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COMMENTS

LABOR LAW—STRIKES BY PUBLIC EMPLOYEES—THE INVALIDITY OF THE PROHIBITION

In the area of labor relations, few subjects have summoned forth as much discussion from commentators and legislative committees, and as little explanation from courts of last resort, as the subjects of collective bargaining by public employees and the right, or lack thereof, of these employees to strike *in support* of such collective bargaining or to strike *for the right* to collectively bargain with their governmental employers. Commentators and legislators are drawn to these problems for several reasons. First, there is no apparent solution to the problems arising in this area under present policies—although a state may prohibit, or attempt to prohibit, public employees from striking, it is impossible to satisfactorily legislate a dispute out of existence.¹ Secondly, the mass work stoppages of recent years, especially those resulting from strikes of “essential” public employees,² have evoked a sense of urgency in the public. Finally, the numerical strength of public employees is forcing the issue before the legislatures.³ At present there are approximately twelve million civilian public employees,⁴ twice the number of persons in public service in 1950; by 1975, it is estimated that one of every five employees will work for a governmental body or agency at the federal, state or local level.⁵

The American Federation of State, County and Municipal Employees has claimed the most rapid increase in membership of any labor organization in the country in recent years.⁶ Commensurate with the statistics defining growth both in numbers of civil service employees and in their membership in labor organizations, is the recent trend toward

1. Anderson, *Disputes Affecting Government Employees*, 10 LAB. L.J. 707, 711 (1959).

2. “Essential,” as it is commonly used with respect to public employees, denotes those persons responsible for the public health and safety, such as police and fire personnel.

3. See Moran, *Collective Bargaining in the Public Service—Massachusetts Style*, 52 MASS. L.Q. 153 (1967).

4. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, 1968 HANDBOOK OF LABOR STATISTICS 80, table 41.

5. Moran, *supra* note 3.

6. Donoian, *The AFGE and the AFSCME: Labor's Hope for the Future?* 18 LAB. L.J. 127, 129 (1967).

the establishment of collective bargaining policies for such employees. Although such policies are often very limited in scope in comparison to those used in the private sector, the states, both by statute⁷ and by judicial pronouncement,⁸ are presumably following the recent adoption of such policies by the federal government.⁹

The purpose of this comment is threefold: to discuss collective bargaining in the public sector; to demonstrate the relationship between collective bargaining and the strike in the public sector; and to evaluate the continued denial of the right to strike. Although the strike issue is not new, the objections to the strike are becoming obscured as the problem outgrows the insufficient, idiomatic "solutions" which have stifled the courts and legislatures thus far. This comment will thus discuss the interrelationship between collective bargaining and the strike in the public sector for the purpose of indicating and proposing resolutions for the seemingly inconsistent policies which have arisen as the "right" to bargain collectively with their employers has been "granted" to public employees while the "right" to strike in support of a bargaining position has been absolutely and universally *denied*. Such inconsistent policies have yielded unusual results:

The experience in Michigan following the passage of its Public Employment Relations Act suggests that, if anything, the introduction of collective bargaining rights to public employment in an already highly unionized state might cause an *increase* in work stoppages. In the first year under the Michigan act, there were twelve strikes by municipal employees; in the previous seventeen years there had been only thirteen.¹⁰

Those states, therefore, which had viewed the granting or affirmative recognition of the right of collective bargaining as a panacea for the claimed ills of public employees must continue to contend with the problem which they presumably had intended to solve—the strike, and resultant work stoppages.

