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# THE APPROPRIATE UNIT QUESTION IN THE PUBLIC SERVICE: THE PROBLEM OF PROLIFERATION

*Eli Rock\**

## I. INTRODUCTION

IT is becoming increasingly clear that of the numerous problems which complicate the practice of collective bargaining in the public sector, none is more important than the appropriate unit question. In the public sector as well as in private industry, determination of the size and composition of the bargaining unit at the initial stages of organization and recognition can be decisive of the question of which employee organization will achieve majority recognition, or whether any organization will win recognition. Save for the employee organization which limits its jurisdiction along narrow lines such as the craft practiced by its members, the normal tendency may be to request initially a unit whose boundaries coincide with the spread of the organization's membership or estimated strength. The public employer, on the other hand, may seek to recognize a unit in which the no-union votes will be in the majority, or a favored employee organization will have predominant strength; or the employer may simply seek to avoid undue proliferation of bargaining units.

The problem in the public sector, however, is of far greater depth than the initial victory-or-defeat aspect of recognition. In the private sector, it is clear that the scope and nature of the unit found to be appropriate for bargaining has acted as an important determinant of the union's basic economic strength—that is, its bargaining over bread-and-butter economic issues. In the public sector, it seems clear that the scope and nature of the unit found to be appropriate will also affect the range of subjects which can be negotiated meaningfully, the role played in the process by the separate branches of government, the likelihood of peaceful resolution of disputes, order versus chaos in bargaining, and ultimately, perhaps, the success of the whole idea of collective bargaining for public employees.

Although the appropriate unit question has received much attention in the private sector during the past thirty years,<sup>1</sup> it has not

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1. See, e.g., Grooms, *The NLRB and Determination of the Appropriate Unit: Need for a Workable Standard*, 6 WM. & MARY L. REV. 13 (1965); Hall, *The Appropriate Bargaining Unit: Striking a Balance Between Stable Labor Relations and Employee*

received the same attention for public sector employees until recently. The purpose of this Article is to focus on certain distinguishing aspects of both the problem and the experience in the public sector, and to discuss a possible approach or philosophy for the future. The primary concern here is undue proliferation of units among the large pool of blue-collar and white-collar employees in the public service. No attempt will be made to deal with special groups such as policemen and firemen, in which the unit question is less difficult. Nor will I discuss the unique problems of supervisors and professional employees, such as teachers, which are sufficiently important and complex to require separate treatment.

## II. PAST TENDENCIES AND PATTERNS

Traditionally, the public employer and union have given little thought to the appropriateness of a unit that requested recognition. More often than not, in the years prior to the enactment of definitive rules for recognition of public employees, a union requesting and receiving some form of recognition was considered the spokesman for its members—in whatever job classifications, functional departments, or physical locations they happened to be. This lenient approach was facilitated by (and perhaps had its start in) the fact that “recognition” frequently carried no legal consequences beyond the ability to appear before legislative or executive bodies hearing budgetary requests or the power to lobby with key political figures.<sup>2</sup> Even when recognition was followed by a procedure similar to bargaining—including in some instances an embodiment of the bargain in a written agreement or memorandum—little if any consideration was given to the appropriateness of the unit being dealt with. Apart from the obvious problems stemming from the failure to grant “exclusive bargaining rights” to these early public employee units and from the inattention to the matter of excluding supervisors from the units representing those whom they supervise, a groundwork was laid for the creation of illogical unit lines. All too frequently the result was a proliferation of bargaining units. The task of changing

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*Free Choice*, 18 W. RES. L. REV. 479 (1967); Maddux, *Bargaining Unit Appropriateness in National Labor Relations Board Representation Proceedings*, 38 L.A. BAR BULL. 298 (1963); Note, *The Board and Section 9(c)(5): Multilocation and Single-Location Bargaining Units in the Insurance and Retail Industries*, 79 HARV. L. REV. 811 (1966).

2. See *Norwalk Teachers' Assn. v. Board of Educ.*, 138 Conn. 269, 82 A.2d 482 (1951); *Miami Water Works, Local 654 v. City of Miami*, 157 Fla. 445, 26 S.2d 194 (1946); Smith & Clark, *Reappraisal of the Role of the States in Shaping Labor Relations Law*, 1965 WIS. L. REV. 411, 423.

this ill-conceived basis has often proved troublesome in the current period of rule-oriented bargaining.

