld provisions of the Hatch Act [5 U.S.C. § 7324(a) (Supp. IV, 1965-1968)], restricting political activities of federal employees. However, in the federal spheres, these restrictions are coupled with a positive right of public employees to petition Congress. 5 U.S.C. § 7102 (Supp. IV, 1965-1968), formerly 37 Stat. 555 (1912). For discussion of the apparent erosion of restrictions on political activities of public employees, see Note, *The First Amendment and Public Employees: Times Marches On*, 57 GEO. L.J. 134 (1968).

74. A glaring example of that possibility was the recent disclosure that a county supervisor in Wayne County, Michigan, concurrently held a position with a public

The bargaining leverage of a public employee union may be further increased by the employer's lack of certain ultimate deterrents possessed by many private employers. A private employer, if pushed to his economic limit, may move to a more favorable location, or go out of business, whereas, in the public sector, the government can be depended upon to remain in existence.

If, through a misguided application of the private sector analogy, a broad strike power is added to these attributes of the public sector, the result may be to tip the balance of bargaining power so heavily in the union's favor that the employer will be forced to accede to excessive demands. The cost of meeting those demands could then be shifted either to public employees providing less vital services or to the city's taxpayers, since both groups usually lack countervailing political muscle.<sup>75</sup> In such a case, recognition of the strike power may indeed prevent strikes, but only at the cost of fostering one-sided settlements.

### C. *The Aid to Bargaining Approach*

Since neither the punitive approach nor recognition of the right to strike adequately accommodates the interests involved in labor relations in the public sector, the best remedial approach appears to be one that aims at balancing power at the bargaining stage.<sup>76</sup>

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employee union representing county employees. Detroit News, Feb. 9, 1969, at 6A, col. 3.

75. Hildebrand, *supra* note 14, at 151. A peripheral effect of such shifting may be to accelerate the flight of business and large taxpayers to the suburbs, where their relative political power is likely to be much greater. In view of the pervasive concern for "the urban problem" it seems unwise to encourage the flight of taxpayers from the cities.

76. Present collective bargaining laws tend, in a limited fashion, to promote a balance of bargaining power. At a minimum, they assure the right to union organization and representation, thereby eliminating the necessity to strike over that fundamental issue. The traditional power advantage of the employer is further offset by those statutes which establish a comprehensive right to exclusive representation and which place the employer under a duty to bargain. Such laws emphasize promotion of settlements through negotiation rather than punishment of employees after a strike has occurred. Yet the simple right of representation, even when coupled with a duty to bargain, is not enough to achieve a balance of power. Especially when the employer has recourse to injunctive relief against strikes, he is unlikely to feel bound to bargain meaningfully. However, it is in precisely that situation in which the employer so retains the preponderance of bargaining power that employees are likely to resort to the strike because of the frustration of their bargaining objectives. Consequently, it seems that a statute granting bargaining rights which only partly offset the employer's advantage is in fact likely to increase the incidence of strikes because it promotes employee organization and, hence, a greater capacity to launch strikes. Thus Michigan, whose public employees enjoy relatively extensive bargaining rights, experienced more teachers' strikes in 1967-1968 than did any other state. Of 114 walk-outs, forty-seven occurred in Michigan, followed by Ohio and Illinois with twelve each, Pennsylvania with six, and New York with five. GERR No. 276, at B-9 (Dec. 23, 1968). See also Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 945 (1969).

When bargaining has been unsuccessful—whether due to an imbalance in bargaining power permitting one party to refuse to compromise or due to a stand-off between parties of equal strength—it may be desirable to have some method of bringing objectivity into the situation. In this connection, resort has been made to other devices in an attempt to avoid strikes while striving for an equitable settlement. Among the procedures which have been used to support the bargaining process in this manner are mediation, fact-finding, and arbitration.

### 1. *Mediation*

Mediation promotes settlements by introducing a third party who attempts to ease strained relations between the bargaining parties. The mediator, or conciliator, may act as an intermediary in communication between the bargaining parties, on the assumption that a party will be more likely to accept a solution proffered by a neutral party than he is to accept the identical solution proposed by his opponent. There is less reason for suspicion of a mediator's offer, and a party may more easily save face with his constituents by accepting the offer of a neutral. The mediator may also point the way to possible compromise, although his role is theoretically considered to be the passive one of helping the parties to agree on their own solutions.

Mediation is widely used in public employee labor disputes, though present statutes vary as to the type of mediation available. Some merely permit the parties to consult outsiders;<sup>77</sup> others provide a formal mediation service consisting of general labor mediators<sup>78</sup> or specialists in public employee disputes.<sup>79</sup> Usually mediation is available only when both parties seek it, but in Michigan it is available at the request of either party,<sup>80</sup> and in New York it may be ordered by the state Public Employee Relations Board (PERB).<sup>81</sup>

Mediation can be a highly useful aid to bargaining, particularly in the public sector where the bargaining parties are likely to be inexperienced.<sup>82</sup> It can also help, to some extent, in lessening an

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77. *E.g.*, CAL. GOVT. CODE § 3505.2 (West 1968).

78. *E.g.*, MICH. COMP. LAWS ANN. §§ 423.207, 423.25 (1967); VT. STAT. ANN. tit. 21, § 1705 (1969 Supp.), §§ 501-513 (1959); WIS. STAT. ANN. § 111.70 (1969).

79. N.Y. CIV. SERV. LAW § 209 (McKinney Supp. 1968).

80. MICH. COMP. LAWS ANN. § 423.207 (1967).

81. N.Y. CIV. SERV. LAW § 209 (McKinney Supp. 1968).

82. In public employee disputes in which parties may be inexperienced bargainers, mediators serve as teachers as well as conciliators. A competent state mediation service has been viewed as absolutely essential to the operation of a public employee collective bargaining statute. Yet many states provide none at all or, at best, an ineffective service. *See* Address by Robert G. Howlett to the Federal Mediation and Conciliation Service Seminar, GERR No. 286, at E-1 (March 3, 1969).

imbalance of power. For instance, when mediation is available at the request of either party, or when it can be ordered by the state, it will ensure that the parties are bargaining. On the other hand, those statutes which provide for mediation only upon the agreement of both parties are of limited usefulness. When negotiations have broken down, a party may be reluctant to seek mediation for fear that his request might be interpreted as evidencing a desire to compromise his bargaining position. Moreover, even if one party does seek mediation, the other party may resist simply because of the adversary impulse fostered by the bargaining. Yet it is precisely at this point of impasse that mediation is most needed. At the very least, then, mediation should be available upon request of either party;<sup>83</sup> and the better solution would be either to require mediation at a certain stage in negotiations<sup>84</sup> or to empower a state agency to order it.<sup>85</sup>

## 2. Use of a Fact Finder

The use of a fact finder or a fact-finding committee has been more effective in assisting bargaining than has mediation.<sup>86</sup> That procedure, sometimes called "advisory arbitration,"<sup>87</sup> combines elements of both mediation and arbitration. Unlike the mediator who works only with the parties' own proposals, the fact finder examines the merits of the dispute itself. Under the more formal approaches, the fact finder may conduct hearings, collect evidence, and have a subpoena power.<sup>88</sup> His recommendations, however, are not binding on the parties as in arbitration. At most, his findings may be used in reporting to a political authority,<sup>89</sup> or in making a public recommendation to force public opinion against a recalcitrant party.<sup>90</sup>

The use of a fact finder is primarily intended to prevent strikes

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83. See, e.g., MICH. COMP. LAWS ANN. § 423.207 (1967).

84. See, e.g., Advisory Committee on Public Employee Relations, Report to Governor George Romney 8 (1967) [hereinafter Michigan Report].

85. See, e.g., N.Y. CIV. SERV. LAW § 209(3) (McKinney Supp. 1968).

86. See Belasco, *Resolving Disputes over Contract Terms in the State Public Service*, 16 LAB. L.J. 533, 534 (1965).

87. *Id.* at 533-40.

88. The New York PERB is granted hearing and subpoena power [N.Y. CIV. SERV. LAW §§ 205(5)(j), (k) (McKinney Supp. 1968)], and may delegate its powers to fact-finding boards [N.Y. CIV. SERV. LAW § 209(3)(b) (McKinney Supp. 1968)]; cf. Maryland Report, *supra* note 58, at AA-1, AA-7. See also Address by Robert G. Howlett to the Federal Mediation and Conciliation Service Seminar, GERR No. 286, at E-6 (March 3, 1969); WIS. STAT. ANN. § 111.88(2) (1969).

89. It has been recommended that a report to the governor be the final step in the fact-finding process. Michigan Report, *supra* note 84, at 11. See, e.g., N.Y. CIV. SERV. LAW § 209(3)(c) (McKinney Supp. 1968).

90. See, e.g., MICH. COMP. LAWS ANN. § 423.25 (1967); N.Y. CIV. SERV. LAW § 209(c) (McKinney Supp. 1968).

by facilitating the settlement of disputes, but its effectiveness in this regard is not universally acknowledged. Those who charge that the formal fact-finding procedure tends to discourage rather than to promote negotiated agreement describe its negative effects in two ways. Their first contention is that the mere availability of a fact finder may induce the parties to rely upon that outside aid;<sup>91</sup> if they do so, a basic virtue of collective bargaining—communication between the parties—is lost. Second, it is argued that the practice of making public recommendations may actually hinder agreement because those issues which might have been negotiable can no longer be conceded by the party favored in the fact finder's report without a public loss of face.<sup>92</sup>

Nevertheless, these objections to the fact-finding process lose much of their force if certain distinctions between the public and the private sector are taken into account. In the public sector, reaching a settlement by negotiation, although important, is less critical than it is in private employment. More important are the terms of that settlement: they should be equitable for both of the parties and for the taxpaying public. The use of a fact finder can help to create the balance of bargaining power necessary for such equitable settlements, because public disclosure of the merits of the dispute can serve to restrict the demands of a powerful union or to increase the offer of a powerful but politically conscious employer.

