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Theodore W. Kheel

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STRIKES AND PUBLIC EMPLOYMENT

Theodore W. Kheel*

ONE of the major unmet challenges we face is how to prevent strikes by public employees without denying them the right to organize and bargain collectively. Public employment grows in significance each day as governments at every level undertake new programs to supply additional services for the public good. Across the nation there are some twelve million public workers, twice the number there were in 1950.¹ More than 8.5 million of these public employees work for state and local government;² it is anticipated that their number will grow by two thirds in the next decade. Of 2.8 million federal workers, more than one million are union members.³ It is estimated that ninety-nine per cent of American cities with a population over 250,000 have unions or employee associations representing public workers. Labor Department statistics for 1969 showed 629,000 state and local employees in AFL-CIO affiliates, and independent teachers' organizations report membership of 1,168,000.⁴ The fastest growing labor organization in the country is the American Federation of State, County, and Municipal Employees, AFL-CIO.⁵

This tendency of public employees to organize has been aided by legislation facilitating union recognition and imposing obligations on public employers to negotiate with employee representatives.⁶ The spread of organization among public employees is also a reflection of a more general tendency in our society to form groups in order to augment the force of individual demands by concerted action. Students, black Americans, football players, tenants, and welfare recipients, among others, have joined together in pursuit of shared aims. Organization quite naturally produces greater demands

* Member of the New York Bar. A.B. 1935, LL.B. 1937, Cornell University.—Ed.

1. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 1968, at 80, table 41 (1968).

2. *Id.*

3. *Id.* at 296, table 126.

4. *Id.*

5. Ross, *Those Newly Militant Government Workers*, FORTUNE, Aug. 1968, at 104.

6. *E.g.*, CONN. GEN. STAT. ANN. § 10-153(d) (Supp. 1969); MICH. COMP. LAWS ANN. § 423.209 (1967); N.J. STAT. ANN. §§ 34:13A-1 to -13 (Supp. 1968); N.Y. CIV. SERV. LAW §§ 200-12, (McKinney Supp. 1968) [The present version of this law, as amended by a bill passed March 4, 1969 (effective April 1, 1969), appears in GOVERNMENT EMPLOYEE RELATIONS REPORT, No. 288, at F-1 (March 17, 1969).]; WIS. STAT. ANN. § 111.70(2) (Supp. 1969). See Report of the Governor's Commission To Revise the Public Employer Law of Pennsylvania (June 1968).

and often some form of action to support those demands. This, too, is not unique to labor organizations. Politicians and commentators speak of a new militancy and point to more strident demands and direct action by all sorts of groups.

In public employment there has been an increasing resort to strikes in all parts of the nation by employees previously immune—teachers, policemen, firemen, welfare workers, garbage collectors, hospital attendants, doctors, nurses, and zoo keepers. The strike fever is contagious, and leapfrogging demands and multiplying disputes leave government hesitant, defensive, and distracted from the unresolved problems of our urban crisis. The basic question—and the great challenge—is how to prevent strikes that imperil the public interest while still providing millions of public employees with the opportunity to participate in the process of determining the conditions of their work, an opportunity not only guaranteed employees in the private sector but also accepted as socially beneficial.

The common answer to this question in public employment was to prohibit all strikes by statute or court decision⁷ and to prescribe penalties in the form of fines or imprisonment, or both, for violation of these prohibitions. Employees were allowed to negotiate with their employers through unions, but they were required to accept as final the decision of the legislative or executive body with authority to set terms of employment. Any further change had to be sought by lobbying or through the polls.

This was the pattern in New York under the Condon-Wadlin Law.⁸ It was not successful. The legal prohibition of strikes did not prevent workers from threatening disruptions of service and, on occasion, from carrying out the threat. The penalties assessed against individual workers did not deter them from concerted action.⁹ After a twelve-day transit strike in 1966 that nearly brought New York City to a complete standstill,¹⁰ the need for change was apparent.

7. See Annot., *Union Organization and Activities of Public Employees*, 31 A.L.R.2d 1142, 1159-61 (1953). For a more recent view, see *School Dist. v. Holland Educ. Assn.*, 380 Mich. 314, 157 N.W.2d 206 (1968). See also Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 892, 898 (1969).

