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STATE AND LOCAL ADVISORY REPORTS ON PUBLIC EMPLOYMENT LABOR LEGISLATION: A COMPARATIVE ANALYSIS

*Russell A. Smith**

RECENT years have witnessed a tendency on the part of state and local governmental authorities, executive and legislative, to establish advisory groups to make recommendations concerning public employment labor relations legislation.¹ In addition, the National Governors' Conference in 1966 created a "Task Force on State and Local Government Labor Relations" which, with the support of a grant from the Carnegie Foundation, made a study of labor relations policy in the public sector. In 1967, this group made its report, which contained a significant set of "findings" by an ad hoc Advisory Committee.² These reports are tangible evidence of an increasing realization by public officials and the general populace

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1. President Kennedy established a precedent for the advisory-group approach at the state level by his appointment in 1961 of a "President's Task Force on Employee-Management Relations in the Federal Service." This group was headed by then Secretary of Labor Arthur Goldberg. The Report, sometimes referred to as the "Goldberg Task Force Report," was implemented in 1962 by Executive Order 10,988 [3 C.F.R. 521 (1959-1963 compilation)] which, for the first time, established as a general policy at the federal level, rights of unionization and collective bargaining for employees of most federal agencies. The executive order provided for several varieties of "recognition," including exclusive representation in appropriate units under certain circumstances. It required federal agencies to engage in collective bargaining with organizations having exclusive bargaining rights, and to grant other forms of "recognition" to organizations not having such rights. The executive order denied a right of recognition to any organization asserting the right of federal employees to strike, and it excluded certain managerial areas from the scope of collective bargaining. The order left bargaining unit determination within the control of the employing agency. Specific sanctions for violation of the obligations imposed on the agencies were not stipulated, nor was any tribunal given authority to enforce such obligations. The Civil Service Commission, however, was charged with the development of "a program to assist in carrying out the objectives" of the order. In so doing, it has issued in the form of guidelines, "Standards of Conduct for Employees Organizations and Code of Fair Labor Practices."

2. Report of the Task Force on State and Local Government Labor Relations. (This Report was published by the Public Personnel Association, which has granted permission for quotations that appear in this Article.) Governor Smith, of West Virginia, noted in his Letter of Transmittal to the National Governors' Conference that the Task Force study had a fourfold mission:

1. To provide information essential to the formulation of a sound philosophy on many facets of government-employee relations.
2. To furnish a frame of reference for the consideration of legislative and administrative measures.
3. To identify critical issues and policies, alternative ways of handling them, and to assess their impact on the public service.
4. To draw on the relevant private sector experience in a public sector setting.

There has since been issued a 1968 supplement to the Task Force Report (also published by the Public Personnel Association).

that public employee "unionism," with its attendant problems, has emerged as the most significant development in American labor relations in the last decade.

The reasons for public concern are obvious. First, there has been a rapid increase in the proportion of the total work force employed by various levels of government.³ Unionism in the private sector has apparently reached a plateau both in terms of the level of management-employee involvement and in conceptualization of underlying dispute settlement philosophies, procedures, and legal structures. In marked contrast, the public sector has become the focus of increasingly successful organizational efforts by unions and certain professional associations seeking collective bargaining rights on behalf of public employees—teachers, policemen, fire fighters, sanitation workers, transit workers, and others. At the same time, public policy—with certain notable exceptions emerging only in recent years—has been essentially adverse to attempts at unionization and collective bargaining in the public sphere.⁴

A large number of states and some municipalities have repudiated past policies adverse to self-organization in the public sector by enacting legislation granting rights of unionization and collective bargaining to public employees,⁵ but the traditional prohibition against strikes by public employees remains unchanged. Yet, as anyone who reads the newspapers knows, public employees have been increasingly prepared to resort to strikes in open defiance of the law. This is true even in the case of policemen and firefighters—employees whose services are regarded as essential to the community. Thus, the grant of organizational and bargaining rights to public

3. Stieber, *Collective Bargaining in the Public Sector*, in *THE AMERICAN ASSEMBLY, CHALLENGES TO COLLECTIVE BARGAINING* 65 (1965).

4. See generally Smith & Clark, *Reappraisal of the Role of the States in Shaping Labor Relations Law*, 1965 WIS. L. REV. 411, 421-25; Stieber, *supra* note 3.

5. CALIF. GOVT. CODE §§ 3500-11 (West Supp. 1968) (excluding school district employees); CONN. GEN. STAT. ANN. §§ 7-467 to -478 (Supp. 1969) (municipal employees); CONN. GEN. STAT. ANN. §§ 10-153b to d (Supp. 1969), § 10-153f (1967) (teachers and school superintendents); DEL. CODE ANN. tit. 19, §§ 1301-13 (Supp. 1966); MASS. ANN. LAWS ch. 149, §§ 178G-N (Supp. 1967) (municipal employees); MASS. ANN. LAWS ch. 149, § 178F (Supp. 1968) (state employees); MICH. COMP. LAWS ANN. §§ 423.201-216 (1967) ("Hutchinson Act"); MINN. STAT. ANN. §§ 179.50-58 (1966); MO. REV. STAT. §§ 105.500-530 (Supp. 1968); N.Y. CIV. SERV. LAW, §§ 200-12 (McKinney Supp. 1968) ("Taylor Law") [The present version of this law, as amended by a bill passed on March 4, 1969 (effective April 1, 1969), appears in Government Employee Relations Report, No. 288, at F-1 (March 17, 1969).]; ORE. REV. STAT. §§ 243.710-780 (1967); R. I. GEN. LAWS §§ 28-9.1 to -14 (1969) (Fire Fighters); R. I. GEN. LAWS §§ 28-9.2-1 to -14 (1969) (policemen); R. I. GEN. LAWS §§ 28-9.3-1 to -16 (1969) (teachers); R. I. GEN. LAWS §§ 28-9.4-1 to -19 (1969) (municipal employees); R. I. GEN. LAWS §§ 36-11-1 to -6 (Supp. 1967) (state employees); VT. STAT. ANN. tit. 21, §§ 1701-05 (Supp. 1968) (municipal employees); WIS. STAT. ANN. §§ 111.70(1) to (5) (Supp. 1969) (municipal employees); WIS. STAT. ANN. §§ 111.80-94 (Supp. 1969) (state employees); WASH. REV. CODE ANN. tit. 41.56 (Supp. 1967).

employees has left unresolved many important legal and social issues, including—some would argue⁶—the very premises underlying the modern legislation. Also unresolved are problems of accommodating public employee collective bargaining (with or without a legal right to strike) with serious public concern over the subject areas and impact of that bargaining.

In this context, the reports of the various advisory groups may appropriately be regarded as an important body of opinion concerning public sector unionization. This, I assume, is why the editors of the *Michigan Law Review* concluded that a discussion of them should be included in this Symposium. Instead of focusing on two or three of the more recent and highly publicized reports, I will discuss most of them, recognizing that space limitations necessarily preclude a comprehensive treatment of each.

The reports surveyed in this Article will be designated by reference to the state or other governmental unit with which each is associated. The reports are, in chronological order, the Connecticut Report of February 1965,⁷ the Minnesota Report of March 1965,⁸ the Rhode Island Report of February 1966,⁹ the New York ("Taylor Committee") Report of March 1966,¹⁰ the Michigan Report of

6. See generally Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 93 (1969).

7. Report of the Interim Commission To Study Collective Bargaining by Municipalities. This report was issued by an eleven-member commission established by Public Act No. 495 of the 1963 Connecticut General Assembly. The Commission, composed of municipal officials, employer organization officials, state legislators, and academicians, was chaired by Professor Robert Stutz of the University of Connecticut.

8. Report of the Governor's Committee on Public Employee Labor Relations Laws. The Committee was appointed by Governor Carl F. Rolvaag and consisted of representatives of labor, public employer management, and the academic community. Its chairman was Judge William D. Gunn of the Minnesota District Court.

9. This was a report of a Commission To Study Mediation and Arbitration created by the Rhode Island General Assembly. The Commission consisted of four members from the house of representatives, three from the senate, and four from the "public," appointed by the Governor. The Report resulted in the enactment of the Rhode Island Teachers Arbitration Act. R.I. GEN. LAWS ANN. § 28-9.3-1 (1968).