Nor has the enactment of rules in the past ten years invariably led to a different pattern.<sup>3</sup> For example, under New York City's Executive Order 49, issued by Mayor Wagner in the late fifties, certificates of recognition were granted for over 200 separate units, some containing as few as two employees. The proportion of units to number of member-employees found in New York City is perhaps exceeded only in Detroit, where some seventy-eight separate units have come into existence. At the federal level, marked proliferation of units has also characterized the pattern of recognition under Executive Order No. 10,988;<sup>4</sup> a similar tendency seems inherent in a number of recently enacted state legislative standards for unit determination.<sup>5</sup>

Notwithstanding this rather pessimistic summary, the past ten years have clearly been the decisive decade for all aspects of public sector bargaining, and this is particularly true for the specific rules regarding unit determination. A major example of this development occurred in 1962 with President Kennedy's promulgation of Executive Order No. 10,988. In this document, which was originally regarded as the federal employee's Magna Carta of labor relations, the following general standards are specified for appropriate unit determination when "exclusive" recognition is sought by a majority organization:

Units may be established on any plant or installation, craft, functional or other basis which will ensure a clear and identifiable community of interest among the employees concerned, but no unit shall be established solely on the basis of the extent to which employees in the proposed unit have organized.<sup>6</sup>

Another section of the Order also provides for "formal" recognition in a "unit as defined by the agency" when an employee organization has ten per cent of the employees as members, and no other organiza-

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3. For an excellent discussion of the recent experience with the unit issue at all levels, see A. Thomson, *Unit Determination in Public Employment*, part of a series entitled "Public Employee Relations Reports," published by the New York State School of Industrial and Labor Relations at Cornell University.

4. 3 C.F.R. 521 (1959-1963 Comp.). See Barr, *Executive Order 10,988: An Experiment in Employee-Management Cooperation in the Federal Service*, 52 GEO. L.J. 420 (1964).

5. See, e.g., CONN. GEN. STAT. ANN. §§ 7-471, 10-153(b) (Supp. 1969); DEL. CODE ANN. tit. 19, § 1304 (Supp. 1966); MICH. COMP. LAWS ANN. § 423.213 (1967); MO. REV. STAT. § 105.500(3) (Supp. 1968); ORE. REV. STAT. § 662.705(1) (1967); R.I. GEN. LAWS ANN. § 28-9.4-4 (1969); Sullivan, *Appropriate Unit Determinations in Public Employee Collective Bargaining*, 19 MERCER L. REV. 402, 410-16 (1968).

6. Executive Order No. 10,988, § 6(a), 3 C.F.R. 521, 532-24 (1959-1963 Comp.).

tion holds exclusive representation rights.<sup>7</sup> Finally, another section provides for "informal" recognition when the employee organization does not qualify for exclusive or formal recognition, without regard to whether other employee organizations hold one of the other forms of recognition in the same unit.<sup>8</sup>

Regardless of whether this three-sided format was justified under the state of recognition and bargaining then prevalent in the federal service, there can be little question that the system was calculated to encourage representational footholds on a mass scale within small units. And, it did result in proliferation of units, albeit on a reduced scale, as informal or formal recognition often led to exclusive recognition. Emphasis on the "community of interest" standard in the administration of Executive Order No. 10,988,<sup>9</sup> and the use in some instances of the National Labor Relations Board's technique of the "*Globe* election"—a procedure in which the members of a homogeneous occupational group are allowed to vote on separate recognition for their own unit, as opposed to a rival organization's request that they be included in a larger unit<sup>10</sup>—have undoubtedly contributed further to widespread fragmentation of units in federal employment.

At the state and local levels, virtually all of the significant legislation passed since 1960 has spelled out standards of some type for unit determination. In many instances these state enactments made possible further proliferation by adding to the existing illogical patterns of recognition new units made possible through espousal of the federal "community of interest" standard and its converse, separate units for groups having "conflicting interests"; by providing for *Globe*-type elections or similar approaches designed to facilitate small unit separation; and, in the states of Delaware<sup>11</sup> and Minnesota,<sup>12</sup> by permitting the government agency to rely on the extent of employee organization. Notwithstanding the fact that some of the state laws embody specific standards used by the National Labor Relations Board for the private sector,<sup>13</sup> observers familiar with bargaining conditions in both sectors have contended that the

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7. *Id.* § 5(a), 3 C.F.R. at 523.