Another factor which fundamentally alters the bargaining process in the public sector is the existence of antistrike statutes. In the current political environment these statutes are not going to disappear,<sup>93</sup> and it is not clear that they should. But given the continued existence of at least a nominal strike ban, the negotiation process in the public sector will remain inescapably different from that of private employment. The effectiveness of collective bargaining depends to a large extent on the parties' evaluations of the relative costs of agreement and of disagreement; an employer, for example, must weigh the cost of a wage increase against the cost of a strike. When the cost of agreement is exceeded by the cost of disagreement, the party will usually settle. This process is sometimes not completed until a strike occurs, since at that time the rela-

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91. The possibility of such overreliance on mediation and fact-finding is recognized in the report of the Governor's Advisory Commission in Illinois. *See* Governor's Advisory Commission on Labor-Management Policy for Public Employees, Report and Recommendations 30 (1967). If that report were followed, the Illinois PERB would be empowered to withhold mediation when it finds that the parties have not in fact negotiated. *See* Note, *supra* note 68, at 566. A similar treatment is possible in Oregon where the fact-finding is wholly discretionary with the PERB. ORE. REV. STAT. §§ 243.7-8 (1969 Supp.).

92. *See* Kheel Report, *supra* note 38, at 33.

93. *See* notes 62-63 *supra* and accompanying text.

tive costs become more easily ascertainable. However, in the public sector, the process of cost assessment cannot function in a similar manner because in that setting the strike is not an acceptable alternative to agreement. Consequently, the process of bargaining in the public sector may afford fewer incentives for settlement than does its private sector counterpart.

Once it is realized that these limitations on bargaining in the public sector exist, resort to forces which complement the bargaining of the parties becomes less distasteful. Moreover, when the fact-finding procedure is viewed in terms of the basic goals of strike prevention and fair settlements, rather than in terms of bargaining orthodoxy, it is clear that fact-finding is on balance desirable. Whatever disadvantages it may have in terms of inhibiting negotiations are compensated for by its tendency to balance bargaining power and to prevent strikes. Experience indicates that the use of a fact finder is a successful method of strike prevention. In many cases in which that device has been instituted, agreement has been reached prior to the issuance of any report;<sup>94</sup> and when impasse has continued up to the recommendation stage, the fact finder's recommendations have usually been accepted by the parties.<sup>95</sup>

### 3. *Arbitration*

The use of a fact finder, however, even when accompanied by public disclosure, does not always provide sufficient pressure to break a bargaining impasse. Consequently, commentators have suggested compulsory arbitration of disputes, and it has been asserted that binding arbitration is the only effective alternative to recognition of a right to strike.<sup>96</sup>

There are two general types of arbitration—"interests" and "grievance." "Interests" arbitration decides the substantive terms of a new contract, thereby resolving a bargaining impasse, whereas

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94. In Massachusetts, for example, out of 200 cases submitted to fact finders in a two-year period, 140 were resolved prior to the issuance of recommendations. In Michigan, 56% of such cases were resolved prior to recommendations. Somewhat less success was experienced in Connecticut where twenty-six out of fifty-seven were resolved prior to recommendations, and in New York where only thirty-three out of 150 cases were settled prior to the fact finder's recommendations. GERR No. 283, at B-3 (Feb. 10, 1969). Perhaps significantly, the higher success rates were in those states combining mediation with fact-finding.

95. For example, out of fifty cases in Wisconsin in the two-year period, the fact finder's recommendations were accepted in 90% of them, and in only three cases were strikes experienced. In Massachusetts, fact-finding was used in 200 cases, but only four strikes ensued. GERR No. 283, at B-2, B-3 (Feb. 10, 1969).

96. See, e.g., R. DOHERTY & W. OBERER, *TEACHERS, SCHOOL BOARDS, AND COLLECTIVE BARGAINING: A CHANGING OF THE GUARD* 104 (1967); Shenton, *Compulsory Arbitration in the Public Service*, 17 LAB. L.J. 138 (1966); Note, *Legality and Propriety of Agreements To Arbitrate Major and Minor Disputes in Public Employment*, 54 CORNELL L. REV. 129 (1968).

"grievance" arbitration settles disputes over the interpretation of an existing contract.<sup>97</sup> Although the latter type has been used much more frequently than has the former, it is submitted that the use of interests arbitration could beneficially be expanded in the public setting, at least with respect to critical employees such as police and firemen.

The machinery of arbitration is similar to that of the fact-finding process. It may take three general forms. First, there is the ad hoc tripartite approach in which each party chooses one member of the panel and those two panel members then pick a third disinterested member.<sup>98</sup> A second approach seeks the services of an outside professional arbitrator, usually chosen by agreement of the parties to the dispute.<sup>99</sup> In a third approach, most appropriate when there is compulsory arbitration, an outside body selects the arbitrator.<sup>100</sup>

Arbitration may be either compulsory or voluntary. Compulsory arbitration, in spite of its apparent attractiveness, has seldom been used to resolve bargaining impasses in public employment, although some states do provide for compulsory arbitration of impasses for certain critical employees such as policemen and firemen,<sup>101</sup> public transportation workers,<sup>102</sup> public utilities workers,<sup>103</sup> and hospital

97. Several courts have inferred from comprehensive bargaining laws imposing a duty to bargain that public employers are permitted to enter grievance arbitration agreements. *See, e.g.,* *Oakland County Sheriff's Dept. v. Local 23, AFSCME*, No. C-66, F-63 (Mich. Lab. Med. Bd.), reprinted in GERR No. 227, at F-1 (Jan. 8, 1968); *Local 953, AFSCME v. Benton Harbor School Dist.*, Civil No. 6229(B) (Mich. Cir. Ct. for Berrien County Oct. 12, 1967), reprinted in GERR No. 216, at E-1 (Oct. 30, 1967); *Local 1226, AFSCME v. City of Rhinelander*, 35 Wis. 2d 209, 151 N.W.2d 30 (1967). The New York statute has been similarly interpreted [*see* GERR No. 228, at E-1 (Jan. 22, 1967)], and a like statute is in force in New Hampshire. *See Tremblay v. Berlin Police Union*, 237 A.2d 668 (N.H. 1968). Some states specifically allow grievance arbitration. *E.g.,* Mo. ANN. STAT. § 290.350 (1965); MASS. ANN. LAWS ch. 149, § 178k (Supp. 1968). *See generally* Note, *supra* note 51; Note, *Labor Law—Public Employment—Arbitration and Agency Shops As Mandatory Subjects of Bargaining*, 14 WAYNE L. REV. 1238 (1968).

98. The new Michigan police and firemen's arbitration statute [Pub. L. No. 312 (Aug. 14, 1969)] has adopted this procedure as has the respective Pennsylvania statute [PA. STAT. ANN. tit. 43, § 217 (Supp. 1969)]. The procedure is also in use in Minnesota for hospital employees [MINN. STAT. ANN. § 179.36 (1966)].

99. The ordinary procedure in this situation is for the parties to request a list of professional arbitrators from a service, such as the American Arbitration Association, and to choose a mutually satisfactory arbitrator from that list. *See* Coulson, *Labor Arbitration—The Insecure Profession*, in PROC. OF N.Y.U. 20TH ANNUAL CONFERENCE ON LABOR 131 (1967).

100. The analogous fact-finding procedure is present in New York where the PERB orders fact-finding and selects the fact finder. N.Y. CIV. SERV. LAW § 209 (McKinney Supp. 1968).

101. *E.g.,* Mich. Pub. L. No. 312 (Aug. 14, 1969); PA. STAT. ANN. tit. 43, § 217 (Supp. 1969); R.I. GEN. LAWS ANN. § 28-9.19 (1968) (fire fighters); WYO. STAT. ANN. §§ 27-265 to -276 (1957).

102. LA. REV. STAT. ANN. § 23.890(e) (Supp. 1969); PA. STAT. ANN. tit. 55, § 563.2 (1964) (toll bridges and toll roads).

103. NEB. REV. STAT. §§ 48-801 to -823 (1968).

employees.<sup>104</sup> Moreover, there are very few states that have provisions even for voluntary arbitration.<sup>105</sup> In general, statutes purporting to provide for arbitration tend to do very little.<sup>106</sup> Although they use the language of arbitration, their procedures are usually not binding,<sup>107</sup> binding only upon the employees,<sup>108</sup> or binding solely for a limited range of issues such as those "not involving expenditures of money."<sup>109</sup>

Reluctance to use arbitration to resolve public employment disputes arises from three factors. First, there is a traditional concern that provisions for the arbitration of public employment disputes may constitute an unconstitutional delegation of authority.<sup>110</sup> Second, even if there is no legal obstacle, there is a conviction that the availability of a decision by an arbitrator will discourage serious efforts at collective bargaining.<sup>111</sup> Finally, there may be some feeling that it is undesirable to leave essentially political decisions—such as those concerning how much public employees will be paid and under what conditions they will work—to one who is not directly responsible to the public.<sup>112</sup>

104. MINN. STAT. ANN. § 179.36 (1966), *upheld in* Fairview Hosp. Assn. v. Public Bldg. Serv. & Hosp. Employees, Local 113, 241 Minn. 523, 64 N.W.2d 16 (1954), *noted in* 39 Minn. L. Rev. 322 (1955).

105. ALAS. STAT. § 23.40-010 (1959); ILL. REV. STAT. ch. 111½, § 301 (1960); NEB. REV. STAT. §§ 48-801 to -823 (1968); N.J. STAT. ANN. § 34:13a-7 (1965); N.Y. CIV. SERV. LAW § 207 (McKinney Supp. 1968).