10. Governor's Committee on Public Employee Relations, State of New York, Final Report, March 31, 1966. Excerpts of the report are reproduced in GOVERNMENT EMPLOYEE RELATIONS REPORT [hereinafter GERR] No. 135, at D-1 to D-2 (April 11, 1966). The Governor's Committee also submitted two subsequent reports, a first Interim Report on June 17, 1968, and a second Interim Report on Jan. 23, 1969. The "Governor's Committee on Public Employee Relations" was appointed by Governor Nelson Rockefeller. The members of the Committee were George W. Taylor, Chairman, E. Wight Bakke, David L. Cole, John T. Dunlop, and Frederick H. Harbison—all well-known labor relations experts.

Mention should also be made of the Report of the New York City Tripartite Panel To Improve Collective Bargaining Procedures (1966). This Panel was appointed by Mayor Wagner, and its report formed the basis for the establishment, by charter, of the Office of Collective Bargaining. This agency has jurisdiction to decide representation questions, provide mediation services, appoint collective bargaining "impasse panels," and provide for grievance arbitration. The report also served as the basis for the enactment of the New York City Collective Bargaining Law (Administrative Code, ch. 54, Local Law 53-1967), and the issuance in September 1967 of Executive Order

February 1967,¹¹ the Illinois Report of March 1967,¹² the New Jersey Report of January 1968,¹³ the Pennsylvania Report of June 1968,¹⁴ and the Los Angeles County Report of July 1968.¹⁵ The "findings" made by the National Governors' Conference Task Force Report will not be included in this survey, but this omission carries no invidious connotation. The Task Force Report is required reading for anyone interested in public employment relations because it contains, in addition to a general bibliography, an excellent analysis of the problems presented by public sector unionism and much valuable factual documentation of existing laws.

I. PURPOSE AND IMPACT OF THE REPORTS: AN OVER-ALL APPRAISAL

The task assigned to most of the advisory groups by their respective governmental units was very broad: What kind of a statutory policy on public employee unionism should the particular jurisdiction adopt? There was no legislation granting rights of unionization to public employees in Connecticut, Minnesota, New York, Illinois, or Los Angeles County prior to the appointment of the advisory committees. In New York, the legislation in effect at the time of the report—the Condon-Wadlin Law¹⁶—simply prohibited strike action under threat of repressive penalties. Thus, Condon-Wadlin not only provided for automatic dismissal of any striking employee, but also specified that should he subsequently be rehired, he would be ineligible for higher pay until three years after the strike. Moreover, he

No. 52. Under these provisions, rights of unionization and collective bargaining are conferred on employees of City agencies other than the Board of Education.

11. A Governor's Advisory Committee on Public Employee Relations was appointed by Governor George Romney in July 1966. The members of the Committee were the author (as chairman), Gabriel N. Alexander, Edward L. Cushman, Ronald W. Haughton, and Charles C. Killingsworth.

12. The Governor's Advisory Commission on Labor-Management Policy for Public Employees was appointed by Governor Otto Kerner, and included representatives from labor, management, the state legislature, and universities. Professors Martin Wagner and Milton Derber of the University of Illinois served as Chairman and Vice Chairman, respectively.

13. The New Jersey Public and School Employees' Grievance Procedures Study Commission was established pursuant to a mandate of the New Jersey legislature. The Commission consisted of twelve members, two from the senate, two from the assembly, and eight appointed by the Governor. The Chairman was Marver H. Bernstein.

14. The Governor's Commission To Revise the Public Employee Law of Pennsylvania was appointed by Governor Raymond P. Shafer. The Commission consisted of Chairman Leon E. Hickman, eight "citizen members," and two members of the legislature.

15. A Consultants' Committee was appointed by the Board of Supervisors of Los Angeles County to recommend an employee relations ordinance for Los Angeles County. The Committee consisted of Benjamin Aaron, Chairman, Lloyd H. Bailer, and Howard Block.

16. 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).

was to remain on "probation" for five years. Since none of the existing laws had proved effective in preventing strikes, the problem in each jurisdiction was to start afresh and frame a new kind of policy.

By the time the Michigan Advisory Committee was created, Michigan had already adopted its 1965 Public Employment Relations Act,¹⁷ which granted rights of unionization to public employees and reversed an earlier negative policy similar to that of New York. The Michigan Committee, established in the context of an anticipated school strike emergency in the fall of 1965, was requested to reassess the basic policies reflected in the 1965 Act and to determine whether there were any serious deficiencies in that law which should be corrected immediately.¹⁸ The recommendations of the Michigan group have yet to receive legislative approval, although there has been strong support for some of the proposals.

The New York Report contains the best in-depth analysis of the unique characteristics of state and local public employment relations bearing upon the question whether and within what limits public policy should accord rights of unionization and collective bargaining to public employees. The Illinois Report (influenced, I suspect, considerably by the work of the Taylor Committee) also deserves special commendation for its treatment of the relevant policy issues. This report was the more remarkable because, despite the tripartite composition of the Governor's Advisory Commission, it achieved substantial unanimity in its conclusions. Although the recommendations of the Illinois Commission reached the state legislature, they foundered there in part because of disagreement within the ranks of labor.¹⁹

The Connecticut, Illinois, and Los Angeles reports contain the most complete treatment of the details of proposed legislation. Indeed, the Connecticut and Los Angeles reports respectively incorporated a draft statute and ordinance which in all essentials

17. MICH. COMP. LAWS ANN. § 423.201-216 (1967). For a discussion of the 1965 Act, see Howlett, *Michigan's New Public Employment Relations Act*, 45 MICH. ST. B.J. 12 (1966); GERR No. 206, at E-1 (Aug. 21, 1967), which contains the text of the speech, "Michigan's Experience with Public Employee Bargaining," delivered by Robert G. Howlett, Chairman of the Michigan Labor Mediation Board, to the Annual Convention of State Labor Relations Agencies.

18. See GERR No. 181, at F-7 (Feb. 27, 1967).

19. Most unions favored some form of legislation similar to that recommended by the Commission. However, they disagreed vehemently among themselves over the strike issue: some groups, including the American Federation of State, County, and Municipal Employees, were willing to accept a "no-strike" provision in order to obtain rights of self-organization and collective bargaining; other groups refused to accept any legislation which contained a ban on strikes. See Derber, *Labor-Management Policy for Public Employees in Illinois: The Experience of the Governor's Commission*, 21 INDUS. & LAB. REL. REV. 541, 552 (1968); GERR No. 199, at B-4 (July 3, 1967); GERR No. 212, at B-13 (Oct. 2, 1967).

subsequently became law in those jurisdictions.²⁰ Measured in terms of legislative response, these reports, together with the Minnesota, New Jersey, and Rhode Island reports, were the most successful. The New York Report also engendered an important legislative response, although the Committee's basic recommendations, as modified, did not receive legislative approval until the second legislative session after the Report was issued.²¹ The Pennsylvania Report, on the other hand, seems doomed, at least for the present, to remain part of the archives. Governor Shafer has indicated his outright rejection of the Report's basic approach on the strike issue and has proposed his own set of alternatives.²²

II. AREAS OF GENERAL CONSENSUS

The advisory groups appear to be in general accord on certain matters of fact and on at least some basic principles which should be accepted as public policy. First, they agreed that there are certain salient differences between private and public employment relations which will necessarily affect the characteristics of collective bargaining in the public sector. One result of this is that three decades of experience with governmental regulation of private labor relations may not be directly applicable to the settlement of disputes in the public sector. Second, panels agreed that, despite such differences, public policy should accord to public employees rights of self-organization and unionization similar to those accorded in the private sector—including some form of collective bargaining. Public employees should also enjoy the same freedom of choice which private sector employees have under the Taft-Hartley Act to refrain from unionization if they so desire.²³

The reports generally recommended that appropriate legislation be broad enough in scope to cover all or most categories of governmental employees. Thus, under most proposals, the range of coverage would include blue-collar as well as white-collar workers, public school teachers, police and fire fighters, and, in some instances, even supervisory employees. The Michigan Committee, however, had to take into account an existing constitutional provision which probably has the effect of making those employees of the state government who are subject to the jurisdiction of the constitutionally created

20. CONN. GEN. STAT. REV. §§ 7-467 to 27-475 (1965); LOS ANGELES COUNTY ORD. No. 9,646 (1968).

21. N.Y. CIV. SERV. LAW §§ 200-12 (McKinney Supp. 1968), *amending* ch. 790, art. VII, tit. C, § 108, [1958] N.Y. LAWS, N.Y. JUDICIARY LAW § 751 (1948).