8. 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).

9. Under the provisions of this act, the striking employee was subject to immediate dismissal. The employee could be reinstated only on condition that he remain on probation for five years and his compensation was to remain fixed for a period of three years. However, these sanctions were found to be largely unenforceable and, thus, were seldom invoked.

10. See N.Y. Times, Jan. 13, 1966, at 1.

Not only had the law failed to stop the strike, but it threatened to produce a second work stoppage because of the penalty provisions. The enforcement of these provisions would have denied the transit workers the higher wages and other benefits negotiated under the mayor's auspices. As a result, the governor and the legislature concluded that there was no alternative but to waive the penalties despite the clear violations of the statute. The law was in disrepute. Governor Rockefeller convened a special committee headed by Dr. George W. Taylor, one of America's greatest authorities on industrial relations. The report of this committee was substantially incorporated in a piece of new legislation, although with one important qualification which will be discussed below. The Taylor Law continued the absolute prohibition on strikes by public employees,¹¹ while shifting penalties so that they would be directed primarily against the employee organization rather than the individual worker.¹² In addition, it assured rights of organization, imposed an obligation on public employees to meet and confer with employer representatives, and established an elaborate machinery of third-party recommendations to aid the parties in the "collective negotiations"¹³ that were expected to produce agreements.

The penalties flowed necessarily from the strike ban. Once a form of conduct is made illegal, a system of penalties for violations must also be prescribed. In the case of unions, this is not without its difficulties. Who is to blame when a strike occurs? Is it the leaders of the union, the union itself, or the members who actually strike? Condon-Wadlin implied that it was the strikers, since it prohibited them from receiving wage increases for a specified period of time.¹⁴ The Taylor Law shifted the burden to the union and its leaders, undoubtedly because of the widespread belief that during the transit

11. The Taylor Law is incorporated in 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 GOVERNMENT EMPLOYEE RELATIONS REPORT, No. 288, at F-1 (March 17, 1969).] The strike prohibition is contained in section 200.

12. The New York Legislature amended the Taylor Law on March 4, 1969, to provide for stiffer penalties against striking public employers and their unions. The amendments call for unlimited fines against striking unions and the loss of dues check-off privileges for unlimited periods. Another section provides for the loss of two days' pay for each day a public employee is on strike. Moreover, a striking worker is subject to one year's prohibition with loss of tenure for any violation of the strike prohibition. For the text of the law as amended, see GOVERNMENT EMPLOYEE RELATIONS REPORT, No. 288, at F-1 (March 17, 1969) [hereinafter GERR].

13. The Taylor Law uses the term "collective negotiations" instead of "collective bargaining," because the latter phrase implies the possibility of a strike. And, according to the Taylor Law, strikes are illegal.

14. N.Y. CIV. SERV. LAW § 104(5)(c) (McKinney Supp. 1968).

strike the union's leadership had induced the workers to strike. But the current wave of rank-and-file rejections of negotiated settlements¹⁵ casts a serious doubt on the validity of this underlying assumption in the penalty provisions of the Taylor Law.

In addition to a schedule of penalties, a law granting public employees the right to negotiate must also contain a strike substitute to resolve any impasse in negotiations. The Taylor Law calls for the appointment of a board to make recommendations for a settlement.¹⁶ But recommendations by definition can be rejected. The framers of the Taylor Law apparently assumed that the unions would be the only ones to reject recommendations and that the pressure of public opinion would eventually induce them to accept the findings of a distinguished panel. But experience has proven that public agencies also reject recommendations and that neither employers nor employees are forced to agreement by critical editorials or public dismay. In the famous sanitation strike in February of 1968, Mayor Lindsay rejected as "blackmail" a panel's recommendation for an additional increase of fifty cents a week and was widely praised for this action. The fact is that either side can reject recommendations with impunity, leaving open the question of how the dispute is then to be settled. It is also true that when recommendations are rejected by one side and accepted by the other, the dispute usually becomes more difficult to settle. Positions become frozen, and the likelihood of a serious impasse is increased. In the absence of any further procedures, the status quo prevails, usually to the union's disadvantage, thus deepening the belief of labor organizations that the law is unfair to them. In the traditional dispute over a wage increase, a union objecting to the amount recommended is effectively without recourse, since it cannot strike. The result is the same where the union accepts but the public employer rejects. To avoid such a situation, unions are led to threaten a strike during negotiations in an effort to solidify their bargaining position. It is doubtful that such threats can be made illegal. In one instance, a union seeking to discount the prospect of a strike nevertheless conveyed a threat when its president answered affirmatively a reporter's question as to whether the union intended to adhere to its traditional policy of no contract, no work. This was a strike threat, but hardly grounds for a criminal proceeding.