8. *Id.* § 4(a), 3 C.F.R. at 523.

9. See Barr, *supra* note 4, at 430-31.

10. *Globe Mach. & Stamping Co.*, 3 N.L.R.B. 294 (1937).

11. DEL. CODE ANN. tit. 19, § 1304 (Supp. 1967).

12. MINN. STAT. ANN. § 179.52 (1966).

13. See generally Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 897-8, 903 (1969).

degree of fragmentation in some of the states exceeds that of the private sector.<sup>14</sup>

Clearly, at both state and federal levels the standards place a high premium on the subjective judgment of the decision-making body or individual, and results are also shaped to a high degree by the happenstance of the petitioning organization's requested unit at the time of the petition. Particularly when there is no rival organizational claim for a larger unit—which is often the case—the over-all effect has been to encourage recognition of the smaller unit. Even if a union succeeds in winning recognition in a large unit, employees in that unit are generally not required to become members of the union. The relative lack of union security clauses in the collective bargaining agreements of the public service assures that, to a degree unparalleled in the private sector, dissident small-unit groups are able to maintain their separate identities and to prolong the battle for break-off from the larger group's exclusive bargaining agent.

### III. THE CASE FOR AND AGAINST THE SMALL UNIT

It cannot be assumed automatically that the pattern of many small units is wrong. A single craft, classification, department, or installation which would otherwise constitute a small minority if included in a larger unit can argue with some justification that its specialized interests and needs may be subordinated to the wishes of the larger unit's majority. Moreover, the smaller unit which performs a particularly essential function may also be capable of striking a better bargain for itself when left to do its own negotiating.

“Community of interest” is more than a catch phrase. It not only points up that like-situated employees will better understand their own problems and press their unique needs, but it also recognizes the instinct of exclusiveness which causes employees to *want* to form their own organization rather than become part of a larger organization in which they may feel themselves strangers. The desire to possess such “freedom of choice” or “self-determination” should, it can be argued, receive greater weight for public employees, because they are “public,” than for those in the private sector.

There is nothing inherently wrong in permitting an employee organization to gain a foothold in a smaller unit, if the employees in that unit select it; and, if the union is effective in the small unit, it may grow and achieve recognition in other separate units or in a single large unit. This consideration may be particularly significant

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14. See A. Thomson, *supra* note 3, at 10.

in the early period after the promulgation of legislation or executive orders encompassing a vast group of employees whose right to representation had not previously been formally legitimized. It is frequently easier for unions to secure employees' allegiance in smaller, distinctive groups than in larger, heterogeneous ones.

At the same time, there are important considerations which, it seems, point toward a unique, long-range need for larger units in the public sector. The special problems of unit determination in the public sector were most clearly recognized legislatively in 1967 in New York's Taylor Law, which included, in addition to the common standards of community of interest and necessity to promote the public welfare, the further requirement that in defining an appropriate unit the following standard should be taken into consideration: "the officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to, the terms and conditions of employment upon which the employees desire to negotiate . . . ."<sup>15</sup> The latter clause clearly reflects awareness of the fact that the employer-negotiator in the public service frequently has only limited authority, and that this condition will affect the scope of bargaining. As pointed out by the New York Governor's Committee on Public Employee Relations,<sup>16</sup> the picture in the public sector is fundamentally different from that in the private sector. In private business, the authority to bargain on all of the normally bargainable matters is present or can be delegated, no matter what the size or make-up of the bargaining unit. By contrast, in the public service the necessary authority may not be delegable to lower-level functional units; legal requirements and tradition often call for uniformity of certain working conditions for like categories of employees throughout the governmental entity, regardless of bargaining unit categorization; and, even at the top of the particular level of government involved, authority is normally divided at least three ways—among the executive branch, the legislative branch, and a civil service commission.

Inherent in the previously quoted section of the Taylor Law,<sup>17</sup> therefore, is the necessity that some consideration be given to the nature of the subject matter sought to be bargained upon in seeking to arrive at the appropriateness of a unit.<sup>18</sup> This provision of the

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15. N.Y. CIV. SERV. LAW § 207(1)(b) (McKinney Supp. 1968).