7. See ALASKA STAT. § 23.40.040 (1962); CAL. GOV'T CODE § 3505 (West Supp. 1968); CONN. GEN. STAT. ANN. § 7-468 (Supp. 1969); DEL. CODE ANN. tit. 19, § 1309 (Supp. 1968); ILL. REV. STAT. ANN. ch. 102, § 42 (Smith-Hurd 1969); ME. REV. STAT. ANN. tit. 26, § 980 (Supp. 1968); MASS. ANN. LAWS ch. 149, § 178F (Supp. 1969); MICH. COMP. LAWS § 423.215 (1967); MINN. STAT. ANN. § 179.50 (1966); MO. REV. STAT. § 105.510 (Supp. 1969); N.H. REV. STAT. ANN. § 31:3 (Supp. 1969); N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1969); N.Y. CIV. SERV. LAW § 202 (McKinney Supp. 1968); ORE. REV. STAT. § 243.740 (1967); PA. STAT. ANN. tit. 43, § 215.1 (1964); R.I. GEN. LAWS ANN. § 36-11-1 (1967); VT. STAT. ANN. tit. 21, §§ 1701-02 (Supp. 1968); WASH. REV. CODE ANN. § 41.56.100 (Supp. 1969); WIS. STAT. ANN. § 111.82 (Supp. 1969); WYO. STAT. ANN. § 27-266 (1967).

8. See *Norwalk Teachers' Ass'n v. Board of Educ. of City of Norwalk*, 138 Conn. 269, 83 A.2d 482 (1951); *Chicago Div. of Ill. Educ. Ass'n v. Board of Educ. of City of Chicago*, 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966).

9. Exec. Order No. 10,988, 3 C.F.R. 521 (1959-63 comp.).

10. Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 945 (1969) (emphasis added).

STATUS OF COLLECTIVE BARGAINING IN THE PUBLIC SECTOR

Rather than describe the recent enactments granting collective bargaining rights as reflective of a trend in the law or as evidence of an existing right, it would be more accurate to characterize them as creating rights which had not heretofore existed in such jurisdictions.¹¹ Although collective bargaining has been recognized by the United States Supreme Court as a *fundamental right*¹² inherent in the right of *private* employees to organize, state courts have refused to recognize the inclusion of the former right in the latter when discussing the rights of public employees.¹³ A recent Illinois case, however, has recognized the existence of the right of public employees to bargain collectively with their employers, absent a statute prohibiting such bargaining.¹⁴ Collective bargaining, in this sense, is limited by the *nature of the employer* rather than by a *statute* which restricts such bargaining.

The traditional argument underlying the denial of the right to bargain is that since the public employer is a creature of statute and is thereby limited by such statute, the entering into of an agreement whereby the employer promises to negotiate or bargain with regard to the policies by which it carries on its statutory duties constitutes an *illegal delegation of its authority*.¹⁵ It has been suggested, however, that the progress made in New York toward a permissive policy in this area was not the result of the inapplicability of the "delegation" argument, but rather it resulted from the practicalities of the situation. In *Railway Mail Ass'n v. Murphy*, the Supreme Court of New York applied the illegal delegation rationale: Collective bargaining has no place in government service. The employer is the whole people. It is impossible for administrative officials to bind the government of the United States or the state of New York by any agreement made between them and representatives of any union. Government officials and employees are governed and guided by laws which must be obeyed and which cannot be abrogated or set aside by any agreement of employees and officials.¹⁶

Thirteen years after this unequivocal denial of bargaining rights to public employees, the New York Supreme Court *upheld* a collective bargaining agreement between the bargaining representative of the transit workers and the New York Transit Authority.¹⁷ This change of position was

11. See, e.g., *Los Angeles Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen*, 54 Cal. 2d 684, 335 P.2d 905 (1960); *Miami Waterworks Local No. 654 v. City of Miami*, 157 Fla. 445, 26 So. 2d 194 (1946).

12. *UAW v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 259 (1949).

13. See *Nutter v. Santa Monica*, 74 Cal. App. 2d 292, 168 P.2d 741 (1946).

14. *Chicago Div. of Ill. Educ. Ass'n v. Board of Educ. of City of Chicago*, *supra* note 8.

15. *Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947).

16. 180 Misc. 868, 876, 44 N.Y.S.2d 601, 608 (Sup. Ct. 1943).