22. *See* GERR No. 252 (July 8, 1968). *See* GERR No. 267, at E-1 (Oct. 21, 1968), for the alternative proposal by Governor Shafer.

23. Taft-Hartley Act § 7, 29 U.S.C. § 157 (1964).

Civil Service Commission exempt from any labor relations legislation.²⁴ Although the Committee acknowledged this situation, it recommended that the Civil Service Commission, in its own discretion, adopt the substance of official state policy on rights of public employee unionization and collective bargaining.²⁵

The advisory groups agreed that public sector labor legislation should include a prescribed set of public employer obligations toward employees and employee unions modeled after the code of employer unfair labor practices in the National Labor Relations Act (NLRA).²⁶ In addition, the panels usually proposed that a set of complementary obligations be imposed on labor organizations and employees. Here, however, the NLRA model was only partially followed. Thus, the groups typically recommended that coercive measures to impose unionization upon employees or attempts to induce public employers to impose such constraints should be prohibited. Moreover, in the event an organization acquires bargaining rights, there should be a requirement of good faith collective bargaining with the employing agency. But, the advisory panels seem to have evidenced little concern with the other kinds of union "unfair labor practices" specified by the NLRA—secondary boycotts, organizational and recognitional picketing, and strikes in support of jurisdictional disputes. The explanation for this is not clear. If we are to continue a "no-strike" policy in the public sector, it would seem that other kinds of concerted coercive action in support of collective bargaining demands should also be prohibited. Organizational and recognitional picketing and strikes in support of jurisdictional disputes could present the same kinds of problems in the public sector as they do in the private sector.

It was generally agreed that public sector labor legislation should embrace the principle of exclusive recognition of the union or organization selected by the majority of employees in a defined bargaining unit. Here again, the NLRA obviously had its influence on the advisory panels.²⁷ The New York and Los Angeles reports, however,

24. The Public Employment Relations Act purports to be a broad exercise of jurisdiction. With respect to state employees, it provides: "The provisions of this Act as to state employees within the jurisdiction of the Civil Service Commission shall be deemed to apply insofar as the power exists in the Legislature to control employment by the state or the emoluments thereof." MICH. COMP. LAWS ANN. § 423.204a (1967). However, the Michigan Constitution provides: "The legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the State classified Civil Service." MICH. CONST. art. IV, § 48.

25. GERR No. 181, at F-2, F-6 to F-7.

26. NLRA § 8(a), 29 U.S.C. § 158(a) (1964).

27. The principle of "exclusive recognition" is incorporated in section 9 of the NLRA, 29 U.S.C. § 159(a) (1964), along with criteria of a general nature followed by the National Labor Relations Board in defining an "appropriate bargaining unit."

indicated a somewhat different and more cautious approach than the NLRA in handling "representation" matters.²⁸

With the exception of the Pennsylvania Report, which would permit strikes in certain circumstances, all the reports agreed that legislation on public sector employment relations should continue the "no-strike" policy traditionally applicable to public employees.²⁹ As will be noted, however, the groups differed on the rigorosity of the sanctions which should be applied to vindicate this policy.³⁰

All the reports emphasized the necessity of devising effective dispute settlement procedures to take the place of strikes. Although it was generally recognized that the government has a responsibility to provide more than mediation services, the proposals for intervention beyond mediation showed little originality. The formula usually suggested was "fact-finding" with accompanying public recommendations. Compulsory arbitration was rejected³¹ except in the Michigan³² and Rhode Island reports, in which it was recommended on a limited basis only. None of the reports displayed the kind of ingenuity (some would say disingenuousness) to be found in the recently enacted Canadian national legislation,³³ recommended by an advisory commission.³⁴

III. AREAS OF DISAGREEMENT ON SUBSTANCE OR APPROACH

A. Administration and Enforcement

While there was general agreement that the resolution of representation issues and the enforcement of the unfair labor practice pro-

28. The New York recommendation was merely for further study. N.Y. Report 29-30. The Los Angeles recommendation was for recognition of only one organization, that which represents a majority. Such representation would not be exclusive. L.A. Report 23.

29. See pt. III.D.1. *infra*.

30. See pt. III.D.2. *infra*.

31. See pt. III.E. *infra*.

32. GERR No. 181, at F-3.

33. The Public Service Staff Relations Act was enacted in February 1967, c. 72, [1966-67] Can. Stat. This legislation, which applies only at the national level, grew in large part out of the work of a Preparatory Committee on Collective Bargaining in the Federal Civil Service established in 1963. The statute contains a number of very interesting features, the most significant of which from the American point of view, is the provision permitting a labor organization to "opt" either for a strike or for arbitration in connection with contract-term collective bargaining. The option has to be taken in advance of a collective bargaining period and can be revised annually. Certain subject matters are excluded from the arbitration process, and employees whose duties are deemed by the parties or the government to be "necessary in the interest of the safety or security of the public" are forbidden to engage in a strike.

34. For a comparison of the Canadian Public Service Staff Relations Act to the United States Executive Order No. 10,988, 3 C.F.R. 521 (1959-1963 Compilation), see the report of the Canada-United States Conference on Labor Relations in GERR No. 273, at A-2 (Dec. 2, 1968); see also Arthurs, *Public Interest Disputes in Canada: A Legislative Perspective*, 17 BUFFALO L. REV. 39 (1967); Arthurs, *Collective Bargaining in the Public Service of Canada: Bold Experiment or Act of Folly?*, 67 MICH. L. REV. 971 (1969).

hibitions should be handled by an administrative agency, the reports differed on whether a single agency should administer both the private sector law and the public sector law. The Connecticut panel recommended that the same agency which administers the state's private sector labor legislation should also be given jurisdiction over public employment labor relations.³⁵ In Michigan, the 1965 Act had already vested jurisdiction over public employment relations in the State Labor Mediation Board³⁶—the same agency which administers the private sector legislation. The Michigan Committee, although listing the question of separate administration as a matter deserving further study, was not convinced that separation of administration was of such importance that it should be given immediate consideration.³⁷

The Taylor Committee contemplated administration of the proposed public sector legislation by a new agency—the Public Employment Relations Board—independent of the tribunal which administers New York's private sector labor law;³⁸ this recommendation was ultimately embodied in New York's so-called Taylor Law.³⁹ The New York Report did not indicate the rationale behind its proposal for separate administration. The clear implication, however, is that since novel approaches may be required to deal with the unique problems of unionism in the public sector, the necessary expertise should be permitted to develop unhampered by any preconceptions associated with the administration of private sector legislation. Presumably, there is merit in this approach, although budgetary and other practical political constraints may dictate the solution in particular states. The New Jersey Commission's approach, for instance, had some unique aspects. Its position represented an amalgam drawn from the experience of other states and from practical considerations deemed appropriate to New Jersey. The Commission believed "that the experience of the private sector in dispute settlements should be applied to public employment when it is relevant and that functions of administration and enforcement that are pertinent only to public employment should be organized separately."⁴⁰ It therefore recommended the creation of a single governmental agency charged with the responsibility for invoking a variety of dispute settlement procedures short of compulsory arbitration in both the public and

35. GERR No. 81, at D-4 (March 29, 1965).

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

37. GERR. No. 181, at F-12 (app.).

38. N.Y. Report 22.

39. N.Y. CIV. SERV. LAW §§ 200-12 (McKinney Supp. 1968). [The present version of this law, as amended by a bill passed on March 4, 1969 (effective April 1, 1969), appears in GERR, No. 288, at F-1 (March 17, 1969).]