106. "Arbitration" like "collective bargaining" tends to become a platitude, given lip service but not substance, by both legislators and study commissions. Thus, some statutes grant collective bargaining rights without allowing the strike which would give the rights substance and without providing sufficient controls to make the process effective. The New York legislature, recognizing that the provisions of its Taylor Law did not allow real collective bargaining, substituted its own platitudinous phrase "collective negotiations." N.Y. CIV. SERV. LAW § 203 (McKinney Supp. 1968). Similarly, a proposed Pennsylvania law required as a final step in negotiations that there be "binding arbitration" except for police and firemen. But it would then have emasculated that provision by making the arbitrator's decision purely advisory, except with respect to determinations which did not require legislative action in order to be effective. Proposed Pennsylvania Public Employee Bargaining Law § 807(a), reprinted in GERR No. 267, at E-5 (Oct. 21, 1968).

107. In effect, such advisory arbitration is the same as fact-finding. *See, e.g.,* Me. Rev. Stat. Ann. tit. 26, §§ 980-990 (Supp. 1968) (fire fighters); *See also* Proposed Pennsylvania Public Employee Bargaining Law § 807(a), reprinted in GERR No. 267, at E-1 (Oct. 21, 1968). *See generally* Belasco, *supra* note 86, at 533-44.

108. *E.g.,* R.I. GEN. LAWS ANN. §§ 29-9.3-.12 (1968) (arbitration binding on teachers and on school board except as to matters "involving expenditure of money"). *Cf.* Proposed Pennsylvania Public Employee Bargaining Law § 807(a), reprinted in GERR No. 267, at E-1 (Oct. 21, 1968) (arbitration binding on employer except as to matters requiring legislative enactment).

109. R.I. GEN. LAWS ANN. §§ 28-9.4-11 to -13 (1968).

110. The delegation of power doctrine is no longer very important in the federal setting, but state courts have been slow to discard it. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.15 (1968).

111. *See* text following note 144 *infra*.

112. *See* text accompanying note 145 *infra*.

The first of these factors is supported by most older cases,<sup>113</sup> but recent cases have shown a greater acceptance of both grievance<sup>114</sup> and, to a lesser extent, interests arbitration.<sup>115</sup> Moreover, most of the cases in which arbitration has been held an impermissible delegation are distinguishable from those that would arise in the present setting in that in those cases there was no statute authorizing even public employee bargaining, much less arbitration. Since, under such circumstances bargaining itself could be construed as an impermissible delegation,<sup>116</sup> it followed logically that an agreement to submit disputes to arbitration was likewise invalid.<sup>117</sup>

The extent to which the delegation problem may preclude application of interests arbitration to public employee bargaining disputes depends initially upon the extent to which the decision of the arbitrator may be binding upon the governmental authority. In the absence of a statute specifically authorizing interests arbitration it is unlikely that a governmental authority can be bound by an arbitrator's decision.<sup>118</sup> Although with respect to grievance arbitration the power to agree to such arbitration may be inferred from a collective bargaining statute,<sup>119</sup> that logical nexus is not so apparent in the case of interests arbitration. Interests arbitration arguably bypasses bargaining and thereby deviates altogether from the purpose of the collective bargaining statute.<sup>120</sup>

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113. See, e.g., *Fellows v. LaTronica*, 151 Colo. 300, 377 P.2d 547 (1962); *Washington ex rel. Everett Firefighters, Local 350 v. Johnson*, 46 Wash. 114, 278 P.2d 662 (1955) (city charter provision for compulsory arbitration of firemen's wage dispute held unlawful delegation of power). See also *Van Riper v. Traffic Tel. Workers Fedn.*, 2 N.J. 335, 66 A.2d 161 (1949).

114. See, e.g., *Local 1226, AFSCME v. City of Rhinelander*, 35 Wis. 2d 209, 151 N.W.2d 30 (1969); *Local 953, AFSCME v. Benton Harbor School Dist.*, Civil No. 6229(B) (Mich. Cir. Ct. for Berrien County Oct. 12, 1967), reprinted in GERR No. 216, at E-1 (Oct. 30, 1967); *Tremblay v. Berlin Police Union*, 237 A.2d 668 (N.H. 1968).

115. See, e.g., *City of Warwick v. Warwick Regular Firemen's Assn.*, 256 A.2d 206 (R.I. 1969). See also Shenton, *Compulsory Arbitration in the Public Service*, 17 LAB. L.J. 138 (1966); Note, *supra* note 96. Before the *City of Warwick* case, the authorities usually cited in support of the validity of public employees' interests arbitration were *Fairview Hosp. Assn. v. Public Bldg. Serv. & Hosp. Employees, Local 113*, 241 Minn. 523, 64 N.W.2d 16 (1954), and *New Jersey Bell Tel. Co. v. Communications Workers of America*, N.J. Traffic Div. No. 55, 5 N.J. 354, 75 A.2d 721 (1950). But those cases are of doubtful relevance since they did not involve public employees, but private employees engaged in critical occupations.

116. See, e.g., *Railway Mail Assn. v. Murphy*, 180 Misc. 868, 44 N.Y.S.2d 601 (1943), *revd. on other grounds*, 326 U.S. 88 (1945).

117. See, e.g., *Operating Engineers, Local 321 v. Water Works Bd.*, 276 Ala. 462, 163 S.2d 619 (1964). See also Note, *supra* note 96.

118. See, e.g., *Washington ex rel. Everett Firefighters, Local 350 v. Johnson*, 46 Wash. 114, 278 P.2d 662 (1955); *Fellows v. LaTronica*, 151 Colo. 300, 377 P.2d 547 (1962).

119. See note 106 *supra*.

120. For the opposite view, see Note, *supra* note 96, at 138.

But even when there is statutory authorization for interests arbitration, that authorization raises serious delegation problems, whose resolution depends in part upon the form of the statute. Such legislation can provide for arbitration that is (1) totally voluntary, that is, upon the agreement of both parties; (2) semi-voluntary, that is, upon request by a single party; or (3) compulsory. All three categories have in common certain delegation problems, which may be divided into two general types: those concerning the delegation of power from one branch of government to another, and those concerning the abdication of governmental responsibility to an outsider. For example, a statute which permits parties to engage in voluntary interests arbitration might be viewed as permitting an unconstitutional delegation from one branch of government to another, since the local executive, by agreeing to the arbitration, could bind other divisions of government. However, a statute specifically providing that arbitration would be binding upon all branches of a local government should validate the arbitration against this delegation objection, because, to the extent that the state legislature can control the distribution of local governmental power, it would be similarly empowered to delegate that power within a particular governmental unit.

But even if the arbitration decision can properly bind both the local legislative body and the executive, its effectiveness will be limited unless the decision is to take precedence over state restrictions on the local government's powers. For example, the scope of employee relations in local government is often limited by state laws controlling civil service standards or retirement plans.<sup>121</sup> Although disputes over these matters seemingly relate to "wages and conditions of employment" which comprise the subject matter of bargaining under the public employee statutes,<sup>122</sup> they are beyond the scope of a local government's bargaining power.<sup>123</sup> Consequently, they would presumably also be beyond arbitration, at least under a statute which merely permitted local governments to agree to interests arbitration. Other state-imposed limitations may restrict the binding ability of arbitration even as to matters more purely local in nature. For example, when there are state restrictions on local taxing power or on tax rates, a municipality may find it legally impossible to comply with the economic burdens of an arbitration decision.<sup>124</sup>

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121. For discussion of restriction on local government, see Rehmus, *Constraints on Local Governments in Public Employee Bargaining*, 67 MICH. L. REV. 919 (1969).

122. See, e.g., MICH. COMP. LAWS ANN. § 423.213 (1967); N.Y. CIV. SERV. LAW § 204 (1968).

123. See Rehmus, *supra* note 121, at 926-29.

124. *Id.* at 921-26.

For arbitration to enjoy maximum effectiveness as a strike substitute, then, it would have to bind state government as well as local. A recent Pennsylvania arbitration statute applying to disputes with police and firemen purports to have that effect.<sup>125</sup> But an arbitration statute so drawn would seem to be subject to the second delegation objection, that of abdication of governmental responsibility. As it applies to the local level, that objection may be weakened if the state statute makes arbitration compulsory. A voluntary arbitration law might be viewed as in effect permitting government officials to abdicate their responsibility for the cost of governmental operations. But when arbitration is compelled by law, the abdication argument loses much of its force. The local official will then have not abdicated his responsibility; instead, his responsibility will have been removed by a higher governmental authority.<sup>126</sup>

Yet the objection might be raised that the higher governmental authority which has ordered the arbitration has itself abdicated its responsibility by delegating it to an outside party. To the extent that this objection has merit, however, it can be avoided if the arbitration is governmental in nature.<sup>127</sup> Thus, arbitration might properly be conducted by a state labor board, by a public employment board, or perhaps by a "labor court."<sup>128</sup>

But even governmental arbitration must withstand attack on

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125. PA. STAT. ANN. tit. 43, §§ 217.1-12 (Supp. 1969), provides that the decision by a tripartite board of arbitration, chosen by the parties, shall be binding, and that if legislative action is required to meet the arbitration award, the state or local legislative body must take appropriate action within a specified period of time.

126. In some instances, it may be doubtful that the state legislature can properly remove that local responsibility. In states whose constitutions guarantee home rule to certain cities, the legislature may be constitutionally unable to alter the allocation of responsibility within city governments by requiring those governments to submit their labor disputes to binding arbitration. Where home rule is not constitutionally guaranteed, however, home rule charters will not bar arbitration. See, e.g., PA. STAT. ANN. tit. 43, § 217.9 (Supp. 1969) (arbitration statute applicable despite any existing or future home rule charters).

127. In the recent case of *City of Warwick v. Warwick Regular Firemen's Assn.*, 256 A.2d 206 (R.I. 1969), the Supreme Court of Rhode Island found that arbitration by a tripartite panel with the third party chosen by the parties to bargaining was governmental in nature and thus not an impermissible delegation of governmental authority. While the result in that case may or may not be desirable, the court's reasoning is wholly tautological. The court answered the argument that the arbitration constituted a delegation to a private person by reasoning that since the statute authorized whomever might be chosen as arbitrator to receive a portion of the state's sovereign power, that person was therefore made a public officer. As such, he was clearly not a private person, and hence there was no impermissible delegation of governmental authority to a private person. 256 A.2d at 210-11.