16. Governor's Committee on Public Employee Relations, State of New York, Final Report 15-18 (March 31, 1966).

17. See text accompanying note 15 *supra*.

18. Governor's Committee, *supra* note 16, at 25-27.

Taylor Law also recognizes that the subject matter of bargaining must normally be limited by the scope of the "employer's" authority to make agreements or effective recommendations, and a likely consequence is that the smaller the unit decided upon, the more restricted the scope of the bargaining by that unit will be.

Apart from this inhibiting effect on the bargaining experience, an approach which permits or favors small units makes it very difficult to resolve other institutional complications which arise in bargaining in the public service. The New York Governor's Committee, in both its 1966 Report<sup>19</sup> and its 1968 Report,<sup>20</sup> pointed out the unique importance of completing a negotiation with public employees in time to incorporate the agreement's financial essence in the budget of the governmental unit—which, by law, generally must be submitted to the legislature by a specified date.<sup>21</sup> However, many of the annual bargaining sessions in the public sector today are extraordinarily prolonged, starting with direct negotiation, followed by resort to mediation and the frequently used machinery of fact-finding or impasse panels. After all of this there may be further extensive dealings with upper-echelon individuals or groups in the executive and legislative branches. Thus, the sheer weight of the process<sup>22</sup> may lead to its breakdown if the trend toward proliferation of bargaining units in numerous jurisdictions continues unabated. It is noteworthy that in the City of Philadelphia<sup>23</sup>—which is frequently cited as an example of well-established, peaceful, and effective bargaining at the municipal level—all employees except policemen and firemen have been represented by a single unit for most of the last two decades. Even with only a single unit and without use of impasse resolution machinery, however, the experience in Philadelphia has been marked by many instances of abnormally prolonged annual negotiations. The Philadelphia experience also demonstrates the need to establish detailed liaison between the executive branch, the legislative branch, and the civil service commission during the

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19. *Id.* at 33-34, 39.

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

21. See generally Rehmus, *Restraints on Local Governments in Public Employee Bargaining*, 67 MICH. L. REV. 919, 924-25 (1969).

22. For example, a February 27, 1968, report by an impasse panel for the unit of Detroit police officers recommended a procedure for future bargaining. The essential steps which the panel proposed were to extend over a period of nine months in a particular year. *Excerpts from Detroit Police Panel Report*, GOVT. EMPLOYEE REL. REP. [hereinafter GERR] No. 235, at D-1, D-10 (March 11, 1968).

23. The author was the labor relations adviser to the City of Philadelphia between 1952 and 1962.



course of an annual bargaining program in order to minimize the chaotic effects of overlapping authority on the government side.

While it is possible that a city the size of Philadelphia might also have had a history of successful labor relations in the public sector under a pattern which broke down the public employee bargaining group into a small number of separate units, there is little question that the success could not have been achieved under the patterns of excessive fragmentation found elsewhere. In any event, the existence of the single large unit clearly contributed significantly to that city's ability to surmount effectively the institutional obstacles complicating public sector bargaining. Moreover, proliferation can and does breed excessive competition among rival organizations. One consequence of this may be a high incidence of breakdowns in peaceful bargaining. To be sure, competition in bargaining is to some extent unavoidable; this condition is not necessarily undesirable socially, and will continue to characterize the experience in private and public sector alike, regardless of the size of units involved. Nevertheless, there is hardly a permanent justification for permitting what appears to be a greater proliferation of bargaining units in the public sector than that now prevailing in the private sector. The institutional factors discussed above add a unique dimension to the task of achieving peaceful and successful bargaining in the public sector. Because of this, and because of the likelihood that proliferation will result in an increased number of breakdowns in the bargaining process, larger units must become the accepted norm in the public sector.