40. GERR No. 229, at D-7 (Jan. 29, 1968).

private sectors. It proposed a separate agency to deal with problems of representation and unfair practices in the public sector.⁴¹

Another procedural problem is whether, following the model of the NLRA,⁴² the agency charged with administering the public sector legislation should have both prosecutorial and adjudicatory functions. The Connecticut Report suggests that the appropriate administrative agency should have both functions.⁴³ However, in practice, the burden is on the complainant to prosecute his claim before the agency.⁴⁴ The New York and Los Angeles Reports are unclear on this point,⁴⁵ and the implementing legislation in both jurisdictions is also somewhat ambiguous.⁴⁶ In practice, the New York Public Employment Relations Board appears to follow closely the model of the NLRA: the Board's counsel can file charges and act as the prosecuting agent before the Board for both strike charges and claims of employer reprisals. In the case of Los Angeles, it was apparently contemplated that the ultimate decision should be left to the discretion of the Employee Relations Commission itself.⁴⁷ The Commission has not yet adopted formal rules defining whether it will undertake a prosecutorial role in addition to its adjudicatory function, but it is clear that the Commission does have an important investigatory responsibility.⁴⁸ The Illinois Report, on the other hand, stated categorically that the proposed Illinois Public Relations Board should have no investigatory or prosecutorial functions in unfair practice cases and that each complainant should be responsible for prosecuting his own claim.⁴⁹ The rationale was that it would be unwise to combine in any single agency both the functions of "prose-

41. The resulting New Jersey statute did not fully implement these recommendations. See New Jersey Employer-Employee Relations Act, N.J. STAT. ANN. §§ 34:13A-1 to -11 (Supp. 1968), amending N.J. STAT. ANN. §§ 34:13A-1 to -13 (1959).

42. Under the NLRA, all investigative and prosecutorial functions are lodged with the Office of the General Counsel, which exercises final authority on behalf of the NLRB in this area. NLRA § 3(d), 29 U.S.C. § 153(d) (1964). This approach could certainly be followed under state legislation on public employee unionism, provided public interest in the vindication of the statutory policies is sufficiently strong to justify the assumption of a public prosecutorial function. Such mundane considerations as costs in relation to the total work load of the agency could be determinative of this question in some jurisdictions. Assuming the prosecutorial function is invested in a public agency, a further question is whether the "prosecutor," upon filing a charge, should have exclusive jurisdiction over the matter from that point on. This question is not answered in any of the reports.

43. GERR, No. 81, at D-1.

44. Telephone interview with John A. Gaspic, agent of the state labor relations board in Hartford, Conn., Feb. 25, 1969.

45. See N.Y. Report 36; L.A. Report 31-32.

46. N.Y. CIV. SERV. LAW § 205(5) (McKinney Supp. 1968); L.A. COUNTY ORD. No. 9,646, § 7(g) (1968).

47. Telephone interview with Lloyd H. Bailer, Chairman of the Los Angeles Employee Relations Comm., Feb. 26, 1969.

48. *Id.*

49. GERR No. 184, at D-11 (March 20, 1967).

cutor and judge.”⁵⁰ The Michigan State Labor Mediation Board, although apparently empowered under the 1965 Act to establish a prosecutorial arm,⁵¹ has not yet done so. The Michigan Committee, however, did not regard this as a priority item.

The reports typically assumed that the appropriate administrative tribunal would have discretion, supported upon review by the courts, to impose sanctions for substantive violations of the governing law on public employee unionism. Again, the procedures followed under the NLRA undoubtedly provided the model.⁵² The Los Angeles group’s recommendations, however, were unique: an Employee Relations Commission would have jurisdiction over charges of unfair practices committed either by the County or by a labor organization. Upon a finding by this Commission of an unfair practice by an employee organization, “the County would be free to take such action as it deemed necessary under the circumstances,” subject to authority in the Commission to review any action claimed to be “immoderately punitive.”⁵³ The Report was somewhat ambiguous, however, on the question whether a Commission order against the County Board of Supervisors would be legally enforceable.

B. *Representation Issues*

The reports recognize two basic kinds of representation issues. The first relates to the issue of exclusivity: Is an employee organization to be recognized as the bargaining agent for union members alone, or for all employees in a defined “bargaining unit”? The second issue, which assumes acceptance of the principle of exclusive representation, concerns the establishment of suitable criteria for the definition of bargaining units. The Connecticut, Illinois, Minnesota, New Jersey, and Pennsylvania reports followed the model of the NLRA and subscribed to the principle of exclusive representation. The exclusivity principle had already been adopted in the Michigan legislation of 1965,⁵⁴ and the Michigan Committee did not advocate a change.

The New York and Los Angeles reports were more cautious on the issue of exclusivity. Indeed, the Taylor Committee proposed that the newly established Public Employment Relations Board “should make the problem of exclusivity . . . the focus of continuing study looking toward recommendations for legislation.”⁵⁵ In the

50. *Id.*

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

52. *See* NLRA § 10, 29 U.S.C. § 160 (1964).

53. L.A. Report 30.

54. MICH. COMP. LAWS ANN. § 423.211 (1967).

55. N.Y. Report 30.

meantime, the matter of exclusivity should be left "to agreement between the parties and to fact-finding boards."⁵⁶ This recommendation was implemented in the 1967 New York legislation⁵⁷ which replaced the Condon-Wadlin Law.

The Los Angeles Report included the following observations:

... We believe that after some stability has been established in employee representation units and the parties have accumulated some experience in the conduct of collective relations under the ordinance, the issue of exclusive representation should be given careful reconsideration. Exclusive representation tends not only to enhance administrative efficiency, but also to increase the responsibility as well as the power of the employees' exclusive representative. An organization having exclusive representation status speaks for all employees in the appropriate unit; but by the same token, it is legally bound fairly to represent each employee in that unit, whether or not he is a member of the organization.

Under present circumstances, however, we do not think it feasible to provide for exclusive representation rights in the recommended ordinance. . . . To grant any organization exclusive representation at the opening stage of collective relations under the ordinance would tend to make subsequent unit determinations less flexible and might give that organization an unfair advantage over others.⁵⁸

However, the Report recommended that formal recognition be accorded to the organization selected by a majority of the employees in an appropriate unit. "Status as majority representative would entitle the organization to negotiate with the management of that unit and to insist that any agreement reached be embodied in a written instrument signed by both parties."⁵⁹ This recommendation might appear to be somewhat inconsistent with the Commission's previous observations rejecting the notion of exclusive bargaining rights. Apparently, the answer is that while an organization could be certified to represent a majority of the employees in an "appropriate unit"—thereby giving it the right to negotiate an agreement applicable unit-wide—any other organization representing employees within the unit would retain a right of "consultation." If this is a correct interpretation of the proposals, it seems that a "certified" employee organization would, as a practical matter, acquire exclusive bargaining rights. Any matter negotiated and incorporated into a written agreement between management and a certified union could hardly be subject to

56. *Id.*

57. The "Taylor Law," N.Y. CIV. SERV. LAW §§ 200-12 (McKinney Supp. 1968). [The present version of this law, as amended by a bill passed on March 4, 1969 (effective April 1, 1969), appears in GERR No. 288, at F-1 (March 17, 1969).]

58. L.A. Report 21-22.

59. *Id.* at 23.

nullification on the basis of separate consultations between management and some other organization representing part of the employees in the unit.

Because of the peculiarities of public employment labor relations, determination of the appropriate unit for bargaining may well present greater difficulties in the public than in the private sector. For this reason, some of the reports recognized that the large amount of discretionary authority which the federal statute grants to the NLRB for bargaining unit determinations⁶⁰ would not be appropriate in the public sector. These reports recommended that certain specific standards be incorporated into the governing state statutes in order to guide the administering agencies in determining appropriate bargaining units. The New York Report in particular stressed the necessity for a careful appraisal of what is termed "the fragmented vs. the over-all unit for negotiations."⁶¹ The Report stated: "Criteria for the definition of the term 'appropriate' are required which square with the characteristics of the public employment relationship and with the joint responsibility of the employees and administrators for the effective performance of their mission, namely, to serve the public."⁶² The Report enumerated a number of specific criteria upon which the determination of the appropriate bargaining unit should ultimately rest.⁶³ In essence, the implementing New York legislation of 1967 incorporated these suggested standards.⁶⁴ In observing the work of the state's Public Employment Relations Board, it will be particularly interesting to note whether it arrives at unit determinations substantially different from those which would be expected in the private sector.

60. NLRA § 9(b), 29 U.S.C. § 159(b) (1964).

61. N.Y. Report 10.

62. *Id.* at 23.

63. The New York Report suggests that the following factors should be taken into account in formulating criteria for defining an appropriate bargaining unit:

(1) Consistency of the employee-employer unit with a community of interests among employees included in the unit.