128. Cf. NEB. REV. STAT. § 48-820 (1968) (arbitration by court of industrial relations). See generally Fleming, *The Labor Court Idea*, 65 MICH. L. REV. 1551 (1967). Such a court might be analogous to the Civil Service Commissions, which have authority to determine wages, hours, and conditions of employment, are semi-autonomous, and have not been held an invalid delegation of legislative responsibility. See Shenton, *Compulsory Arbitration in the Public Service*, 17 LAB. L.J. 138, 143 (1966).

grounds of improper delegation of legislative authority. The traditional means by which a legislative delegation is justified is by including in the delegating statute sufficient "standards" to guide the body which is to exercise the legislative authority.<sup>129</sup> In the public employee situation, it is unclear what these standards must be.

Standards developed in cases involving nonpublic employees engaged in critical occupations, such as communications workers<sup>130</sup> or hospital employees,<sup>131</sup> are of uncertain relevance, because the cases involved substantially different issues than those in a public employee arbitration case.<sup>132</sup> In light of the apparent propensity

129. In *New Jersey v. Traffic Tel. Workers' Fedn.*, 2 N.J. 335, 66 A.2d 616 (1949), the Supreme Court of New Jersey held that a statute requiring compulsory arbitration of labor disputes in public communications was invalid because of a lack of standards. But an amended version of the statute, which included standards to guide the decision of the arbitrator, was upheld in *New Jersey Bell Tel. Co. v. Communication Workers of America*, N.J. Traffic Div. No. 55, 5 N.J. 354, 75 A.2d 721 (1950). See also *City of Warwick v. Warwick Regular Firemen's Assn.*, 256 A.2d at 210 (R.I. 1969); K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 2.15 (1958).

130. In the context of public utility disputes, the New Jersey Supreme Court found to be adequate, those standards which required the arbitrator to consider: (1) the interests and welfare of the public; (2) a comparison of wages, hours, and conditions of employment of the employees involved in the arbitration proceedings with those of other employees doing comparable work; and (3) "[o]ther factors . . . traditionally taken into consideration in determination of wages, hours, and conditions of employment through voluntary collective bargaining." *New Jersey Bell Tel. Co. v. Communication Workers of America*, N.J. Traffic Div. No. 55, 5 N.J. 354, 371, 75 A.2d 721, 729 (1950).

131. In *Fairview Hosp. Assn. v. Public Bldg. Serv. & Hosp. Employees, Local 113*, 241 Minn. 523, 64 N.W.2d 16 (1954), the Minnesota Supreme Court permitted even vaguer standards, finding sufficient the statutory statement of general labor policy: to protect and promote the interests of public, employees, and employers alike; to promote industrial peace, regular and adequate income for employees, and uninterrupted production of goods and services; to reduce menace to health and welfare, and morals . . . arising from economic insecurity due to stoppages . . . of business and employment.

241 Minn. at 546, 64 N.W.2d at 30-31.

132. One issue involved in nongovernmental employee cases concerns the general propriety of arbitration as a means of deciding justifiable disputes. See *New Jersey Bell Tel. Co. v. Communications Workers of America*, N.J. Traffic Div. No. 55, 5 N.J. 354, 75 A.2d 72 (1950). At one time, private sector arbitration was viewed as an infringement upon the judiciary. See, e.g., *Boston Printing Pressman's Union v. Potter Press*, 141 F. Supp. 553 (D. Mass.), *aff'd.*, 241 F.2d 787 (1st Cir. 1956), *cert. denied*, 355 U.S. 817 (1957). See generally Cushman, *Voluntary Arbitration of New Contract Terms—A Forum in Search of a Dispute*, 16 LAB. L.J. 765 (1967). Another issue in such cases concerns compensation for governmental "taking" of a private employee's right to strike. In *Fairview Hosp. Assn. v. Public Bldg. Serv. & Hosp. Employees, Local 113*, 241 Minn. 523, 64 N.W.2d 16 (1954), the court felt that the use of arbitration was a necessary substitute for the employee's relinquishment of the right to strike. The distinction between that situation and the governmental employment situation is thus clear, for the governmental employee has no "right" to strike, whereas the private employee has a recognized right, albeit a limited one. The private employee's right to strike resembles a property right subject to taking under the police power only in a manner consistent with fourteenth amendment due process requirements—that is, the right must not be "arbitrarily and unjustly withdrawn," and there should be "a substantial and reasonable substitute for the rights withdrawn." 241 Minn. at 543, 64 N.W.2d at 27. Hence, in the private sector, a provision for compulsory arbitration takes on the nature of compensation for loss of the right to strike.

of some state courts to find improper delegations in arbitration of public employee bargaining disputes,<sup>133</sup> it seems unlikely that the vague standards developed in the nongovernmental context<sup>134</sup> would be adequate.

Statutory standards to guide and control arbitration vary widely, ranging from none at all in Pennsylvania<sup>135</sup> to highly detailed standards in Michigan<sup>136</sup> and Rhode Island.<sup>137</sup> Some indication of what standards will be accepted for arbitration of government employee disputes appeared in a recent Rhode Island case.<sup>138</sup> In that case, the state supreme court upheld compulsory arbitration of a firemen's wage dispute, basing its decision on a statute which required that a tripartite arbitration panel consider as factors: (1) a comparison with prevailing wage rates and conditions of employment in building trades in the local area; (2) comparison with firemen's wage rates in surrounding towns of comparable size; and (3) the interest and welfare of the public, hazards of the employment, and qualifications and skills of the employees.<sup>139</sup>

The criteria which have been developed in reference to the use of a fact finder may offer some additional guide as to what standards will suffice in the arbitration context. Only three states furnish statutory criteria for the fact finder. Statutes in Maine and Rhode Island concentrate on comparison with private employment situations, with only a vague reference to "the public interest and welfare," whereas Minnesota's statute appears more applicable to the delegation problem which is encountered when the arbitration is to be binding.<sup>140</sup> Under Minnesota's statute, the fact-finding panel is required to consider tax limitations imposed by charter on the local government, wage-hour comparisons with employees of other governmental agencies, internal consistency of treatment of employees in the several classes,<sup>141</sup>

133. See, e.g., *Fellows v. LaTronica*, 151 Colo. 300, 377 P.2d 547 (1962); *Washington ex rel. Everett Firefighters*, Local 350 v. *Johnson*, 46 Wash. 114, 278 P.2d 662 (1955).

134. See notes 130-31 *supra*.

135. PA. STAT. ANN. tit. 43, §§ 217.1-10 (Supp. 1969).

136. MICH. COMP. LAWS ANN. § 423.239 (Supp. 1969).

137. R.I. GEN. STATS. ANN. §§ 28-9.1-10 (Supp. 1969).

138. *City of Warwick v. Warwick Regular Firemen's Assn.*, 256 A.2d 206 (R.I. 1969).

139. 256 A.2d at 211-12.

140. ME. REV. STAT. tit. 26, § 989 (Supp. 1968) (fire fighters); R.I. GEN. STAT. ANN. § 28-9.3-9 (1968) (teachers); R.I. GEN. STAT. ANN. § 28-9.4-10 (1968) (municipal employees); MINN. STAT. ANN. § 179.57(4) (1966). See generally Krinsky, *Public Employment Fact-Finding in Fourteen States*, 17 LABOR L.J. 532, 539 (1966).

141. This consideration is important in light of the "leapfrogging" situation confronting municipal employers—with a multiplicity of bargaining units, a settlement with one is likely to set the floor for negotiations with other groups. If arbitration is to be binding but is to stay within the limits of a city's tax structure, it will be necessary for the arbitrator to consider the peripheral as well as the immediate effects of his decision. A decision which grants a large pay increase to police, for example, may work to the relative detriment of another group in later negotiations, because the city may be then financially incapable of giving a comparable increase.

and other factors normally considered by the governmental agency in its employment relationships.<sup>142</sup>

Standards such as those in the Minnesota statute appear to satisfy best the delegation requirement, as long as the arbitration is done by a governmental agency and procedural safeguards are provided. Those safeguards might include written findings by the arbitrator and the availability of judicial review to ensure adherence to the statutory criteria.<sup>143</sup> By requiring consideration of the tax and charter limitations on the local government, such standards would preclude arbitration decisions which require state legislative action—a limitation which is necessary to avoid the argument that a legislature cannot bind itself to enact future legislation to be suggested by an outside party. In effect, then, an arbitration statute limited to matters within the power of the local governmental unit restricts arbitration to those matters over which there is local collective bargaining authority. Arbitration so restricted is not completely satisfactory as an alternative to the strike power, for while such arbitration cannot change a state law restricting local government, the strike and its attendant political measures can bring about that change.<sup>144</sup> However, it is not yet certain that in order to overcome objections based on the grounds of improper delegation, arbitration must be restricted to this degree.

Even if there is no legal obstacle, the wisdom of relying upon arbitration to achieve a balance of bargaining power might still be questioned. Arbitration, like fact-finding, presents the possibility that the parties will not really negotiate, but rather will prefer to rely upon the arbitrator. That fear seems especially relevant to the public employee situation in which the bargainers may be inexperienced.

Moreover, the policy considerations behind the argument that the government's resort to arbitration is an abdication of its re-

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142. MINN. STAT. ANN. § 179.57(4) (1966).

143. A related question concerns the extent to which judicial review should be available. The Pennsylvania statute expressly prohibits judicial review. PA. STAT. ANN. tit. 43, § 217.7 (Supp. 1969). The Michigan arbitration statute, on the other hand, provides for judicial review, but only on the questions whether the panel exceeded its jurisdiction, whether it entered an order unsupported by substantial evidence in the record, or whether it entered an order procured by fraud or other unlawful means. MICH. COMP. LAWS ANN. § 423.242 (1967).