#### IV. SOME SIGNIFICANT RECENT EXPERIENCES

A number of specific case histories furnish valuable insight into both the unit determination problems posed in the public service and the steps which may be taken to resolve those problems. For example, the Post Office Department, whose employees had long been members of various employee organizations, was faced with problems of unprecedented magnitude and complexity in formalizing its bargaining structure under Executive Order 10,988. The approach decided upon was to establish one set of appropriate bargaining units at the national level for national issues, another set at the regional level for regional issues, and a third set of 24,000 units at the local level for local issues.<sup>24</sup> Separate representational procedures were

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24. Postmasters have recently voiced some dissatisfaction with this solution, since a union which is unsuccessful in obtaining a desired provision at the local level may try again at the regional and national levels. GERR No. 265, at A-3, A-4 (1968).

instituted to select majority bargaining agents at each level, and subsequently bargaining agreements were entered into at each level encompassing the issues pertinent and bargainable at that level. At the national level, it should be added, a single joint agreement was reached with seven separately designated exclusive bargaining agents.<sup>25</sup>

Under the above format, an employee who has one bargaining agent at the local level may be represented by rival organizations at the higher levels; there are, in fact, at least eleven examples of "triple representation" for a particular craft or grouping in the Post Office Department.<sup>26</sup> However, the disadvantages of this condition appear to be outweighed by the practical value of this highly innovative technique designed to permit maximum bargaining under extremely difficult circumstances. On the one hand, the solution affords a high degree of local "self-determination"; at the same time it recognizes the significant principle that, in establishing bargaining units in the public sector, attention must be given to the relationship between the subjects sought to be included in the bargaining and the degree of meaningful "employer" authority to bargain with the proposed unit. Moreover, when issues arise that affect the Post Office Department on a national scale, the ability of the seven designated national bargaining agents to enter into a joint agreement greatly minimizes the normal institutional difficulties indigenous to public sector bargaining.

Regardless of whether this hierarchical arrangement proves a lasting success for the Post Office, there seems to be little question that the technique may not be feasible for the federal service as a whole, and that the long-run solution to the existing problem of proliferation probably lies in a simple movement toward larger and fewer units. In fact, there is now some evidence to indicate the beginnings of a trend toward consolidation of bargaining units in some of the federal agencies.<sup>27</sup> An additional step which would also help to avoid undue proliferation of bargaining units in the future would be to amend Executive Order No. 10,988 to exclude the possibility

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25. The seven unions are the Natl. Assn. of Letter Carriers, the Natl. Assn. of Post Office & Gen. Service Maintenance Employees, the Natl. Assn. of Post Office Mail Handlers, Watchmen, Messengers & Group Leaders, the Natl. Assn. of Spec. Delivery Messengers, the Natl. Fed. of Post Office Motor Vehicle Employees, the Natl. Rural Letter Carriers Assn., and the United Federation of Postal Clerks. GERR No. 212, at A-5 (Oct. 2, 1967).

26. PRESIDENT'S COMMISSION ON POSTAL ORGANIZATION, TOWARDS POSTAL EXCELLENCE 118 (1968).

27. Letter to the author dated July 8, 1968, from Louis S. Wallerstein, Chief, Division of Federal Employee-Management Relations, U.S. Dept. of Labor.

of any further "informal" recognitions and to raise the minimum required membership for "formal" recognition in a unit.<sup>28</sup>

Another interesting development is taking place in New York City. With the creation of the Office of Collective Bargaining,<sup>29</sup> New York City began to consolidate its bargaining units through techniques such as recognition by citywide job classifications.<sup>30</sup> This transition was followed, in the spring of 1968, by the truly basic step of recognizing one exclusive bargaining agent for *all* the employees of the mayoral agencies<sup>31</sup> for purposes of those citywide working conditions which are required to be uniform for such employees.<sup>32</sup> Separate representation in smaller units continues for purposes of other issues, and this condition is no doubt prolonging the same problems that are found elsewhere; but the basic trend appears to be a salutary one.

A third experience of interest involves the employees of the State of New York. Prior to the enactment of the Taylor Law, which defined the first set of rules for bargaining by both state and local government personnel, the majority of the state's 124,000 employees<sup>33</sup> had belonged to the statewide Civil Service Employees Association (CSEA)—an organization which, at least in its earlier years, had shunned the concept of formalized collective bargaining.<sup>34</sup> Following enactment of the Taylor Law, the state, as employer, recognized the CSEA as the bargaining agent for a "general unit" of all the employees.<sup>35</sup> After nearly a year of bargaining by this unit, the Public Employment Relations Board (PERB), the state agency charged with administering the Taylor Law,<sup>36</sup> received petitions challenging the appropriateness of the general unit.<sup>37</sup> In opposition to the CSEA,

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28. A presidential review commission appointed in 1967 has suggested such an amendment. Under this proposal, the minimum required membership for "formal" recognition in a unit from its present ten per cent [Executive Order No. 10,988, § 5(a), 3 C.F.R. at 523 (1959-1963 Comp.)] to thirty per cent. N.Y. Times, April 11, 1968, at 28, col. 3.