(a) Community of interests of employees with respect to conditions of employment applying particularly to them.

(b) Community of interest of employees with respect to the continuation of a traditional, workable, and, on the whole, satisfactory negotiating pattern.

(c) Community of interest of employees with respect to specialization of occupation according to their craft or profession.

(d) Community of interest of employees with respect to the matter of exercising their right of representation.

(2) Consistency of the terms of employment, the determination of which lies within the discretionary authority of the employing agency, with terms concerning which negotiation is sought.

(3) Compatability of the employee-employer unit with the joint duty of administrators and employees to carry out their fundamental mission, *i.e.*, service to public.

N.Y. Report 23-28.

64. N.Y. CIV. SERV. LAW § 207 (McKinney Supp. 1968).

C. *The Scope of Collective Bargaining*

The advisory reports generally recognize that the determination of appropriate subjects for collective bargaining in the public sector involves problems of the first magnitude. One critical problem is that public agencies, without some accommodating change in applicable law, may lack the authority to make binding contractual commitments relating to certain subjects. For instance, limitations on discretionary authority are found in civil service legislation, municipal charter provisions, school codes, and other special legislation. A second question, more of policy than of law, is whether some subject matters should be entirely excluded from the scope of collective bargaining because of the special responsibility of public agencies to carry out public service functions.⁶⁵ If there is to be a mandate for collective bargaining in the public sector, to what extent can or should the legislation take cognizance of these factors? Alternatively, should the state legislation merely include a broad duty to bargain, modeled on the NLRA, which would leave legal questions to be decided by the courts and policy questions to be decided by the processes of collective bargaining?

The Michigan Act of 1965 followed the NLRA pattern by prescribing a general obligation to bargain collectively on wages, hours, and other terms and conditions of employment. The Act also contained a proviso similar to those in the NLRA guaranteeing the right of an individual employee to have his grievance adjusted at any time.⁶⁶

The Taylor Committee recognized that, as in the private sector, labor organizations in the public sector have broad bargaining aspirations. However, it noted that "the expectations . . . concerning what they can negotiate about are limited by the fact that certain terms of employment are mandated by legislative enactment."⁶⁷ As an example, the Committee referred to employees whose terms of employment are fixed by civil service legislation. The Committee ultimately concluded that, as a practical matter, the closest that political entities can come to traditional collective bargaining is "negotiation of terms on the assumption of the necessity for a joint commitment of the negotiating parties to the terms, but with the necessity to seek approval and the appropriations to implement any agreement from a legislative body."⁶⁸ The Committee noted that there can be tradi-

65. Cf. Exec. Order 10,988, 3 C.F.R. 521 (1959-1963 compilation).

66. Compare NLRA §§ 8(d), 9(a), 29 U.S.C. §§ 158(d), 159(a) (1964), with MICH. COMP. LAWS ANN. § 423.211 (1968).

67. N.Y. Report 57.

68. *Id.* at 58.

tional collective bargaining only "if the public through the action of its legislatures is ready to delegate to a bargaining 'team' composed of the executives of government agencies and the negotiators for employee organizations the virtual determination of its budget, the allocation of public revenues to alternative uses, and the setting of the tax rate necessary to balance that budget"—a "delegation scarcely likely to occur in the foreseeable future."⁶⁹

The New Jersey Commission tersely recommended "that the scope of negotiations should be limited by the discretionary or recommending power of the appointing authority in public employment"⁷⁰ The reference to "recommending power," if written into law, could leave the range of negotiations very broad indeed. Of course, if the "discretionary power" of the employing authority is limited, the results of the bargaining process might not be conclusive. One possible solution to this problem is to specify that the results reached in collective bargaining shall prevail over any pre-existing statutory limitation on the authority of the employing agency. For example, the draft statute proposed by the Connecticut Commission included the following provision:

Where there is a conflict between any agreement reached by a municipal employer and an employee organization and approved in accordance with the provisions of this Act and any charter, special act, ordinance, or rules and regulations adopted by the municipal employer or its agents . . . or any general statute regulating the hours of work of policemen or firemen, the terms of such agreement shall prevail.⁷¹

The Connecticut body recognized only two qualifications to this principle:⁷² first, collective bargaining should not interfere with civil service control of merit-rating systems; second, every collective bargaining agreement must be approved by the legislative body with authority over the employing agency. Under these qualifications, the legislative body would retain ultimate authority to reject demands which it considered inconsistent with sound fiscal or other policies. Despite these limitations, the Connecticut recommendations on the scope of bargaining represent a position strikingly different from the far more cautious approach taken by the Taylor Committee.

Most of the advisory groups considered whether the legislature should pass an explicit statutory requirement wholly reserving certain managerial "prerogatives" as outside the scope of collective bar-

69. *Id.* 60-61.

70. GERR No. 229, at D-7.

71. GERR No. 81, at D-9.

72. *Id.*

gaining. Following the pattern set by the Goldberg Task Force Report⁷³ at the federal level, most of the groups favored such provisions. Exceptions are found in the Connecticut and Michigan reports.⁷⁴ Public employers represented to the Michigan Advisory Committee that the 1965 Michigan Act should be amended in order to preserve certain managerial prerogatives.⁷⁵ The Michigan Committee, while cognizant of the potentially serious problems underlying these suggestions, did not consider them of such immediate importance as to warrant legislative changes without further study.

The Taylor Committee did not deal as explicitly with this matter as did some of the groups, but its perceptive analysis of the problems, discussed under the caption "Character of Participating Activity,"⁷⁶ assumed that collective bargaining should not interfere with subject areas now delegated to various governmental authorities. The Report also noted that "the issue of 'retained rights' of the employer (related in public service to the proper performance of both the legislative and executive functions) is more difficult to deal with in the public sector than in the private sector."⁷⁷ The Illinois Report stated:

It should be the exclusive function of each public employing agency to determine the mission of the agency, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations.

It should be the right of each public employing agency to direct its employees, take disciplinary action, relieve its employees from duties because of lack of work or for other legitimate reasons, and determine the methods, means, and personnel by which the agency's operations are to be conducted. But this should not preclude employees from negotiating or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and working conditions.⁷⁸

The Pennsylvania Report simply stated that collective bargaining should be "appropriately qualified by a recognition of existing laws dealing with aspects of the same subject matter and by a carefully defined reservation of managerial rights."⁷⁹

The Los Angeles Report followed a more conservative (or some would say, more sophisticated) view of the scope of public employee collective bargaining. It also presented perhaps the most complete

73. See note 1 *supra*.

74. Connecticut: GERR No. 81, at D-4 (by implication). Michigan: GERR No. 181, at F-12 (app. F).

75. See GERR No. 181, at F-10 (app. D).

76. N.Y. Report 58.

77. *Id.* at 17.

78. GERR No. 184, at D-7.

79. GERR No. 281, at E-1 (Jan. 27, 1969).

supporting rationale. Employee organizations, of course, had argued before the Committee that the "duty to bargain" should be stated in general terms such as those employed in the NLRA in order to leave the broadest scope for collective bargaining. County officials maintained that failure clearly to enumerate certain functions and duties as reserved to various agencies of county government would invite meaningless and unlawful attempts on the part of employee organizations to widen the legally permissible scope of negotiation. The Committee stated its position as follows:

On this issue we believe that attempts to draw an exact analogy with the private sector are misguided and dangerous. The extent to which private employers have agreed to share traditional managerial decisions with labor organizations has varied widely between industries and sometimes between enterprises in the same industry. Concessions on this subject are often merely pragmatic adjustments to special situations. In the event of bargaining impasses over this question, private employers and unions can usually resort to the economic weapons of lockout and strike.

In the public sector, however, the situation is quite different. Managers of governmental agencies must insure that the functions entrusted to them are carried out promptly and without interruption. We think they should have the right initially to determine the manner in which these functions are to be performed. Accordingly, the provision we recommend explicitly sets forth those rights that County management may exercise unilaterally and without prior negotiation with employees or their organizations.