144. That fact is exemplified by the New York transit workers strike under the Condon-Wadlin Law, Law of March 27, 1947, ch. 391, [1947] N.Y. Laws 842, *as amended*, Law of April 23, 1963, ch. 702, [1963] N.Y. Laws 2432 (repealed 1967). The transit authority was barred by state law from granting any pay increase whatsoever to those who had engaged in the strike. But the trains were stopped, and the city was paralyzed. The ensuing political repercussions produced what was in effect a special legislative dispensation—a wage settlement which was a legislated exception to the Condon-Wadlin law. Arbitration could not have produced a settlement under those conditions; only the political coercion of the strike produced the necessary statutory change. See Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 933 (1969).

sponsibility apply even though the delegation is kept within constitutional limits. By relying upon arbitration, a governmental official can avoid an unpleasant decision for which he would otherwise be politically accountable. Although the effect may not necessarily be the raising of taxes by an unaccountable arbitrator, the decision may well affect the allocation of governmental expenditures within a political unit.<sup>145</sup> Such a decision arguably should remain with those who are politically accountable for it.

In light of the possible adverse effects of arbitration, it seems advisable that it be used sparingly in resolving labor disputes in public employment. Perhaps it should remain limited to employee groups such as policemen and firemen, for whom the strike is completely unacceptable.<sup>146</sup> But in whatever situations it is used, arbitration cannot be fully adequate as a strike substitute. Nor should it be viewed as the exclusive means of dispute resolution. Rather, it should be part of a comprehensive bargaining scheme in which arbitration, or preferably, the threat of arbitration, could prevent either party from having an overwhelming bargaining advantage, and could encourage the parties to reach an equitable settlement.

#### D. *The Unfair Labor Practice Proceeding*

Another possible device which may prove useful in promoting effective collective bargaining for public employees while avoiding strikes is the unfair labor practice proceeding. The remedy provided by such a proceeding is potentially important, particularly in a comprehensive collective bargaining program. Like arbitration, however, it is presently available in only a few states; and even where the remedy can be sought, as in Michigan, it may be available only to the union.<sup>147</sup>

Typically, unfair labor practice procedures are modeled after those of the NLRA,<sup>148</sup> and permit an aggrieved party to bring actions before a quasi-judicial body, charging the violation of specific statutory prohibitions. That procedure is most effective in performing such functions as enforcing recognition and enjoining antiunion discrimination. But because of timing and enforcement problems, it has limited usefulness at the bargaining stage. Since the administrative machinery is incapable of acting on short notice, charges filed

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145. This danger could perhaps be partially alleviated by the utilization of arbitration standards which seek to prevent disrupting the relative standings of employee groups. See note 141 *supra*.

146. See, e.g., the Pennsylvania and Michigan arbitration statutes dealing with police and firemen. PA. STAT. ANN. tit. 43, §§ 217.1-10 (Supp. 1969); MICH. COMP. LAWS ANN. § 423.231 (1967).

147. See, e.g., MICH. COMP. LAWS ANN. § 423.216 (1967).

148. NLRA § 8, 29 U.S.C. § 158 (1964). See generally Smith, *Unfair Labor Practices in Public Employment*, GERR No. 268, at E-1 (Oct. 28, 1968).

during the course of bargaining are unlikely to be disposed of until the contract deadline has passed and the public has suffered the adverse consequences of the parties' disagreement. Moreover, even if the case is decided in time, the enforcement powers of the adjudicating body are often inadequate, particularly when the charge alleges a failure to bargain in good faith. The Michigan State Labor Mediation Board, for example, is not legally empowered to order a settlement in that situation; instead, enforcement is limited to issuing "cease and desist" orders, the continued violation of which may result in contempt penalties.<sup>149</sup> The threat of such restraining orders may help to equalize bargaining power, but the delay before sanctions are imposed renders that threat less effective as a preventive measure.

Nevertheless, the unfair labor practice proceeding may accomplish a useful publicity function similar to that of a fact finder's recommendations. When time permits a decision to be rendered during the course of bargaining, posting or publication of that decision may be ordered,<sup>150</sup> and the resulting pressure from public opinion can exert a beneficial influence on subsequent negotiations. If the fact-finding process is also available, however, it seems wasteful to seek an unfair labor practice remedy whose primary advantage is already available through fact-finding. Of course, the remedy itself is not useless, but its shortcomings point out the necessity of developing more effective methods of using such bargaining controls.

#### IV. THE COMPREHENSIVE APPROACH TO LABOR RELATIONS IN THE PUBLIC SECTOR

##### A. *Application of Collective Bargaining Aids*

The basic objections to the use of aids to collective bargaining is that they are ineffective because of poor timing, inadequate staffing, haphazard application, and the absence of a comprehensive and integrated approach to the settlement of labor disputes. If the use of aids to bargaining, such as mediation and fact-finding, depends upon the request of one or both of the parties, those procedures may not be invoked at all,<sup>151</sup> or may be invoked at such a late stage in the negotiations that they cannot be effective.<sup>152</sup> Conse-

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149. MICH. COMP. LAWS ANN. § 423.216 (1967).

150. For example, the Michigan Labor Mediation Board, in holding that a school board's practice of mailing its latest offer directly to teachers was an unfair labor practice, ordered its remedial order to be posted in the school. *Morenci Educ. Assn.*, No. C-68, H-96 (Mich. Lab. Med. Bd. Dec. 12, 1968), reprinted in GERR No. 281, at B-2 (Jan. 27, 1969).

151. See notes 82-85 *supra* and accompanying text.

152. For example, when the fact-finding procedure is not invoked by a party until

quently, state statutes should establish governmental regulatory bodies, authorized to provide services to aid bargaining, and empowered to require their use when agreement has not been reached by a specified time prior to the contract or budget submission deadline.<sup>153</sup>

In the past, the administration of bargaining aids furnished by public agencies has been hampered by a lack of the competent personnel and adequate staffing necessary to provide prompt and efficient implementation. After enactment of Michigan's PERA, for example, the Michigan Labor Mediation Board, which is responsible for furnishing mediation and fact-finding services and for handling recognition and election proceedings, found itself so inundated with both types of requests that it was often unable to meet the demand.<sup>154</sup> Undeniably, providing better services means increased cost; but in light of the cost of strikes which those procedures are designed to prevent, spending more for prevention is preferable and justifiable.

The need for prompt service, competent personnel, and an integrated approach to public employment labor problems lends support to the proposal that such services should be rendered by a state agency specializing in labor relations in the public sector. Such an approach can offer the advantage of specialization. Certain aspects of public employment, such as the political element, the strike prohibi-

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a strike is imminent, it is unlikely that there will be time for the fact finder to make an adequate investigation and a thoughtful report. Instead, the process will turn into intensive mediation, concentrated on averting the impending strike, rather than on considering the merits of the dispute. That situation is said to be present in Michigan. See Howlett, *supra* note 82.

153. Mandatory application of outside bargaining aids was suggested in the Michigan Report, *supra* note 84, at 8-9, and in the Pennsylvania Governor's proposed statute, Pa. H.B. No. 2834, § 801 (1968), reprinted in GERR No. 267, at E-1, E-3 (Oct. 21, 1968). In New York, the PERB has discretion to order mediation and fact-finding, but is not required to do so at any specified time. N.Y. CIV. SERV. LAW § 209 (McKinney Supp. 1968).

A drawback to the application of bargaining aids on a timetable basis is that the certainty of their availability may impair the bargaining process. That objection is particularly troublesome if arbitration is available, for arbitration is most helpful to bargaining when its availability is uncertain. The threat of arbitration can help balance bargaining power, but neither party can cease bargaining in reliance upon its availability. This uncertainty can be achieved by making arbitration discretionary with a governmental regulatory body, such as New York's PERB. N.Y. CIV. SERV. LAW § 205 (McKinney Supp. 1968). Of course, uncertainty concerning the availability of arbitration may be difficult to maintain in the case of critical employees such as police and firemen. But even in that situation, reliance upon its availability may be discouraged by providing a comprehensive bargaining program aimed at making arbitration unnecessary, and by making arbitration relatively less attractive by having the parties bear the costs of the service.

154. In 1967, for example, the Michigan State Labor Mediation Board received requests for mediation at double the 1966 rate, and it received representation petitions at a rate four times that of the previous year. The volume of cases created a severe backlog. See Michigan Report, App. E, *supra* note 84.

tion, limitations on local governmental authority, and elements of social conflict serve to distinguish it sharply from its private sector counterpart. Consequently, specialized expertise beyond that acquired in private sector practice is required to deal with public sector labor disputes. A mediator of disputes in the public employment field, for example, must be prepared to deal with inexperienced parties<sup>155</sup> and with employees who may be more militant,<sup>156</sup> and more concerned with political and social issues than are their private sector counterparts.<sup>157</sup> Similarly, fact finders and arbitrators, in order to deal adequately with a labor dispute in the public sector may need special skills in addition to those required in the private sector. At present, most fact finders tend to be either mediators, in which case they may not apply the necessary quasi-judicial approach,<sup>158</sup> or arbitrators, whose experience tends to be in private employment grievance arbitration.<sup>159</sup> Neither experience necessarily prepares one to weigh the considerations present in public employment.

Moreover, dispatch in the fact-finding and arbitration procedures is essential in the public sector. While delay is irritating in private grievance situations, it can be calamitous in public employment, in which the avoidance of strikes assumes overriding importance. Independent arbitrators and fact finders do tend to be more prompt when they are functioning in critical public employee labor disputes than they do in private sector disputes.<sup>160</sup> But that promptness could be more certain if the aids are provided by an adequately staffed state agency, aware of the need for promptness.