29. The office was established by Local Law of the City of New York No. 53, GERR, No. 205, at E-1 to E-10 (Aug. 14, 1967).

30. See, e.g., the decisions on certification reported in GERR No. 253, at B-2, B-3 (July 15, 1968).

31. N.Y. Times, Feb. 27, 1968, at 1, col. 1.

32. *Id.* See also Editorial, *Milestone in Municipal Labor*, N.Y. Times, Feb. 29, 1968, at 36, col. 1.

33. The figure does not include approximately 3,500 state police and approximately 10,000 employees of state universities. GERR No. 219, at B-7 (Nov. 20, 1967).

34. See Governor's Committee, *supra* note 16, at 11-12.

35. GERR No. 219, at B-7 (1967).

36. N.Y. CIV. SERV. LAW § 205 (McKinney Supp. 1968).

37. Immediately after the Governor recognized the CSEA as exclusive bargaining agent, the Public Employment Relations Board issued an order withholding recognition of the CSEA pending the Board's disposition of petitions by other employee

twelve separate employee organizations requested recognition in twenty-five different bargaining units.<sup>38</sup> The proposed units were drawn along highly diverse occupational, departmental, or installation lines.<sup>39</sup>

Shunning the extremes of either one general unit or twenty-five separate units, the PERB ruled in favor of five separate statewide negotiating units and directed elections to determine the majority agent in each of those units.<sup>40</sup> The units were constituted along lines cutting across departments; instead, the employees were grouped into families of occupations primarily on the basis of function and training. In denying the requested continuance of the general unit, the PERB adopted an earlier finding of its Director of Representation<sup>41</sup> regarding the unit's inconsistency with the "community of interest" standard of the law<sup>42</sup> and, noting that the employees were divided among ninety occupational groupings, encompassing more than 3,700 separate job classifications, held: "The enormity of this diversity of occupations and the great range in the qualifications requisite for employment in these occupations would preclude effective and meaningful representation in collective negotiations if all such employees were included in a single unit."<sup>43</sup> On the other hand, the PERB concluded that accepting the opposite extreme of twenty-five separate units would foster a proliferation of small groups and would cause "unwarranted and unnecessary administrative difficulties" which "might well lead to the disintegration of the State's current labor relations structure."<sup>44</sup> In addition to these policy considerations, the PERB relied upon the provision of the Taylor Law requiring that the bargaining unit be "compatible with the joint responsibilities of the public employer and public employees to serve the public."<sup>45</sup> This standard, the PERB determined, "requires the designation of as small a number of units as

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organizations. GERR No. 221, at B-1 (Dec. 4, 1967). The CSEA petitioned to vacate that order and, although the petition was dismissed by the Supreme Court, *CSEA v. Helsby*, 55 Misc. 2d 507, 285 N.Y.S.2d 806 (1967), it was upheld, and the order vacated, on appeal, *CSEA v. Helsby*, 29 App. Div. 2d 196, 286 N.Y.S.2d 956, *affd.*, 21 N.Y.2d 541, 236 N.E.2d 481, 289 N.Y.S.2d 203 (1968).

38. *See In re State*, GERR (PERB 1968) No. 279, at G-1, G-1 to G-3 (Jan. 13, 1969), *petition to set aside dismissed*, *CSEA v. Helsby*, 58 Misc. 2d 745, 296 N.Y.S.2d 246 (Sup. Ct. 1969).

39. *Id.*

40. *Id.*

41. *In re State*, GERR (PERB 1968) No. 262, at E-1 (Sept. 16, 1968).

42. *Id.* at E-8.

43. *In re State*, GERR (PERB 1968) No. 279, at G-1, G-3.