17. *Civil Serv. Forum v. New York City Transit Authority*, 3 Misc. 2d 346,

thought to have been inspired by fear of another strike such as the one preceding the *Murphy* case.¹⁸

In 1951, the Supreme Court of Errors of Connecticut, in *Norwalk Teachers' Ass'n v. Board of Education of City of Norwalk*,¹⁹ the leading case holding strikes by public employees to be unlawful, issued a declaratory judgment which recognized the public school teachers' rights to bargain as a unit with their employer, absent prohibiting legislation:

There is no objection to the organization of the plaintiff as a labor union, but if its organization is for the purpose of "demanding" recognition and collective bargaining the demands must be kept within legal bounds. . . . [T]his means nothing more than that the plaintiff may organize and bargain collectively for the pay and working conditions which it may be in the power of the board of education to grant.²⁰

Within this final phrase lies the basis of the "delegation" argument which had been so frequently employed to deny completely the right to bargain. Today, however, the "delegation" argument serves no purpose where legislatures have provided for some form of collective bargaining for public employees. Notwithstanding the freedom with which a court may dispense the right to bargain in areas not covered by the more limited statutes,²¹ there remains the existence of one limiting factor—where bargaining extends into areas which have been preempted by statute or rule,²² there is nothing with which the negotiating employer has to bargain. For example, Michigan's Hutchinson Act²³ imposes a duty upon public employers to bargain collectively with their employees with respect to wages, hours and conditions of employment. Although wages and hours may be determined by rules imposed upon the employer, it is impossible to imagine a statute which specifically defines all conditions of employment.²⁴ In a recent case, Chief Justice DeBruler of the Indiana Supreme Court quoted

151 N.Y.S.2d 402 (Sup. Ct. 1956). See generally SPERO, GOVERNMENT AS EMPLOYER (1948).

18. Cornell, *Collective Bargaining By Public Employee Groups*, 107 U. PA. L. REV. 43 (1958).

19. *Supra* note 8.

20. *Norwalk Teachers' Ass'n v. Board of Educ. of City of Norwalk*, *supra* note 8, at 277, 83 A.2d at 485-86. (emphasis added).

21. *E.g.*, ILL. REV. STAT. ANN. ch. 111½, § 328a (1967) (permits collective bargaining to transit workers); 7 WYO. STAT. ANN. ch. 14 § 27-266 (1967) (permits collective bargaining to firefighters under very strict limitations).

22. "Although executive and administrative officers may be vested with a certain amount of discretion and may be authorized to act or make regulations in accordance with certain fixed standards, nevertheless the matter of making such standards involves the exercise of legislative powers. Thus qualifications, tenure, compensation and working conditions of public officers and employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract." *City of Springfield v. Clouse*, *supra* note 15, at 1251, 206 S.W.2d at 545.

23. MICH. COMP. LAWS ANN. §§ 423.201-216 (1967).

24. See, *e.g.*, ORE. REV. STAT. § 243.740 (1967).

from a policy statement of a city school board which stated:

Be it resolved, that the Board of School Trustees of the School City of Anderson will professionally negotiate with the Anderson Federation of Teachers with regards to employment salary schedules, grievance procedures, working conditions and administrative policies.²⁵

The amount of discretion resting in the Board of School Trustees serves to discredit the "delegation" argument should an attempt be made to apply it. Where there is such discretion in a governmental agency operating under a statute permitting collective bargaining, there is no reason why such discretion should not be carried to the bargaining table. In a state such as Illinois, which has held that the right to bargain collectively exists independent of statute,²⁶ there is no reason why discretionary matters may not be agreed upon by the employer and the employee within the bounds of that discretion, absent a statute prohibiting such bargaining.