At the same time, we recognize that actions taken by management, purportedly "in the public interest," sometimes are unnecessary or arbitrary. We have therefore provided that nothing in the section on employer rights shall preclude employees from raising grievances about the practical consequences that decisions on matters reserved for management may have on wages, hours, and other terms and conditions of employment.⁸⁰

The Los Angeles Committee then distinguished between the "scope of consultation" and the scope of "negotiation": those matters explicitly made nonnegotiable by ordinance, but which affect employee relations, should be subject to "consultation" between employees and the employing agency. Thus under the proposed ordinance "every reasonable effort shall be made by management to consult with employees or their representatives prior to initiating basic changes in any rule or procedure affecting employee relations."⁸¹ Since the distinction between negotiation and consultation will "not always [be] clearly discernible," the Committee felt that it would be unwise "to try to draw [such a line] once and for all and for all sub-

80. L.A. Report 8-9.

81. *Id.* at 10.

jects”⁸² Rather, the Committee suggested that “in close and doubtful cases the [proposed] enforcement commission be empowered to draw the line on an *ad hoc* basis.”⁸³ It will be interesting to follow the experience in Los Angeles County to see whether the somewhat ambiguous distinction between negotiation and consultation produces results markedly different than those that would be expected under the NLRA’s general definition of the scope of collective bargaining.

Some proposals for an explicit reservation of managerial prerogatives in public employers would constitute, if adopted, a mandate that collective bargaining agreements in the public sector should include something approaching—perhaps even more comprehensive than—the “management rights” provisions frequently negotiated into private sector contracts. I have some doubt about the feasibility, or even the desirability, of this kind of attempted restriction on the scope of public employee collective bargaining. Private sector unions generally do not quarrel with the position that the ability of a private firm to determine such matters as the kind and quality of its products or services is and should remain a managerial prerogative. However, there are some categories of employees in the public sector who, by virtue of the nature of their occupations and professional interests, might claim to have a negotiable concern with the “mission” or goals of particular public agencies. For example, public school teachers may reasonably assert that they have a legitimate interest not only in compensation and “conditions” of employment, but also in the fundamental educational policies to be followed in a school system.⁸⁴ Perhaps the same could be said of police and fire fighters. Obviously, a public agency cannot abdicate all of its public responsibility to teachers, policemen, or fire fighters, but an obligation to negotiate—to share in decision-making—does not necessarily involve abdication. Indeed, it can be argued that the quality of many public services would be substantially improved if those most directly involved in, and dedicated to, the “mission” of the agency had a more direct hand in the policy-making process.

D. *The Strike Issue*

1. *The Right To Strike*

The question whether public employees should be permitted the right to strike has received unusual emphasis in the various state

82. *Id.* at 11.

83. *Id.* at 12.

84. See Klaus, *The Evolution of a Collective Bargaining Relationship in Public Education: New York City's Changing Seven-Year History*, 67 MICH. L. REV. 1033, 1042-46 (1969); Wollett, *The Coming Revolution in Public School Management*, 67 MICH. L. REV. 1017, 1019-21 (1969).

advisory group reports, not only because of the difficult underlying policy issues involved, but also because the public seems to be more genuinely concerned about this matter than with most other issues raised by public employee unionism. With the single exception of the Pennsylvania Report, the advisory groups subscribed to the traditional position that employees in the public sector should not be permitted to strike. Still, as I read the reports, they exhibit varying levels of philosophic commitment to this policy.

The Taylor Committee left little doubt concerning the extent of its commitment to the no-strike position. According to its Report, strikes "in the field of government service" should continue to be illegal regardless of how essential the particular services involved are to the community.⁸⁵ The argument did not rest on the traditional theory that public employee strikes constitute an impermissible interference with the "sovereignty" of the state.⁸⁶ Instead, the Committee emphasized certain differences between the functions, constraints, and freedoms applicable to employers in the public and private sectors. Because of the distinction between "the constraints of the market place on collective bargaining" in private employment and "the constraints imposed by democratic political processes" in public employment, "the strike cannot be a part of the negotiating process" in the public sector.⁸⁷ The Illinois Commission also took the position that work stoppages are not appropriate in the public sector and should be unequivocally prohibited.⁸⁸

The Connecticut, Michigan, and New Jersey committees, although advocating continuance of a no-strike policy, intimated less conviction about the validity of this approach. Although the Connecticut Commission stated that "the right to strike is an essential element in any viable system of free collective bargaining," it deferred to the existing consensus opposed to the right to strike for public employees.⁸⁹ The Michigan Committee stated that it did not regard the "ultimate issue" as settled,⁹⁰ and the New Jersey Commission recognized "that both public sentiment and judicial opinion may alter over time."⁹¹

The Los Angeles Committee, although stating that "public employee strikes are and should be unlawful,"⁹² elected for undisclosed

85. N.Y. Report 42.

86. For discussions of the doctrine of "sovereignty" in relation to public employee collective action, see W. HART, *COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE* (1961); C. RHYNE, *LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW* (1946).

87. N.Y. Report 16.

88. GERR No. 184, at D-11.

89. GERR No. 81, at D-5.

90. GERR No. 181, at F-2.

91. GERR No. 229, at D-6.

92. L.A. Report 31.

reasons not to justify its position. Thus, according to this advisory group, to say that strikes are unacceptable "is merely to add a dimension to the problem and does not contribute to its solution."⁹³ The Los Angeles panel, like most of the others, emphasized the necessity of producing collective bargaining attitudes and dispute settlement procedures (short of compulsory arbitration) that "the parties will be willing to substitute for trial by economic combat."⁹⁴ But the Committee did not claim that its recommendations directed toward this objective offered a "fool proof panacea";⁹⁵ indeed, none of the advisory groups made such a claim.

The Pennsylvania Commission was alone among the advisory groups in taking the position that "except for policemen and firemen, a limited right to strike should be recognized," subject to certain basic safeguards designed to protect the public interest and conditioned upon exhaustion of other procedures.⁹⁶ The argument for this startling deviation from the traditional view merits careful examination. The Commission's Report states, in part:

No one should have a right to strike until all collective bargaining procedures have been exhausted. . . .

Likewise there can be no right of public employees to strike if the health, safety or welfare of the public is endangered. . . .

But where collective bargaining procedures have been exhausted and public health, safety or welfare is not endangered it is inequitable and unwise to prohibit strikes. The period that a strike can be permitted will vary from situation to situation. A strike of gardeners in a public park could be tolerated longer than a strike of garbage collectors. And a garbage strike might be permissible for a few days but not indefinitely, and for longer in one community than another, or in one season than another.

The collective bargaining process will be strengthened if this qualified right to strike is recognized. It will be some curb on the possible intransigence of an employer; and the limitations on the right to strike will serve notice on the employee that there are limits to the hardships that he can impose.⁹⁷

2. *Sanctions for Violations of the No-Strike Policy*

Those advisory groups which recommended adherence to the no-strike policy have taken somewhat different positions on what sanctions should be employed to implement that policy. There was substantial accord that punitive sanctions directed at individual

93. *Id.*

94. *Id.*

95. *Id.*

96. GERR No. 251, at E-1 (July 1, 1968).

97. *Id.* at E-2 to E-3.

employees, such as those embodied in New York's now-defunct Condon-Wadlin Law⁹⁸ or Michigan's former Hutchinson Act,⁹⁹ are unworkable in any major strike situation. However, the New York, Michigan, and Illinois groups did agree that one possible sanction is a "self-help" approach under which the employing agency could initiate disciplinary action or discharge proceedings against employees who break the law.¹⁰⁰

A number of reports specifically recommended use of the injunction as a remedial alternative. Here, however, some rather significant differences in approach become apparent. The Taylor Committee took the position that in every strike or threatened strike situation, an injunction should be sought and granted. Indeed, the Committee proposed that the law officer of the employing agency involved in the dispute should be empowered automatically to seek an injunction against illegal strikes and, if the resulting court decree were violated, "to institute a criminal contempt proceeding promptly."¹⁰¹ The New York Committee also maintained that a public agency which had sought and obtained injunctive relief should be dissuaded from "negotiating away," through the processes of collective bargaining, either the injunction itself or the striking organization's potential liability for contempt.¹⁰² It is implicit in the recommendations of the Taylor Committee that an equity court should not be limited in the fine or other penalty which it can assess against an organization or individual found to be in contempt of an injunction. The Committee proposed the elimination of the 250-dollars-per-day ceiling on fines which had been prescribed in section 751 of the New York Judiciary Law.¹⁰³ However, the legislature did not follow this suggestion; in the Taylor Law in 1967 it revised the Judiciary Law to prescribe a maximum fine for individuals of 250 dollars per day and a maximum fine for employee organizations of the lesser of a week's membership dues or 10,000 dollars per day. Obviously, any such provision, placing an upper limit on the penalties which can be imposed for contempt of court, makes it difficult to test fully the theory that the injunctive remedy can be a means of dealing effectively with strike situations.¹⁰⁴

98. 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).