44. *Id.*

45. N.Y. CIV. SERV. LAW § 207(1)(c) (McKinney Supp. 1968).

possible consistent with the overriding requirement that the employees be permitted to form organizations of their own choosing" in order to achieve meaningful representation.<sup>46</sup>

The PERB did not make specific reference to the statutory standard requiring consideration of a requested unit in terms of the employer-agency's existing authority to deal effectively with possible bargaining subject matter within such a unit.<sup>47</sup> There seems to be little question, however, that the size and nature of the five designated statewide units insure adequate authority, on the side of the state's negotiating representatives, to make meaningful agreements or recommendations with respect to a large portion of the substantial issues normally deserving of consideration in an effective collective bargaining relationship. Moreover, since the employees were geographically dispersed and because the general unit presented serious problems of providing direct representation, the PERB's breakdown of the employees into five large families of jobs probably maximizes the possibilities for self-determination and adequate union responsiveness in representing the various segments within each family.

The New York experience is also noteworthy because the direct confrontation between the two opposite extremes presented by the requested patterns at the inception of newly formalized public sector collective bargaining afforded an opportunity to weigh the basic implications of excessive fragmentation. In contrast to policy makers in cities like New York and Detroit and in some of the departments at the federal level, the New York State PERB was able to adopt a coherent policy at a time when the damage had not yet been done. At the same time, the Board's decision rejected a monolithic bargaining unit which would have been neither proper nor realistic for public employees at this stage of history.

## V. CONCLUSION

From the foregoing examination of some of the problems and practical experience associated with the appropriate unit issue in the public service, it seems relatively clear that the answer, at least for the present, cannot lie in "instant" creation of large single bargaining units, however desirable that solution might be from the standpoint of administrative convenience. Even in the near-Utopian example presented by Philadelphia, separate units have always existed for the police and fire departments. Moreover, the present

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46. GERR No. 279, at G-1, G-4.

47. N.Y. CIV. SERV. LAW § 207(1)(b) (McKinney Supp. 1968).

single large unit for Philadelphia's civilian employees was preceded by a period of unit recognition along department lines, with several employee organizations representing or claiming to represent the employees. In any event, the unit problems in the public service are altogether too new and different to permit any simple solutions at this stage; it seems clear that a considerable period of trial-and-error lies in store.

Nevertheless, there is sufficient experience to warrant the twin conclusions that there has been too much fragmentation of public employee bargaining units thus far, and that this condition will inhibit the evolution of orderly collective bargaining arrangements for the future. Apart from the details in individual cases, I believe that a basic philosophy is required which will generally favor larger units rather than smaller units. The special problems of the public service call for such an approach, to a significantly greater extent than in the private sector. The available evidence also reveals that this basic philosophy is not being implemented, except in isolated instances such as the above-described decision by the Public Employment Relations Board in New York. Unfortunately, the general tendency has been in the opposite direction, particularly when the freedom-of-choice argument has been given special weight in light of the "public" nature of the employment.

The problem might also be viewed as a two-stage phenomenon, however. Given the fact that basic bargaining authorization was often granted almost overnight to a large mass of employees who were essentially naïve and inexperienced regarding collective bargaining, and given the further fact that these *were* public employees, the marked initial tendency toward small units was perhaps understandable. It was reasonable to expect that employee organizations which were suddenly permitted to engage in bargaining over a large number of problems for the first time would seek to establish their powers in small units; perhaps it was also reasonable that, from a public policy viewpoint, the employees who were encountering a new experience in labor relations were afforded an initial period of familiarization through comfortable association with their counterparts in small groups.

Nevertheless, because we have long since entered and in some instances passed through such a stage, the question arises as to what the second stage should be. Fragmentation into too many small units can severely limit the scope of bargaining subject matter, and that in turn might defeat the basic bargaining right. Although the three-tier bargaining pattern used by the Post Office Department was

fashioned at an initial stage of recognition, it may warrant serious consideration elsewhere as a second-stage process capable of balancing the twin necessities of providing freedom of choice for employees and accommodating the practical realities of bargaining in the public sector. Similarly, the hierarchical, multiunion structure of bargaining found under the Whitley Councils in England<sup>48</sup>—a system which greatly resembles the Post Office pattern—warrants serious study in this country, particularly for employees of extremely large entities such as some of the federal departments or the government of an entire state.