Another consideration supporting the establishment of a state agency to administer the procedures which aid bargaining is the need for some degree of consistency in decisions. When outside parties are chosen by the bargainers, the individual biases of those

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155. Howlett, *Michigan's New Public Employee Relations Act*, 45 MICH. ST. B.J. 14, 16 (1966).

156. There is some indication that public employees tend to be more militant than members of long-established private industry unions. That militancy is illustrated by the frequent rejections of negotiated settlements by rank-and-file public employees. See Kheel, *supra* note 144, at 934.

157. Public employee disputes often involve noneconomic issues. For instance, in the Ocean Hill-Brownsville dispute, and in the Memphis Sanitation strike, elements of social conflict predominated. For an indication of the connection between public employee unionism and the civil rights movement, see 17th Convention of American Federation of State, County, and Municipal Employees, GERR No. 248, B-3, B-4 to 6 (June 10, 1968).

158. See Statement by William Saxton at the 22d Annual Meeting of National Academy of Arbitrators, GERR No. 283 at B-1, B-3 (Feb. 10, 1969).

159. Cf. Coulson, *Labor Arbitration—The Insecure Profession*, in PROC. OF N.Y.U. 20TH ANNUAL CONFERENCE ON LABOR 131 (1967).

160. Cf. Coulson, *Spring Checkup on Labor Arbitration Procedure*, 16 LAB. L.J. 259, 260-61 (1965).

parties tend to produce diverse decisions.<sup>161</sup> Such diversity is particularly harmful in public employment where a settlement in one dispute may affect both other employees of the governmental unit involved<sup>162</sup> and employees of other governmental units.<sup>163</sup> In view of the possible external effects of a single settlement, then, it is desirable for the state to seek some consistency in its fact-finding and arbitration decisions. That consistency can be gained, to some extent, by the setting of criteria for decisions<sup>164</sup> but greater consistency is obtainable if the fact-finding and arbitration are done by a single group. The consistent body of precedent produced in this manner will enable parties to determine ahead of time the probable outcome of resorting to outside aid, and, as a result, more disputes could be settled without invoking such aid.

### B. *The Use of Sanctions To Encourage Bargaining*

In order to achieve consistent results from the application by a state agency of aids to bargaining, it may be necessary to provide certain sanctions to support those aids. Moreover, in a comprehensive approach, the punitive remedies of the strike prohibition may play an additional role, since use of preventive aids, by itself, may fail to achieve an adequate balance of bargaining power. Suc-

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161. Arbitration services provide extensive records on individual arbitrators, and on the basis of those records, parties seek the arbitrators most likely to furnish a favorable decision. Reliance on such past records is so extensive that a young arbitrator finds it almost impossible to break into the field. Coulson, *supra* note 159, at 133.

162. The limitation on the amount of public funds available to satisfy employee wage demands in a given year means that a disproportionate increase won by a single group of employees will result in fewer funds for other employee groups. The difficulties in this regard are aggravated by the political characteristics of public employment. Indeed, to the extent that the fundamental political impulse to maximize one's share of societal wealth is reflected in public employee attitudes, any settlement which threatens to reduce a particular group's share will be most strenuously resisted. Thus, a disproportionately large settlement for any particular group can both unfairly deprive other groups and lead to greater intransigence on the part of those groups. The problem is further aggravated by the multiplicity of bargaining units with which a local government must deal. See Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 MICH. L. REV. 1001 (1969); Slavney, *The Public Employee—How Shall He Be Represented?*, GERR. No. 269, at E-1 (Nov. 4, 1968).

163. An employee group's settlement with one public employer tends to set the pace for bargaining by its counterparts in neighboring communities. This is particularly true in the case of school teachers, for in that area the central bargaining issue is often the comparison with surrounding school districts. Thus, in the recent strike by school teachers in Plymouth, Michigan, the major question was not whether to compare salaries with other communities, but rather with which communities salaries should be compared. Meeting of Plymouth Community School Board, Sept. 8, 1969. There is a rational basis for treating the issue in this way: particularly in suburban areas in which school districts proliferate within a small geographical area, employers are relatively fungible, and a district's failure to meet the standard of its neighbors may result in the loss of its teachers.

164. The setting of criteria is done by statute in Maine, Minnesota, and Rhode Island. See note 140 *supra* and accompanying text.

cess in negotiations often depends upon a mutual desire to avoid a costly strike,<sup>165</sup> and in the public sector, the relative cost of a strike to the parties involved is sometimes highly unequal. For example, a strike by public school teachers which merely delays the fall opening of school represents little or no cost to the teachers, since state laws require a minimum number of school days per year and accordingly teachers will usually receive a full year's salary despite the delayed school opening. When the slight cost to teachers is compared with the record of substantial pay increases won by such delays, the tactic appears quite attractive indeed.<sup>166</sup> That situation is in direct contrast to the one which arises in most private sector strikes, in which strike time represents a direct economic loss to the striking employees. When, as is often the case in the public sector, a strike presents little or no threat of economic loss to employees, it may be desirable to increase the cost of striking and thereby to encourage settlement. Indeed, in order to achieve an equitable balance of bargaining power, some means of cost-equalization is essential.

A possible cost-equalization approach is to allow damage suits by the employer against the union.<sup>167</sup> Such an approach, however, far from promoting a balance of bargaining between the parties, would probably only aggravate any existing imbalance. In situations in which the union possesses the preponderance of power, the employer would be unlikely to invoke the damage remedy for fear of exacerbating relations; and when the employer holds the power, the availability of such a further remedy would merely increase his advantage.

Another means by which cost-equalization might be achieved is through fines against individual strikers. But that approach seems to reflect older attitudes inconsistent with the new bargaining laws, and direct fines could appear to striking employees to be arbitrary and punitive and consequently could prompt greater intransigence in response. Moreover, it is questionable whether sanctions against individuals contribute to a balancing of bargaining power between the parties. But even if such sanctions can promote a balance of power, they should be applied only to the extent necessary to offset an excessive union advantage. Such an approach is

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165. Kheel Report, *supra* note 38, at 30.

166. In September 1967, for example, the Detroit Federation of Teachers engaged in a thirteen-day strike. The settlement then reached provided for a shorter school year, smaller class size, and a two-year contract for teachers with an increase in base pay from \$5,800 to \$7,500. GERR No. 210, at B-1 (Sept. 18, 1967).

167. The employer is probably the only party who could sue, because a member of the general public injured by a strike of vital public services has no standing to sue the union. *Jamur Prods. Corp. v. Quill*, 54 CCH Lab. Cas. ¶ 51,525 (N.Y. Sup. Ct. 1966) (decided under Condon-Wadlin Law).

consistent with the goals of strike prevention and equitable settlements. Where individual penalties are presently required, however, their application is across-the-board and bears no rational relationship to the power of the union, or to the equities of the situation.<sup>168</sup>

Although a more discriminating application of individual penalties might contribute more to equalizing the costs of failure to reach a negotiated settlement, it is clear that that goal can be better achieved by a flexible application of penalties against the union organization as a whole. One such approach is to assess fines against the union for each day that its workers are on strike.<sup>169</sup> A related device, and one which is potentially very effective, is the suspension of the union's privilege of dues check-off.<sup>170</sup>

168. See, e.g., N.Y. CIV. SERV. LAW § 210 (McKinney Supp. 1968), as amended, ch. 24, § 8, [1969] N.Y. Laws 42 (McKinney Supp. April 10, 1969).

169. That device has been less than fully successful in solving New York City's extended labor crises. See, e.g., Montana, *supra* note 38; Kheel, *supra* note 38. Part of the reason for its failure is the militant reaction it engenders on the part of unions. For example, the fine of \$220,000 levied against the New York United Federation of Teachers—amounting to only a few cents per teacher per strike day—has been condemned by George Meany, who has expressed the AFL-CIO's sympathy by instituting a fund-raising campaign so the UFT will not have to "bear the burden alone." GERR No. 283, at B-8 (Feb. 10, 1969). The recent interest of established big labor for the plight of the public employee may be a product of statistics showing the contrast between the stagnant membership roles of private labor organizations as compared to the burgeoning membership of public employee unions. See Note, *supra* note 68, at 549; Donoian, *The AFGE and the AFSCME: Labor's Hope for the Future?*, 18 LAB. L.J. 727 (1967).

Another reason for the failure of the device of using fines might be its inability to achieve an adequate equalization because of statutory limitations on fines. Prior to the amendment in 1969, the Taylor Law's limitations on fines against unions that violated injunctions meant that a large union could, in effect, purchase the right to strike by paying fines amounting to perhaps twenty-five cents per member per strike day. GERR No. 283, at B-5 (Feb. 10, 1969). The recent amendment removed the limitations on fines, and the fine is now to be fixed at the discretion of the court. N.Y. JUDICIARY LAW § 751(2)(a) (McKinney Supp. 1969).

If the fines are to be productive toward the goal of balancing bargaining power, the amount of any such fine should reflect, among other considerations, the ability of the union to pay. Neither a heavy fine against a small union nor an insignificant fine against a large union can effectuate that goal. The enforcement provisions of the New York law include as a relevant factor in assessing fines the union's ability to pay. N.Y. JUDICIARY LAW § 751(2)(a) (McKinney Supp. 1969).