The remaining minority of states²⁷ which have refused to recognize any bargaining rights constitutes the repository of the "delegation" argument. This argument serves merely to exclude from the bargaining table those matters which are within the control of the employer; the rationale underlying this argument is outlined by Dean Seitz as:

(1) The fixing of conditions of work in the public service is a legislative function; (2) Neither the executive nor the legislative body may delegate such functions to an outside group; (3) The legislature or executive must be free to change the conditions of employment at any time.²⁸

If this statement is a correct evaluation of the duties of legislatures, then a majority of the state legislatures in this country have abdicated their offices. Rather than submitting to this reasoning, legislatures have created agencies in which the duties and powers necessary for the provision of services have been vested—which obviously is delegation. The manner in which such agencies operate must necessarily be *free* from absolute control by the legislature; if there were absolute control, there would be no need for the agency. An inherent defect in the argument against collective bargaining is the basic assumption that such bargaining is *detrimental* to the operations of government. This assumption is without foundation.²⁹

25. *Anderson Fed'n of Teachers v. School City of Anderson*, 18 Ind. 573, 580, 251 N.E.2d 15, 19 (1969).

26. *Chicago Div. of Ill. Educ. Ass'n v. Board of Educ. of City of Chicago*, *supra* note 8.

27. See *International Long-Shoremen's AFL-CIO Ass'n v. Georgia Ports Auth.*, 217 Ga. 712, 124 S.E.2d 733 (1962); *Wichita Public Schools Emp. U., Local No. 513 v. Smith*, 194 Kan. 2, 397 P.2d 357 (1964); *Mugford v. Mayor & City Council of Baltimore*, 185 Md. 266, 44 A.2d 745 (1945); *Levasseur v. Wheeldon*, 79 S.D. 442, 112 N.W.2d 894 (1962).

28. Seitz, *Legal Aspects of Public School Teacher Negotiations and Participating in Concerted Activities*, 49 MARQ. L. REV. 487, 488 (1966).

29. See MOSKOW, *TEACHERS & UNIONS* 93-114 (1966).

Public employers, no less so than private industry, are incapable of unilaterally deciding what the terms and conditions of employment should be. It is a proper exercise of its delegated powers for the governmental employer to determine policy, working conditions³⁰ and even improvements in the service itself by means of collective negotiations. As was stated by the court in *Los Angeles Metropolitan Transit Authority v. Brotherhood of Railway Trainmen*: "In collective bargaining negotiations . . . the employer is free to reject demands if he determines that they are unacceptable."³¹ At the bare minimum, the policy expressed by this statement, notwithstanding its implicit restriction of collective bargaining to a "suggestion box" level, would at least open a door to the discussion of employment relations problems which might otherwise remain subliminal.

Rather than attempting to rebut the arguments which conclude with an absolute denial of the right to bargain, the Labor Relations Section of the American Bar Association has pointed to the evils of a system which prohibits collective bargaining absolutely or which inhibits such bargaining to a degree where it no longer resembles its counterpart in the private sector:³²

Government as employer has failed in many instances to do what it compels industry to do. Legislatures which deny to government agencies the use of some proper form of collective bargaining procedures so familiar in industry (at least in terms of "collective" negotiation), which attempt to restrict unduly the right of employees to organize and to petition the government for redress of their grievances, need to review the problem more realistically.

It is a fallacy to assume that the usual so-called "Merit-system" laws governing the civil services are so comprehensive that employees have no proper basis for complaint as to their working conditions, or that their grievances are all superficial. Most of such laws relate primarily, if not exclusively to the manner of appointment, promotion, discharge and change in status. Occasionally they regulate classification of positions based on duties and responsibilities, as well as establish a basis for salary plans. Laws governing employee relationships are usually less flexible in the public service than is generally the rule in private employment.³³

In the final analysis, collective bargaining should not be a "yes" or "no" proposition in the public sector. It is a matter of degree in that collective bargaining *can* exist in a limited yet meaningful form.³⁴ While the scope of collective bargaining must take into account the amount of power and discretion vested in the employer, it must also be recognized that

30. Note, 55 COLUM. L. REV. 343, 351 (1955).

31. 54 Cal. 2d 684, 693, 335 P.2d 905, 906 (1960).