At the state level, the evolution of larger bargaining units still remains quite speculative. Even in New York, the previously mentioned decision of the Public Employment Relations Board may represent only a tentative initial step; numerous problems affecting the structure of bargaining probably still lie in store there. Assuming that the PERB's decision is not reversed in the courts, and that a number of separate employee organizations win bargaining rights in the units decided upon, the question of how statewide issues such as pensions and other matters requiring uniform treatment should be negotiated by the separate bargaining agents will remain to be solved. At this time it does not appear that New York State could turn to the hierarchical structure of the Post Office, and for various reasons such as history, it is also unlikely that the Post Office model would have been feasible for the state, at least initially.

Another possible approach which has been suggested, at the federal, state, and local levels, is the concept of "council," "joint," or "coalition" bargaining. This is a procedure in which the separate bargaining agents within a governmental entity bargain jointly with the governmental employer on all agency-wide issues. This approach has been practiced successfully in several governmental entities, notably in the Tennessee Valley Authority and in the City of Cincinnati, Ohio. Interestingly, the technique of coalition bargaining is currently being urged more extensively by unions in the private sector because it would provide them greater economic strength—and, for the same reason, it is also being strenuously resisted by private employers.<sup>49</sup> Nevertheless, the special problems in the public sector make it clear that the approach should be given extensive consideration by both government and public employees. There

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48. See generally INDUSTRIAL RELATIONS IN GREAT BRITAIN 29, 242-44, 331-36 (1954).

49. See, e.g., Abelow, *Collective Bargaining: A Management View*, 21 VAND. L. REV. 339 (1968); Loomis & Herman, *Management's Reserved Rights and the NLRB—An Employer's View*, 19 LAB. L.J. 695 (1968).

are obvious difficulties and disadvantages in such a solution; for example, the larger organizations in the coalition may dominate the smaller in determining the types of package settlements to be agreed upon, or, conversely, the smaller members may exercise undue influence if veto power is vested in them. Nevertheless, the concept has apparently worked in the few places where it has been adopted, and it may be that in the long run this will prove to be the most feasible reconciliation of the conflict between freedom of choice and the realities of bargaining in the public service. Another possible solution may lie in some type of merger or federation of the several employee organizations operating at a particular governmental level. Given the recognized unions' strong desire to maintain separate identities, however, it does not appear likely that such basic organizational changes will occur within the predictable future.

At the level of local government, a special set of factors stemming from the narrower geographical confines of the governmental unit may affect possible future development of larger employee units. Particularly for small and middle-size cities and towns, there is every reason to seek establishment of an extremely small number of separate bargaining units, preferably constituted along the lines of the Philadelphia pattern. Different interests of separate employee groupings can be reconciled within a large unit much more effectively at that level than at the state or federal levels. And, the problems attributable to proliferation can have a substantially more destructive impact within these smaller units of government.

New York City, while it is an extreme case, probably is more representative than Philadelphia of the kinds of actual and potential labor relations problems of the large city, where the sheer numbers of employees can offset the advantages of single geographical unit. The current pattern of dual representation in New York, in which heterogeneous employee groups are subsumed into a single unit of civilian employees for purposes of citywide issues, has not resolved the problems caused by separate representation for smaller units on basic wage issues. A recent impasse panel in New York City, confronted with serious wage inequity problems resulting from separate unit representation within the same job series, has recommended future use of "corollary" bargaining (discussed earlier as council, joint, or coalition bargaining) by the separate bargaining agents, so as to establish and preserve fairness in the interrelationships of wages.<sup>50</sup> Some type of coalition pattern may yet be required in New

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50. Impasse Panel I-14-68, Office of Collective Bargaining, City of New York, Report, Dec. 10, 1968.



York for issues such as wages, while the citywide unit may be preserved for resolution of general problems like pensions. This variation on the alternatives previously discussed may not prove feasible; it may well be that some totally different approach will hold the answer for New York and other large cities.

At the same time, the changes that have already taken place in New York and elsewhere emphasize both the unavoidable difficulty of the problems of unit determination in the public service, and the current overriding need to move from the initial stage of many small units to a pattern of consolidation and merger. Whether consolidation can be achieved only for certain types of issues, whether it is potentially more inclusive, or whether consolidation in some other form evolves, the basic change in direction seems unavoidable if collective bargaining is to prove meaningful and successful for large areas of the public service.