15. This has occurred both in the recent strike by New York City sanitation workers in February 1968 and the November 1968 strike involving Consolidated Edison employees.

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

Where no agreement is reached by the deadline, it becomes difficult if not impossible for the union leader to avoid going over the brink. Alternatively, the unions may resort to subterfuge methods of achieving an effective bargaining posture by working to the rule, feigning sickness, or even by engaging in a mass resignation. Perhaps the most ingenious technique was the decision of a police group to punish all traffic violators for even minor infractions. This effectively reduced automobile accidents, but it also slowed traffic and distracted police officers from other more pressing assignments.

The Taylor Committee foresaw the difficulties arising when recommendations are rejected and proposed that such impasses be submitted to the appropriate legislative body for a final determination.¹⁷ But the New York State Legislature did not view favorably the prospect of having each labor dispute that reached an impasse submitted to it for decision. Moreover, it is questionable whether the legislature is an appropriate body to handle individual labor disputes. It is not surprising, therefore, that the legislature dropped this proposal. As a result, there was no means by which a dispute involving public employees in the State of New York could be resolved if the parties themselves failed to agree. In two subsequent reports to Governor Rockefeller, the Taylor Committee identified this lack of finality as a major defect in the law, but it offered no new solution.¹⁸ Rather, the Committee reaffirmed its proposal for legislative determination to resolve impasses created when either party rejects recommendations. In its recent amendments to the Taylor Law, the New York Legislature apparently accepted this proposal.¹⁹

The Taylor Law has now been in effect for nearly two years. It was subjected to great strain in its infancy. Not yet an adult chronologically, it has aged rapidly in experience and is now seasoned enough to be judged. It has not met the harsh but significant test

17. Governor's Committee on Public Employee Relations, State of New York, Final Report 56-57 (1966).

18. Governor's Committee on Public Employee Relations, State of New York, Interim Report (June 17, 1968).

19. Under the amended law, final resolution of disputes is committed to the appropriate legislative body:

(iii) [T]he legislative body or a duly authorized committee thereof shall forthwith conduct a hearing at which the parties shall be required to explain their positions with respect to the report of the fact-finding board; and (iv) thereafter, the legislative body shall take such action as it deems to be in the public interest, including the interest of the public employees involved.
Law of March 4, 1969, § 209(3)(e), GERR, No. 288, F-1, F-5, amending N.Y. CIV. SERV. LAW § 209(3)(e) (McKinney Supp. 1968).

For the proposal of the Taylor Committee, see Governor's Committee on Public Employee Relations, State of New York, Second Interim Report 5 (Jan. 23, 1969).

by which such machinery must be evaluated: it has not prevented strikes that imperil the public interest. In September 1967, the teachers in New York City struck for fourteen days.²⁰ In the early hours of 1968 a transit strike was narrowly averted after negotiations under an implicit strike threat; in order to achieve settlement, the procedures of the Taylor Act had to be temporarily set aside.²¹ In February 1968, the sanitation service of New York City was interrupted for nine days, leaving the city unsightly, unkempt, infested with disease, plagued by the threat of fire, and seemingly helpless to correct the situation. And in the fall of 1968 the city's schools were closed for two months in a dispute that set new marks for bitterness and hostility, and raised spectres of racial and religious bias that threaten to undermine the fabric of social order.²² Other important city workers, including policemen and firemen, have either threatened strikes or resorted to some form of job action.