170. The effectiveness of a loss of dues check-off privileges has been discounted by David Seldon, President of American Federation of Teachers. According to him, the penalty of loss of check-off would mean perhaps a 15% reduction in dues collections, but "[w]e can always raise dues if we have to." GERR No. 282, at AA-6 (Feb. 3, 1969). Recent New York experience seems to indicate the contrary. Following the teachers' strikes during the decentralization disputes, the UFT's dues check-off privilege was suspended, and the PERB stated that it would not reinstate check-off until the union gave a no-strike pledge. Surprisingly, the militant union president, Albert Shanker, has given that pledge. The suspension reportedly cost the union some one million dollars in lost dues. GERR No. 313, at B-19 (Sept. 8, 1969). The effectiveness of loss of check-off was also indicated when a New York court, after a strike, assessed an \$80,000 fine and a suspension of check-off privileges against sanitationmen. Union spokesmen were said to view the check-off loss as the more onerous penalty, because the union's monthly dues intake of \$1,080,000 would then depend upon

There are other punitive sanctions possible, such as the loss of representation and punishment of leaders, but they are likely to be self-defeating. Loss of representation can be of no use in balancing the bargaining power except perhaps as a threat; the use of that extreme remedy does not contribute to a balancing, but simply removes one of the bargainers. Moreover, such loss of representation would hardly remove the strike threat, since a substantial number of strikes are concerned with the very issue of representation.<sup>171</sup> Similarly, punishment of union leaders is likely to have only a negative effect. Since its application comes after an impasse-strike situation has occurred, the punishment will very probably harden the union's resistance. In addition, the opportunity for martyrdom afforded to a militant leader may serve to intensify the dispute.<sup>172</sup>

On the whole, punitive and enforcement measures may have some value as a means of balancing relative bargaining power in situations in which a strike would be less costly to the union than to the governmental employer. When punitive measures are applied in such instances, they can probably help to shorten a strike and possibly to deter future strikes.<sup>173</sup> But if punitive measures are indiscriminately applied, without regard to their effects on the bargaining process, the ultimate result will almost certainly be to worsen labor relations by increasing the unions' militancy. Still worse, an indiscriminating application will probably aggravate any existing imbalance of power, since the measures will have their greatest effect on the already weak unions and will leave the powerful unions substantially unaffected.<sup>174</sup>

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voluntary contributions from each employee. GERR No. 232, at B-9 (Feb. 19, 1968). Even if Seldon's view is accurate, however, the penalty can still perform its function in balancing bargaining power. A strike will, in any event, be more costly to the union because of the loss of check-off; and thus potential gains from the strike are more likely to be discounted in advance.

171. But if the only penalty is loss of the right to be the *exclusive* bargaining representative, rather than loss of the right to represent at all, the effect may be somewhat less detrimental to labor relations. The employees would retain bargaining rights, but representation would be nonexclusive. Such an arrangement generally produces weak unions and might result in an excessive advantage for the employer. On the other hand, the result might be an increase in militancy as competing groups vie continuously for the employee's support.

172. The likelihood of that result was demonstrated by the New York City experience. Montana, *supra* note 38, at 275-78. The problem has continued under the Taylor Law. See Kheel, *supra* note 38, at 8-12. The practice of imprisoning union officials is deplored by almost all commentators including the Taylor Committee which advocated harsher penalties. Taylor Comm. Recommendations, Jan. 23, 1969, GERR No. 283, at G-1, G-6 (Feb. 10, 1969). But the committee views the question as one for the judiciary to decide in evaluating its contempt process. *Id.* at G-6.

173. But see note 169 *supra*.

174. In the application of New York's former Condon-Wadlin Law, for example, its penalties were invoked only five times prior to 1965, and then only against upstate

### C. Role of the Injunction in the Comprehensive Approach

A potentially more flexible approach to problems of balancing bargaining power is offered by the court injunction. Although the injunction has traditionally been just another weapon for a powerful public employer, it could, if it were applied selectively, reinforce the bargaining goals of a comprehensive scheme of labor relations in the public sector. For example, an injunction could be made mandatory for strikes which occur before the parties have complied with certain required steps in the bargaining process.<sup>175</sup> Courts could be required to determine, before issuing an injunction, that an employer has "clean hands" and otherwise satisfies the traditional criteria for equitable relief.<sup>176</sup> The judicial proceeding could be further integrated with the bargaining aids by requiring the court to consider a fact finder's report in disposing of the request for injunction. If the availability of injunctive relief were dependent upon such standards, both parties would be encouraged to comply in good faith with statutory bargaining procedures.

In some situations, however, there are inherent limitations upon the utility of the injunctive remedy to complement a comprehensive bargaining scheme. For instance, if the government, engaged in a

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unions which generally lack political power. Moreover, in New York City the Law was deliberately *not* invoked thirteen times, and was partially applied twice. Hildebrand, *supra* note 14, at 140. It seems doubtful that a punitive measure by itself could ever be fully effective against a powerful union. Indeed, to make punitive measures more effective, perhaps criminal penalties are required. In this connection, federal law provides that a striking governmental employee may be guilty of a felony and may receive up to a year's imprisonment and a \$1,000 fine. 5 U.S.C. §§ 118p(3), 118r (1964). Yet even so severe a penalty might be of limited effectiveness, especially in light of increasing union militancy; the federal law did not prevent the postal unions from repealing their traditional renunciation of the right to strike. GERR No. 258, at A-1 (Aug. 19, 1968). Nor did it prevent the air traffic controllers from engaging in a "sick out." GERR No. 302, at A-9 (June 23, 1969). Moreover, as the severity of the sanction increases, the likelihood of its enforcement decreases, since no governmental employer even remotely concerned with political survival is likely to brand a striker as a felon.

175. Michigan Report, *supra* note 84, at 16.

176. *Id.* The court in *School Dist. v. Holland Educ. Assn.*, 380 Mich. 314, 327, 157 N.W.2d 206, 211 (1968), suggests this criterion for weighing injunctive relief.

However, the approach was rejected outright by the New Jersey Supreme Court in *Board of Educ. of Union Beach v. New Jersey Educ. Assn.*, 53 N.J. 29, 43, 247 A.2d 867, 875 (1968). In that case the court held that lack of "clean hands" was no bar to injunctive relief when public welfare might be harmed. There are other difficulties, too, with the suggested approach. A court determination of whether a plaintiff has bargained in good faith might tend to infringe upon the determination of an unfair practice by the body initially responsible for that determination—in Michigan, the State Labor Mediation Board. MICH. COMP. LAWS ANN. § 423.215 (1967). Yet, a court's determination of this issue at the time of a requested injunction may be necessary if the good faith requirement is to have any balancing effect. Indeed, because unfair labor practice proceedings are notoriously slow, a prompt judicial determination may be crucial if the injunctive remedy is to have a positive influence on the bargaining process.

dispute with police or firemen, does not comply with its statutory duty to bargain in good faith, injunctive relief should theoretically not be available to it, since the availability of such relief is to encourage the employer to bargain in good faith. But because of the nature of the occupation involved, a strike would be wholly unacceptable, and a court would have to grant an injunction despite the employer's lack of good faith in bargaining. Recognition of such limitations on the use of injunctions, however, does not militate against the selective application of that remedy. Instead, it implies that there should be special provisions, such as compulsory arbitration, for critical occupations.

D. *Administration of a Comprehensive Program of  
Bargaining Aids and Controls*

Since application both of sanctions and of aids to collective bargaining should be aimed at the dual goals of equitable settlements and the prevention of strikes through an approximate balancing of bargaining power, it is of utmost importance that there be administrative machinery capable of effective and consistent pursuit of those goals. Previous portions of this Comment have suggested that the scheme of bargaining aids and controls should be administered by a state regulatory agency perhaps similar to New York's PERB.<sup>177</sup> Because of the need for a comprehensive and consistent approach, that agency should also have primary responsibility for implementation of enforcement sanctions. It should be empowered to assess fines for strike activities and to suspend check-off privileges.<sup>178</sup> The criteria for assessing penalties should be enumerated in the statute creating the agency and should be consistent with the aim of promoting an equitable balance. Thus, the statute could require that the amount of a fine or the duration of a suspension be increased if the union had not bargained in good faith, had gone on strike prior to exhausting supplementary procedures, or had engaged in an unfair labor practice. Similarly, it could provide that penalties for strike activity be lessened if the employer had failed to bargain in good faith or had otherwise been guilty of unfair labor practices. In assessing penalties, the regulatory agency should also consider the report of the fact finder con-

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177. N.Y. CIV. SERV. LAW § 205 (McKinney Supp. 1968). See note 88 *supra* and accompanying text.

178. The Taylor Law presently gives the PERB power to suspend check-off [N.Y. CIV. SERV. LAW § 210(3)(f) (McKinney Supp. 1968), *as amended*, ch. 24, § 8, [1969] N.Y. Laws 44 (McKinney Supp. April 10, 1969)], but fines may be levied only by a court, and then only for violation of an antistrike injunction [N.Y. CIV. SERV. LAW § 212(2)(a) (McKinney Supp. 1965), *as amended*, ch. 24, § 12, [1969] N.Y. Laws 47 (McKinney Supp. April 10, 1969)], not for the strike itself.

cerning abuses of good faith by each party, and it should take into account the size of the union and its ability to pay.<sup>179</sup>

The determination of penalties should be made in an administrative proceeding, with judicial review limited either to enforcement of the agency's order or to appellate consideration of whether the agency had abused its discretion. The suggested approach would offer the advantage of developing a specialized body of administrative decisions to apply to future disputes and to serve as guidelines for the parties to those disputes. If, for example, the parties know that under certain circumstances, penalties definitely will be imposed or a particular remedy will or will not be available, they can act to their best advantage. Assuming that the proposed scheme is successful in its design and application, that course of action would be to bargain in good faith and, it is hoped, to settle.

Another benefit of having a state agency responsible for administration is that the agency would relieve the courts of the burden of imposing sanctions for strikes. Excessive reliance on judicial enforcement appears to be at least partially responsible for the Taylor Law's lack of success in New York.<sup>180</sup> Under that law, the courts are enmeshed in the strike dispute from the beginning. When a strike occurs, the local government is required to seek an injunction<sup>181</sup> and the court is required to grant it.<sup>182</sup> Fines are imposed for violation of the court order, not for the strike per se.<sup>183</sup> Since any continued strike activity is categorized as an affront to judicial authority, the courts, not surprisingly, find it necessary to apply contempt powers, with the result that union leaders are sent to jail.<sup>184</sup> Such incarceration is almost universally deplored as counter-productive,<sup>185</sup> but that result must be expected if the contempt process is relied on to effectuate strike prevention.