32. See, e.g., MO. REV. STAT. §§ 105.500-105.530. Any collective bargaining agreement reached is subject to legislative approval and adoption.

33. ABA SECTION ON LABOR RELATIONS LAW PROCEEDINGS (1955).

34. See, e.g., MICH. COMP. LAWS § 423.215 (1967); N.Y. CIV. SERV. LAW § 202 (McKinney Supp. 1968); WIS. STAT. ANN. § 111.82 (Supp. 1969).

government employees like their counterparts in private enterprise are subject to the same vicissitudes of insecurity of employment, rising prices, accident, illness and old age. Everywhere, from the remotest corners of the earth to the most sophisticated, people seek to assert a measure of control over the conditions under which they live.³⁵

THE STRIKE IN THE PUBLIC SECTOR

While some form of collective bargaining has become accepted practice in most states, the strike by public employees remains an outlawed form of concerted activity. Although one state has conferred upon a certain group of employees the right to strike,³⁶ there is no indication of a trend in that direction. The Supreme Court of Arizona distinguished between employees of a governmental project which was "proprietary" in nature and employees of government in the exercise of "governmental" functions. This rationale was a throwback to the "sovereign immunity" doctrine of torts³⁷ and has been rejected by every other state which has confronted it.³⁸

The strike problem has become more intense in recent years and will continue to plague the legislatures and courts until either a satisfactory alternative to the strike is proposed, if one exists, or a limited right to strike is recognized. There *is* an analogy between private and public employees. That this is true has been proved by the enactment of collective bargaining statutes and by the successful results of "illegal" strikes. Statutes, injunctions and fines have proven to be unsuccessful in compelling compliance to the policy of prohibition. Legislation prohibiting all strikes by public employees serves only to temporarily abate the symptoms while it ignores the problems which underlie the strike situation.

The right of private employees to strike, although protected by federal statute in the Norris-LaGuardia Act³⁹ and in most states by "little Norris-LaGuardia acts,"⁴⁰ has been subjected to a more desperate and violent struggle than has the strike right in the public sector. Until 1932, strikers

35. Weisenfeld, *Public Employees—First or Second Class Citizens*, 16 *LAB. L.J.* 685, 688 (1965).

36. *IBEW v. Salt River Project*, 78 *Ariz.* 30, 275 P.2d 393 (1954).

37. *McGinley v. City of Cherryvale*, 141 *Kan.* 155, 40 P.2d 377 (1935); *Brummett v. City of Jackson*, 211 *Miss.* 116, 51 So.2d 52 (1951); *City of Richmond v. James*, 170 *Va.* 553, 197 S.E. 416 (1938).

38. *See, e.g., Los Angeles Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen*, *supra* note 11, at 694-95, 355 P.2d at 911 (dissenting opinion); *City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council*, 94 *Cal. App. 2d* 36, 210 P.2d 305 (1949); *Port of Seattle v. International Longshoremen's Union*, 52 *Wash. 2d* 317, 324 P.2d 1099 (1958).

39. 29 U.S.C. § 101 (1964).

40. *See, e.g., IND. ANN. STAT. §§ 40-501 et. seq.* (1965); *PA. STAT. ANN. tit. 43, § 206a* (1964).

in private industry were effectively dealt with as conspirators, subjected to criminal prosecution⁴¹ and were often found to be in violation of the Sherman Act.⁴² The strike issue in public employment has, in most instances, arisen in cases wherein an injunction had been sought to restrain public employees from striking.⁴³ In all such cases, the anti-injunction acts of the federal and state governments have been held inapplicable. In the leading case of *United States v. United Mine Workers of America*,⁴⁴ the United States Supreme Court held that where the government had seized private mining operations under the War Labor Disputes Act,⁴⁵ employees of such operations were, in fact, employees of the government and thus not within the protection afforded to them formerly as employees in private industry under Norris-LaGuardia. The Court stated that such restrictive statutes as Norris-LaGuardia "will not be applied to the sovereign without express words to that effect."⁴⁶ This case has been relied upon by state courts⁴⁷ in denying the protection of their anti-injunction statutes to public employees.