It would be unfair to place upon the legal machinery sole responsibility for these interruptions of critical services on which the welfare of New York depends. But the fact remains that the machinery—including the prohibition on strikes with attendant penalties and the fact-finding boards with their power to make recommendations—did not work to settle these disputes or stop the strikes, slowdowns, or threats. In fact it is probable that the Taylor Law exacerbated these conflicts. For one thing, it made subversive a form of conduct society endorses for private workers. It encouraged unions to threaten to strike to achieve the bargaining position participants in collective bargaining must possess. It made the march to jail a martyr's procession and a badge of honor for union leaders. It hardened positions by calling upon representative organizations to declare publicly their acceptance or rejection of fact finders' recommendations. In simple point of fact, it did not and is not likely to work as a mechanism for resolving conflicts in public employment relations through joint determination, whether called collective bargaining or collective negotiations.

Now there is raised with increasing frequency the suggestion that the proper technique for resolution of impasses in public employment relations is some third-party determination where an outsider to the dispute is given ultimate authority to fix the terms of employ-

20. N.Y. Times, Sept. 11, 1967, at 1, col. 8.

21. N.Y. Times, Jan. 1, 1968, at 1, col. 3; *id.*, Jan. 2, 1968, at 1, col. 2.

22. Mayer, *The Full and Sometimes Very Surprising Story of Ocean Hill, the Teachers' Union and the Teachers' Strikes of 1968*, N.Y. Times, Feb. 2, 1969, § 6 (Magazine), at 18.

ment. Most commonly this takes the form of a proposal for compulsory arbitration, but other procedures such as labor courts are also mentioned.²³ The Taylor Committee rejected compulsory arbitration for two reasons.²⁴ First, the Committee thought that it was probably an illegal delegation of the authority of a public agency. Second, it felt that it would encourage disputants to resort constantly to arbitration instead of themselves assuming the responsibility of decision-making. But proposals for arbitration persist. Moreover, they do succeed in framing the issue properly, for the question seems to me to be whether there is a viable alternative to collective bargaining for the effective resolution of disputes in public employment, and compulsory arbitration in one form or another is the only logical, if not practical, alternative. It does provide, at least in theory, for a "final" resolution of conflicts when an impasse is reached.

My concern here is with the proposals that arbitration should become the common technique for settlement of disputes over the terms of a new contract²⁵—including issues of wages, other benefits, and working conditions. This is not a precisely defined area. Increasingly the issues in dispute include questions of employee participation in determination of policy in the work place. This is particularly true in highly skilled and professional categories. Teachers, doctors, social workers—all naturally seek a greater voice in the professional decisions affecting their work.²⁶

There are in effect only three ways by which the terms of employment can be set in the public or private sector. First, they may be set unilaterally, commonly by the employer. In private industry this is still the case where the employees are not organized, but it is illegal

23. See generally Fleming, *The Labor Court Idea*, 65 MICH. L. REV. 1551 (1967).

24. Governor's Committee, *supra* note 17, at 67-68.

25. Disputes over the terms of a new contract should be clearly distinguished from questions of "interpretation" or "application" of contracts already in force. In the private sector, individual questions of interpretation or application are commonly resolved through grievance procedures leading to voluntary arbitration. The inclusion of these procedures in negotiated agreements is one of the great achievements of labor-management relations in this country, for it assures the stability necessary for economic planning and growth during the period of a contract. This practice stands in marked contrast to that of other countries, such as England, where the threat of wildcat or unofficial strikes is a constant impediment to economic growth and industrial efficiency. In the public sector, where contracts of employment are permitted and where obstacles to arbitration of grievances have largely been overcome, the union is generally able to obtain agreement from the public employer to arbitrate questions of interpretation or application during the period of the contract.

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

where unions have been chosen. Although modified by available political appeals, this was the traditional method used in public employment for organized as well as unorganized workers. Second, the terms of employment may be set by joint determination through collective bargaining. Joint talks can supply information and help define the area of disagreement, but real bargaining to resolve those issues depends on the ability of the negotiators effectively to say "no" by suspending the relationship. That possibility exerts pressure on both sides. It infuses the bargaining with the sense of urgency that produces necessary accommodation of conflicting interests.