By withdrawing the imposition of fines from the contempt function of the courts, a state would free the judiciary to exercise its authority in a more appropriate manner, namely, in granting injunc-

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179. The Taylor Law currently requires courts to take such factors into account in determining fines against the union. N.Y. JUDICIARY LAW § 751(2)(a) (Supp. 1969), *as amended*, ch. 24, § 12, [1969] N.Y. Laws 47 (McKinney Supp. April 10, 1969).

180. The manner in which an injunction is required continues under the Taylor Law unchanged from that under Condon-Wadlin, and it was that feature of the old law which was at least partly responsible for its demise. See Montana, *supra* note 38, Kheel, *supra* note 38.

181. N.Y. CIV. SERV. LAW § 211 (McKinney Supp. 1968).

182. N.Y. JUDICIARY LAW § 751 (McKinney Supp. 1969).

183. N.Y. CIV. SERV. LAW § 212(2)(a) (McKinney Supp. 1968), *as amended*, ch. 24, § 12, [1969] N.Y. Laws 47 (McKinney Supp. April 10, 1969).

184. See Kheel Report, *supra* note 38, at 9.

185. *Id.* See also Taylor Comm. Recommendations, Jan. 23, 1969, GERR No. 283, at G-1 (Feb. 10, 1969).

tive relief in emergency situations and in enforcing orders of the agency. Moreover, if injunctive relief is predicated upon traditional equitable criteria, and if the imposition of strike fines is divorced from the contempt process, respect for the judicial process should be enhanced.

If the imposition of sanctions is thus bifurcated, it will become necessary to ensure that disposition by the courts is consistent with the rest of the scheme for labor relations in the public sector. The aims of the law could be impaired, for example, if a court were to grant an injunction without due regard to the equities of the situation. Conversely, a court's refusal to issue an injunction in a critical situation could harm the public and could coerce a public employer to accept a settlement that is heavily weighted against him. Hence, an important consideration is determining which court should have jurisdiction to grant injunctive relief. Since local courts are apt to be more familiar with the complexities of the situation than are distant or specialized courts, those local courts appear to provide the more appropriate forum.<sup>186</sup> Considerations of convenience and flexibility support local court jurisdiction.<sup>187</sup> On the other hand, when one of the parties has undue leverage because of its local political muscle, that power may influence a local court, at least in a state where judges are elected locally. But that consideration should not be crucial in determining which court should have jurisdiction, because, despite the frequent political pressures in public sector labor relations, those pressures are likely to have no substantial effect on any court.<sup>188</sup> Indeed, such pressures are far less likely to affect courts than they are to affect other governmental bodies.<sup>189</sup> In any event, the possibility that political pressures might

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186. See Michigan Report, *supra* note 84, at 15.

187. The flexibility of disposition possible in a local court was recently illustrated in an action brought against striking teachers by the Board of Education in Plymouth, Michigan. *Plymouth Community School Dist. v. Adas*, No. 4381 (Mich. Cir. Ct. for Washtenaw County, filed Sept. 18, 1969). The Plymouth Board of Education presented a *prima facie* case of "irreparable harm" by alleging that a consequence of continuing the strike would be the loss of state aid. But since the Board had sued the individual teachers rather than their organization, the court may have felt that granting the relief requested would have gone counter to traditional judicial reluctance to grant specific performance in situations involving personal services employment. The court evaded the dilemma by, in effect, ordering the parties to settle. After two days of enforced bargaining in chambers, the parties reached agreement, and the strike was terminated. It is doubtful that an equally desirable result could have been obtained under a more distant and perhaps more specialized and inflexible court.

188. When a judge is elected, for example, his term of office tends to be quite long, thereby reducing the probability of adverse political consequences from any single decision. Moreover, he may have a large enough constituency to be able to avoid identification with the local government or with a single group of public employees. See note 189 *infra*.

189. Not only does a judge have a longer term, but his constituency may differ

influence the decision of a local court can be minimized by the statutory provision of standards to govern the issuance of an injunction. A court's failure to consider the fact finder's report, for example, could furnish grounds for appellate reversal. By thus circumscribing the discretion of the local court, the statute can help to ensure that the issuance of injunctions will not impair the goal of effective bargaining. The statute might further require that the court make written findings in support of its decision. Such a requirement would be an aid in supervising local courts and in encouraging their compliance with statutory standards.

Although the courts must aid in the administration of a comprehensive approach to bargaining in the public sector, the public agency probably plays an even more crucial role, and consequently the nature of control over that agency is of fundamental importance. Should the agency be independent or should it be subject to political control? On the one hand, independent regulatory agencies are widely believed to be subject to capture by those whom they regulate.<sup>190</sup> But on the other hand, if the body were subject to direct political control, it might become controlled by a partisan political group.

The possibility that an independent body would be captured by interested parties seems unlikely in the field of public employment. As some have argued, the capture of regulatory agencies is usually made with the approval of the political authority,<sup>191</sup> and such approval would probably not be given in the public sector, since capture by employee interests would be in opposition to the political authority and capture by the political authority or the government itself would immediately destroy the credibility and effectiveness of the entire scheme. Moreover, even if capture can be a significant danger, it is less likely to occur in an agency which regulates more than one interest. Finally, if the members of a public employment relations board are properly chosen, neither management nor labor should have a monopoly on representation.

The extent to which there should be political control of the agency is a difficult question in light of the inherent political as-

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significantly from that of a governmental executive. For instance, a judge may be elected from a county constituency rather than from a single municipality. As a result, a judge is not as likely as is a member of the government to be identified with the public employer, nor is he as likely to be vulnerable to the pressures of a single employee group.

190. See, e.g., M. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 155 (1955). See also K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1.03 (1958), and citations therein.

191. K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1.03 (1958); Jaffe, *The Effective Limits of the Administrative Process*, 67 HARV. L. REV. 1105-35 (1954).

pects of public employment.<sup>192</sup> Dangers of control by local governments or their employees can be minimized if establishment of the agency is on the state level. The problem of political control of the agency at that level by outstate interests unfriendly to labor does not seem to be a realistic possibility, because a state that is able to enact a public employee bargaining law in the first place is probably not so thoroughly controlled by antilabor interests that the agency would fall under their power. Finally, the danger that the state government might establish an agency simply to serve its own interests should be mitigated by the realization that such an agency, without apparent independence and objectivity, would be useless.

It thus appears that neither the threat of domination by special interests nor political control would present a substantial danger to the impartiality of a regulatory agency. Other considerations, however, militate in favor of a degree of independence. One of the purposes of resorting to a state regulatory body is consistency of administration, and that objective might be frustrated if the agency were subject to extensive personnel changes following each election. Moreover, the appearance of being divorced from politics would greatly enhance the bargaining parties' respect for the agency's decisions. Such independence could be achieved by the device of relatively long and staggered terms for members and by the imposition of statutory limitations on the representation of a single political party.<sup>193</sup>

Despite the many benefits of a comprehensive plan for public sector labor relations, however, there are inherent limitations upon what can be accomplished under that type of plan. A bargaining scheme is basically a method for institutionalizing dispute resolution, and the nature of public employment ensures that some disputes simply will not be susceptible to such resolution. It is difficult to imagine, for example, that the New York City school decentralization dispute could have been settled through an established comprehensive plan. Moreover, to the extent that bargaining itself is confined by limitations on state governmental powers and finances, political recourse will inevitably be necessary when those limits are reached.<sup>194</sup> Disputes with such great political dimensions probably can be resolved only by an ad hoc legislative disposition; and for that reason, it seems futile to attempt to deal with them in a general bargaining scheme whose goal should be to establish procedures by which ordinary public sector labor disputes can be resolved.

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192. See text following note 68 *supra*.

193. The New York PERB is structured in this manner. N.Y. CIV. SERV. LAW § 205(1) (McKinney Supp. 1968).

194. See notes 121, 143 *supra* and accompanying text.

## V. CONCLUSION

Attempts to achieve reasonable and equitable settlements of employment disputes in the public sector continue to be plagued by two conflicting approaches to the problem of strike prevention. One seeks this goal through outright prohibition, while the other strives to avoid strikes by promoting collective bargaining on the private sector model. Neither approach by itself is satisfactory, existing combinations of the two provide little help, for they seemingly attempt to apply each approach without regard for the effects of the other. It seems likely that if the seemingly irreconcilable goals of strike prohibition and equitable collective bargaining are to be achieved, it will be through a planned blending of the two approaches. But the combination must aim toward neither the traditional punitive concept of strike prohibition nor adoption of the private sector analogy for bargaining. Instead, the aim should be to apply a variety of methods selectively with a view toward effectuating an approximate balance of the bargaining power. The Michigan Supreme Court in *Holland* has moved in that direction by making the issuance of injunctive relief dependent upon equitable considerations and by attempting to encourage resolution of disputes at the bargaining stage.<sup>195</sup> Nevertheless, courts are limited in this regard; and the effectiveness of such decisions is hampered by the absence of adequate legislation to regulate and encourage collective bargaining.

The desired balance of bargaining power can be promoted with a variety of techniques. But the effectiveness of each depends upon the circumstances in which it operates and upon the other techniques with which it is combined. If bargaining power is to be effectively balanced, there must be integration of techniques toward a *common* goal, rather than the present bifurcation in which bargaining aids such as mediation and fact-finding are applied in an attempt to emulate labor relations of the private sector, while, at the same time, fines and penalties are used indiscriminately for punishment. Undoubtedly, no single approach will be satisfactory for all states, since the factors influencing bargaining power vary so widely. But if the diverse goals of strike prevention, effective collective bargaining, and equitable settlements are to be attained in the public sector, where the militancy of employees is ever-increasing, continued efforts to develop a workable approach are imperative.

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195. 380 Mich. 314, 327, 157 N.W.2d 206, 211 (1968).