99. Law of Oct. 11, 1947, ch. 423, § 208, [1947] Mich. Pub. Acts 336 (for inciting to strike, imprisonment for not more than one year, fine from \$100 to \$1,000).

100. N.Y. Report 43-44; GERR No. 181, at F-4 (Michigan); GERR No. 184, at D-12 (Illinois).

101. N.Y. Report 43.

102. *Id.*

103. *See* N.Y. Report 43.

104. Contrast the fines imposed in *United States v. United Mine Workers of America*, 330 U.S. 258 (1947). The district judge had levied fines of \$3,500,000 and \$10,000 against the United Mine Workers Union and John L. Lewis, respectively, for

Indeed, in recent months the Taylor Committee has again recommended that the limitations on penalties contained in section 751 of the Judiciary Law be removed. In response to this proposal, the New York legislature amended the Taylor Law on March 4, 1969, to provide for unlimited fines against striking unions.¹⁰⁵

The Michigan Committee's approach was somewhat different. The Michigan Act of 1965, although it prohibited strikes by public employees, specifically recognized only one remedial sanction: disciplinary action or discharge by the public employer.¹⁰⁶ The Committee recommended that the legislature amend the statute to make it clear that the judiciary has authority to enjoin strikes—an issue in dispute at the time of the Report but since resolved by the courts themselves.¹⁰⁷ The Committee further recommended that while injunctive relief should be mandatory for any strike threatened or occurring before the exhaustion of recommended dispute settlement procedures,¹⁰⁸ the issuance of an injunction thereafter should be discretionary with the court. In deciding whether to issue an injunction, the court would be expressly authorized to consider all the relevant facts, including a charge that the employing agency had failed to discharge its statutory obligation to bargain in good faith.¹⁰⁹ It is implicit

violation of a restraining order. The Supreme Court sustained the fine against Lewis and \$700,000 of the fine against the Union as appropriate penalties for criminal contempt of the lower court's order. The balance of the fine against the Union was abated subject to union action to purge itself of contempt. I do not suggest that fines of this magnitude, or that an unlimited discretion in the matter of fines, should necessarily be used. Moreover, I am fully cognizant of the fact that even a large fine can have a minimal adverse impact on a large union if, as is probable, the union possesses the power to levy a special assessment on its members to cover the fine.

105. The amended Taylor Law also provides for the loss of dues check-off privileges for unlimited periods and the loss of two day's pay for each day an employee is on strike. Moreover, a striking worker is subject to one year's probation with loss of tenure for any violation of the strike prohibition. GERR No. 288, at F-6 to F-7.

106. MICH. COMP. LAWS ANN. § 423.206 (1967).

107. In *School Dist. v. Holland Educ. Assn.*, 380 Mich. 314, 157 N.W.2d 206 (1968), the Supreme Court of Michigan ruled that Michigan courts have the jurisdiction to restrain strikes by public employees.

108. I recognize that there may be a legal question whether or not a state legislature may constitutionally compel an equity court to issue an injunction, without regard to any question other than the existence or nonexistence of a strike, without inquiry into the "equities" of the case.

109. The effect of this recommendation is to recognize the equitable "clean hands" doctrine in cases of strikes by public employees. The decision of the Michigan Supreme Court in *Holland* (see note 107 *supra*) appears to be consistent with this recommendation. In the *Holland* case, the Court dissolved the temporary injunction granted in a teachers' strike and remanded the case, with the suggestion that the lower court inquire into whether the plaintiff School District had refused to bargain in good faith. 380 Mich. at 327, 157 N.W.2d at 211. The American Bar Association's Section on Labor Relations Law construed this recommendation of the Michigan committee to mean that strikes should be permitted "under limited circumstances." Report of the Committee on the Law of Government Employee Relations, presented at the 1967 Annual Meeting of the American Bar Association and reprinted in the Labor Relations Law Section program for that meeting.

in the Michigan Report that an equity court should not be limited in its discretionary power to impose fines or other penalties for violations of injunctions.

The Illinois Commission, like the Taylor Committee, took the view that an injunction should be sought in all cases of illegal strikes. Unlike the Taylor Committee, however, the Illinois Commission would vest responsibility for initiating court action in the employing agency itself rather than in its principal legal officer.¹¹⁰ As a result, the legal officer could not seek an injunction automatically until authorized to do so by his superiors. The Illinois Commission, also unlike the Taylor Committee, did not indicate what penalties a court should apply in a contempt proceeding against employees or a labor organization for violating an injunction. The panel simply stated that the statute should "affirm the existing power of the courts to enjoin strikes and should make clear that its provisions are not designed to limit any inherent judicial power."¹¹¹ This recommendation seems to recognize that injunctive relief—traditionally an extraordinary legal remedy granted only after judicial balancing of the conflicting interests of the parties—should not be granted simply on a showing by the employing agency that a strike is imminent or has occurred.¹¹² The recommendation also recognizes that an equity court should retain its traditional discretion in the matter of fines.

The Pennsylvania Commission, while proposing that strikes be legalized under strict safeguards designed to protect the public interest, also recommended that "severe penalties" should be imposed for violation of an injunction against a strike declared illegal by judicial decree. These penalties, declared the Commission, should "take the form of fines or imprisonment or both against strikers or the organizations responsible for strikes."¹¹³

The Connecticut, New Jersey, and Los Angeles advisory groups elected to deal with the strike issue only in terms of principle, without prescribing specific sanctions. The Connecticut Report's proposed statutory provision merely stated: "Nothing in this Act shall constitute a grant of the right to strike to employees of any municipal employer and such strikes are hereby expressly prohibited."¹¹⁴ The proposed Los Angeles County ordinance, as noted above, did not

110. GERR No. 184, at D-12.

111. *Id.*

112. *Cf. School Dist. v. Holland Educ. Assn.*, 280 Mich. 314, 325-27, 157 N.W.2d 206, 210 (1968).

113. GERR No. 251, at E-3.

114. GERR No. 81, at D-10.

contain any provision dealing with strikes. The Los Angeles Committee expressed its judgment regarding sanctions as follows:

In our judgment it is far preferable to specify no penalties in the ordinance, thereby preserving for the Commission or County, as the case may be, complete freedom to act in whatever way deemed necessary to deal with a particular situation. Thus, it could take various administrative actions against the offending organization and employees, such as cancellation of checkoff or dismissal, or seek an appropriate remedy in the courts, such as an injunction. Uncertainty as to what the County might do under these circumstances would in itself constitute a possible deterrent against strikes and stoppages.¹¹⁵

The Committee emphasized, however, that it was not recommending the imposition of increasingly severe sanctions as a solution to the problem of public employee strikes.¹¹⁶

A possible sanction against illegal strike action, applied at the federal level under Executive Order 10,988,¹¹⁷ is the denial of recognition to a public sector union or other employee organization which asserts the right to strike or engages in strike action. The Taylor Committee recommended this as an additional sanction which could be imposed in the discretion of the proposed Public Employment Relations Board. Such discretion would enable the Board to weigh "the equities" of a given situation, including the merits of any charge that the employing agency engaged in such "acts of extreme provocation as to detract from the fault of the employee organization or its officers in permitting the strike to take place."¹¹⁸ However, the New York legislature in its 1967 enactment rejected this recommendation of the Taylor Committee: it authorized the cancellation of the "check-off" for a period not to exceed eighteen months, but did not authorize cancellation of recognition rights.¹¹⁹ Withdrawal of recognition was considered, but rejected, by the Illinois and Michigan committees, and, implicitly, by the Connecticut, New Jersey, and Pennsylvania advisory groups. It is not altogether clear whether the Los Angeles Committee included cancellation of recognition among the kinds of "administrative actions" which an employing agency could take against a striking organization.

115. L.A. Report 33-34.

116. *Id.* at 34.

117. 3 C.F.R. 521 (1959-1963 compilation).