Third, a neutral third party may be designated the final decision maker. This is the case in arbitration. The impartial adjudicator hears both sides and makes a decision. Arbitration should not be confused with fact-finding, mediation, or any other form of third-party procedure that does not result in a final decision. In arbitration, the standard of determination can and should be the equity of the claim, whereas in fact-finding with recommendations, the standard has to be the acceptability of the recommendations. The arbitrator's decision is final. Since there is no appeal from the decision, the uncertainty may encourage voluntary agreement. Each party runs a risk, so there may in fact be more incentive to agree than is the case when a board makes recommendations which can be turned down. But it also provides, as the Taylor Committee observed,²⁷ an incentive for negotiators to pass the buck and then complain about the result.

Several states have adopted statutes imposing arbitration in particular types of public employment disputes. In Minnesota, disputes over "maximum hours and minimum wages" of employees in charitable non profit hospitals must be submitted to arbitration.²⁸ A Nebraska statute governing public employee labor disputes provides for arbitration at the request of either party.²⁹ In Rhode Island two statutes provide for arbitration of disputes involving teachers and municipal employees, but the decision is binding only with respect to matters not involving monetary expenditures.³⁰ Under a recent Pennsylvania statute,³¹ unresolved disputes involving uniformed police and firemen must be arbitrated. In other disputes not imperiling public health or safety, a strike may lawfully take place.

27. Governor's Committee, *supra* note 17, at 67-68.

28. MINN. STAT. ANN. §§ 179.36-38 (1966).

29. NEB. REV. STAT. § 48-824 (1968).

30. R.I. GEN. LAWS ANN. §§ 28-9.3-9, 28-9.4-10 (1969).

31. PA. STAT. ANN. tit. 43, § 217 (Supp. 1969).

This is a major departure from traditional thought about strikes by public employees.

While arbitration can be a legal and feasible method of settling disputes in certain situations, it is not in my opinion the panacea for our problems. It does face serious legal obstacles. There are many issues which are proper subjects of bargaining, but which no agency of government can legally submit for decision to a third party. This is evident, for example, in disputes involving teachers whose work is directly affected by educational policy which school boards must ultimately decide. Arbitration will be effective only if viewed as a last resort after other steps have failed and the dispute has reached a stage where the issues remaining unresolved have been sharply narrowed and can be stated within specific bounds. Framing the issues properly, and providing some standards for determination—if only the limits of the arbitrator's authority—is essential if arbitration is to be of any use. The absence of standards of reference makes arbitration of issues involving wages and other terms of a contract fraught with difficulty. In the case of policy questions, arbitration must be viewed as illegal and impractical except within narrowly defined limits. When bargaining has framed the issue with precision, then arbitration may be possible. Thus Congress first framed the issue and then ordered arbitration in the national railroad dispute of 1967. The question submitted was whether a proposal made by a fact-finding panel should be modified.³² The burden was on the parties seeking a change to prove why it should be granted, and standards for such a determination were included in the special legislation. In these circumstances, the board of arbitration was able to function because the outer limits of the award were effectively prescribed by the law imposing arbitration.

Other difficulties involved in using arbitration as the common method of dispute settlement in situations where the issues are submitted without definition were revealed in my experience during a police dispute as the first arbitrator appointed under the 1968 statute in Pennsylvania.³³ The dispute concerned the demand of police in Pittsburgh for wage increases and other benefits, and the demand of the city for a change in the disciplinary procedures for police which the state legislature had set. The police and the city divided sharply on two related questions concerning interpretation of the arbitration statute. The first was whether the arbitration board should consider

32. 45 U.S.C. § 157 (Supp. 1968).

33. PA. STAT. ANN. tit. 43, § 217 (Supp. 1969).

the fiscal requirements of the city in making its decision and limit the award to the existing revenue and taxing authority of the municipality.³⁴ The statute was silent. The police argued that the standard of determination should be "what is a policeman worth in today's society." The city argued that the arbitrator should be guided by the fiscal responsibilities and limitations of the deficit-ridden municipal government. Without any guidelines, the arbitrator's award could well have been grossly inadequate by comparison with the policemen's legitimate needs, or it might have been grossly out of line with the city's fiscal capacity.