118. N.Y. Report 44.

119. N.Y. CIV. SERV. LAW § 210(f) (McKinney Supp. 1968). The amendment of March 4, 1969, however, provides for the loss of dues check-off privileges for unlimited periods. GERR No. 288, at F-7.

3. *The Definition of a Strike*

One additional problem with "the strike issue" is definitional: Should a general strike prohibition be construed to include a variety of concerted actions which, although something less than a formal strike, are undertaken to advance collective bargaining aims? Such concerted actions might include mass resignations, calling in sick (sometimes referred to as "blue flu" in police situations), on-the-job "slowdowns," and, in the case of public school teachers, concerted refusals to sign individual contracts. The Connecticut Report and proposed draft statute made no effort to define a "strike." The New York, Minnesota, New Jersey, Pennsylvania, Michigan, and Los Angeles groups did not deal with the problem explicitly. The advisory body in Illinois, going further, recommended that "the definition of a strike should be broad enough to include such concerted stoppages as mass resignations and the mass calling-in-sick, designed to place pressure on the governmental agency."¹²⁰ Apart from what the committees have said, the courts will probably have little difficulty interpreting general legislation prohibiting public employee strikes to include these other forms of concerted action short of total work stoppage. The more difficult question is whether the sanctions imposed by courts or other tribunals can effectively control this kind of economic pressure.¹²¹

E. *Procedures for the Settlement of Contract Disputes*

All the reports stressed the necessity of evolving dispute settlement procedures which would reduce the need to resort to strike action. The Taylor Committee emphasized that public employer agencies and employee organizations must give serious attention to developing improved bargaining skills and bargaining patterns responsive to budgetary timetables and other constraints in order to cope with the unique problems of collective bargaining in the public

120. GERR No. 184, at D-12.

121. Obviously, the courts will face practical difficulties—including problems of proof—in attempting to supervise employee conduct in the case of alleged "slow-downs," sick-call-ins, and mass resignations. A difficult legal question is whether this type of employee action, though done concertedly for the purpose of forcing an improvement in working conditions, can lawfully be enjoined in view of the constitutional right of an individual to terminate his employment. It would seem that any court decree would have to recognize the right of an individual, disassociated from any group decision, to quit his employment. The situation of the school teacher, who may be required by state law to sign an individual employment contract, also presents its unique legal and practical problems. For example, may a court appropriately order a teacher to sign an individual employment contract before collective bargaining negotiations between the teachers' association and the school board have been completed and an agreement reached?

sector.¹²² This suggestion was based on the premise that skillful, good-faith, realistic negotiations will be more likely to produce settlements than the crude and untutored forms of collective bargaining which have all too often characterized the initial stages of collective bargaining in the public sector.

The advisory reports differed somewhat in their specific recommendations concerning the design and implementation of appropriate dispute resolution procedures. For instance, there was no agreement on how fact-finding should be carried out. Should designated fact finders simply conduct appropriate hearings and make findings of fact, or should they also be empowered to conduct mediation? There have been various suggestions concerning the extent to which fact-finding recommendations should be publicized and public attention focused on the party deemed to be at fault on particular bargaining issues. The Michigan Committee recommended that the parties to a dispute be required to resort to specific statutory procedures—negotiation, mediation, and fact-finding—according to a definite timetable necessitated by the budgetary and other constraints upon the particular public agency.¹²³ These are areas in which there is room for differences of opinion and further experimentation. Experience with a variety of procedures should provide a better empirical basis for judgments concerning their efficacy.

One impasse resolution alternative which may attract increasing support in coming years is the use of compulsory third-party arbitration of disputes over contract terms. The advisory groups, with the exception of the Rhode Island and Michigan committees, rejected this approach. The Michigan Committee suggested that compulsory arbitration be tried, experimentally, for a limited period in the case of policemen and fire fighters.¹²⁴ Implementation of this approach on a wider basis would be difficult without substantial public support as well as the support of the employing agencies and the employee organizations directly concerned, and the latter may not be quickly forthcoming. Moreover, the use of compulsory arbitration raises some fundamental problems of governmental structure: it entails a delegation of authority to third parties to make decisions which the public has traditionally entrusted to its elected or appointed representatives. It may be that some of these problems can be ameliorated by the enactment of specific guidelines or standards for decision which will operate as constraints upon third-party de-

122. N.Y. Report 33.

123. GERR No. 181, at F-2 to F-3.

124. *Id.* at F-3.

terminations. The dimensions of the problems are considerable, however, and cannot be treated adequately here.

The fundamental problem in public sector labor relations, as we have seen, is the assumed inconsistency between the grant of a right to bargain collectively and the attempt to prohibit strike action as a means of supporting bargaining demands. The increasing incidence of public employee strikes despite their illegality suggests that the dilemma may be beyond resolution. If this is in fact the case, the preferable course—suggested by the Pennsylvania Committee¹²⁵ and a few other observers—may be to affirm the right of public employees to strike subject to conditions designed to safeguard the public interest. After all, it appears that the adamant refusal in this country to permit strikes in the public sector is a phenomenon by no means universally shared in other countries. In this regard, the experience of foreign nations with other points of view on the strike issue might profitably be explored.¹²⁶ At the same time, there is some evidence in this country that alternative dispute resolution procedures, including mediation and fact-finding, have been sufficient to induce settlements in most situations.¹²⁷ It may be that these procedures, coupled with the development of improved bargaining skills and an increased recognition by the parties that the public will not tolerate prolonged strikes with an adverse effect upon essential services, will enable most collective bargaining issues to be resolved in the negotiating process short of disruptive strikes. Still, I very much doubt that public sector strikes will wholly disappear. My guess is that their incidence will rise as the areas of organization and collective bargaining in the public sector expand. If this prognostication is accurate, there will be further support for the thesis that strikes cannot really be prevented. Unless we accord public employees at least a limited right to strike, we will be in danger—and perhaps already are—of according a kind of de facto recognition to conduct officially declared illegal. This state of affairs is scarcely desirable in any society which purports to order its human relations according to the processes of law.

IV. CONCLUSION

Obviously, this survey of the reports and recommendations of public employment advisory groups has not purported to take ac-

125. Pennsylvania Report 5, 12-14.

126. See generally Schmidt, General Report (II B) to the Sixth Intl. Cong. of Labour Law and Social Legislation, Stockholm, Aug. 15-17, 1966.

127. See J. BELASCO, PUBLIC EMPLOYEE DISPUTE SETTLEMENT (1966); Stern, *Wisconsin Fact-Finding Procedure*, 20 INDUS. & LAB. REL. REV. 1 (1966); Howlett, *Michigan's Experience with Public Employee Bargaining*, in GERR, No. 206, at E-1 (Aug. 21, 1967).

count of numerous unofficial contributions independently made by various persons interested in public sector unionism—academicians, government personnel, labor leaders, journalists, and others.¹²⁸ This Symposium, indeed, contains a number of such contributions. A comparison of their views with those of the officially constituted advisory groups will reveal that the advisory group reports are not a repository of all there is to be said about public sector unionism.

The peculiar virtue of advisory group efforts lies in the opportunity presented for responsible, consultative deliberation. Indeed, I would reaffirm the merit of the recommendation contained in several of the reports that state public employment relations legislation should establish in each state a permanent advisory commission. These bodies should have the responsibility to examine and report to the governor and the legislature developments in public employment labor relations; they would thus ensure continuous objective appraisal of existing policy in the field with a view toward possible modifications. Pressures on legislative bodies by “management,” “labor,” and other interested groups to adopt some particular policy in the area of public sector unionism will inevitably increase. As this occurs, the need for help in determining the appropriate policy will increase correspondingly because the problems are difficult, the issues are serious, and the public interest is deeply involved.

128. See generally M. MOSKOW, *TEACHERS AND UNIONS* (1966); Morris, *Public Policy and the Law Relating to Collective Bargaining in the Public Service*, 22 SW. L.J. 585 (1968); Newland, *Collective Bargaining Concepts: Application in Governments*, 28 PUB. ADM. REV. 141 (1968); McKelvey, *The Role of State Agencies in Public Employee Labor Relations*, 20 INDUS. & LAB. REL. REV. 179 (1967); Stieber, *Collective Bargaining in the Public Sector*, in THE AMERICAN ASSEMBLY, *CHALLENGES TO COLLECTIVE BARGAINING*, ch. 3 (1967).