The second question was the extent to which the statute imposed an obligation on the state legislature to take action required to effectuate the arbitrators' award. Here, the positions of the parties seemed to reverse. The union argued that the arbitrators could not compel a change in the law. The city said the state legislature was bound by the decision and would have to enact whatever legislation was necessary to effectuate the award. The statute was ambiguous. But if it is read to grant the arbitrators authority to "bind" the legislature, the act might well be unconstitutional. On the other hand, if the legislature has no obligation to provide the necessary funds, the city could be crippled by an award with which it is bound to comply. It would be forced either to impose taxes it opposes or to cut other services not covered by the award. If the legislature does not have to change the law on disciplinary procedures to comply with an arbitration award, then the demand for a change is not arbitrable in spite of what the law says. Either way it is an intolerable dilemma. I declined the opportunity to resolve this question, which properly belongs to the courts, but in issuing my award on wages I made clear my feeling that the legislature had some obligation—albeit not necessarily legal or enforceable—to provide the city the resources it needed to comply with the award without reducing essential services. But the more fundamental issues remained unsettled, and remain today the subject of debate throughout Pennsylvania. The simple lesson is that compulsory arbitration for all disputes and all issues is neither legally sound nor practically feasible. It would be a great mistake to adopt this procedure as the usual method prescribed in advance for all disputes in the expectation that it would signal an end to labor strife in public employment.

I believe, rather, that we should acknowledge the failure of

34. See generally Rehmus, *Constraints on Local Governments and Public Employee Bargaining*, 67 MICH. L. REV. 919 (1969).

unilateral determination, and turn instead to true collective bargaining, even though this must include the possibility of a strike. We would then clearly understand that we must seek to improve the bargaining process and the skill of the negotiators to prevent strikes. For in the end, the solution to the wide range of labor problems involving the many aspects of a dynamic and complicated human relationship must depend on the human factor. The most elaborate machinery is no better than the people who man it. It cannot function automatically. With skillful and responsible negotiators, no machinery, no outsiders, and no fixed rules are needed to settle disputes. For too long our attention has been directed to the mechanics and penalties rather than to the participants and the process. It is now time to change that, to seek to prevent strikes by encouraging collective bargaining to the fullest extent possible.

For the few strikes that might jeopardize public health or safety, I would favor legislation authorizing the governor of a state to seek an injunction for a specified period through procedures similar to those for emergency disputes under the Taft-Hartley Act.³⁵ During the cooling-off period, the parties could continue their search for the basis of accommodation to end the dispute. If these procedures prove unavailing, then the legislature could consider means, but not the specific terms, of settlement, including the possibility of submitting the remaining issues to arbitration within specified bounds. In a particular situation, with issues sharply limited and defined through bargaining, arbitration imposed as a last resort by the legislature can effectively protect the public interest without making a sham of the bargaining process. Our primary reliance would then be placed, as I believe it must if we are to prevent strikes, on joint determination by parties in a true bargaining atmosphere.

I suggest, in short, that there is no workable substitute for collective bargaining—even in government—and that our best chance to prevent strikes against the public interest lies in improving the practice of bargaining. In an environment conducive to real bargaining, strikes will be fewer and shorter than in a system where employees are in effect invited to defy the law in order to make real the promise of joint determination. In a real bargaining environment, the employee representatives, I am convinced, can more effectively meet their dual responsibility to negotiate and to lead. Only if leaders do both can there be constructive labor relationships in place

35. 29 U.S.C. §§ 176-80 (1964).

of the chaos resulting when agreements reached in negotiations are rejected by an angry rank and file or defied by subterfuge forms of strikes such as working to the rule.

My suggestions are not put forth with a guaranty that they will bring a complete end to public employee strikes. They will not. Rather I suggest that reliance on legal prohibitions, penalties, and elaborate third-party recommendations has not worked, and that before we turn in desperation to compulsory third-party determination, which cannot serve as a steady diet, we should give bargaining in the public sector the same opportunity it has received, with beneficial results, in the private sector. The most effective technique to produce acceptable terms to resolve disputes is voluntary agreement of the parties, and the best system we have for producing agreements between groups is collective bargaining—even though it involves conflict and the possibility of a work disruption. There is no alternative.