Many states have, in response to the increasing number of public employee strikes, enacted statutes specifically prohibiting such activity.⁴⁸ Unfortunately, as was seen in the Michigan situation⁴⁹ where there was an increase in work stoppages presumably resulting from a more permissive legislative attitude toward collective bargaining, such statutes have merely

41. See generally TAYLOR, LABOR PROBLEMS AND LABOR LAW (2d ed. 1950).

42. 15 U.S.C. § 1 (1964).

43. *City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council*, *supra* note 38; *Board of Educ. of Community Unit School Dist. No. 2 v. Redding*, 32 Ill. 2d 567, 207 N.E.2d 427 (1965); *Anderson Fed'n of Teachers v. School City of Anderson*, *supra* note 25; *Cleveland v. Division 268 of Amalgamated Assn.*, 85 Ohio App. 153, 85 N.E.2d 811 (1949); *City of Minot v. General Drivers and Helpers Union*, 142 N.W.2d 612 (N.D. 1966).

44. 330 U.S. 258 (1947).

45. Act of June 25, 1943, 57 Stat. 163.

46. *United States v. United Mine Workers of America*, *supra* note 34, at 272.

47. See *Anderson Fed'n of Teachers v. School City of Anderson*, *supra* note 25; *City of Manchester v. Manchester Teachers Guild*, 100 N.H. 507, 131 A.2d 59 (1957); *School Committee of City of Pawtucket v. Pawtucket Teachers Alliance*, 101 R.I. 243, 221 A.2d 806 (1966).

48. CONN. GEN. STAT. ANN. § 10-153e (1967); FLA. STAT. ANN. § 839.221 (1965); GA. CODE ANN. § 89-1301 (1963); HAWAII REV. LAWS § 82-2 (1968); MASS. ANN. LAWS ch. 149, § 178M (Supp. 1970); MICH. COMP. LAWS § 17.455(2) (1968); MINN. STAT. ANN. § 179.51 (1966); MO. REV. STAT. § 105.530 (1966); NEB. REV. STAT. § 48-821 (1960); N.Y. PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT, § 210(1) (McKinney Supp. 1967); OHIO REV. CODE ANN. § 4117.02 (1965); ORE. REV. STAT. § 243.760 (1968); PA. STAT. ANN. tit. 43, § 215.2 (1964); R.I. GEN. LAWS ANN. § 28-9.3-1 (Supp. 1968); TEX. REV. CIV. STAT. art. 5154c(3) (1962); VA. CODE ANN. § 40-65 (1953); WIS. STAT. ANN. § 111.70(4)(1) (Supp. 1969).

49. *Anderson*, *supra* note 10.

provided the courts with a statutory basis for enjoining strikes.

BASES FOR THE STRIKE PROHIBITION

State court decisions denying the right to strike without the aid of statutory prohibition,⁵⁰ although few in number,⁵¹ contain the rational bases for such prohibition and are, therefore, worthy of consideration and analysis. Historically, strikes by public employees were few in number and massive in proportion at the time of President Franklin D. Roosevelt's oft-quoted⁵² statement that:

[M]ilitant tactics have no place in the functions of any organization of Government employees. A strike by public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.⁵³

This statement has become the "underlying basis for the policy against strikes by public employees."⁵⁴ To state, however, that such strikes are violative of public policy,⁵⁵ illegal,⁵⁶ or treasonous,⁵⁷ is to state a conclu-

50. *City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council*, *supra* note 38; *Norwalk Teachers' Ass'n v. Board of Educ. of City of Norwalk*, *supra* note 8; *Miami Waterworks Local No. 654 v. City of Miami*, *supra* note 11; *Board of Educ. of Community Unit School Dist. No. 2 v. Redding*, *supra* note 43; *Hansen v. Commonwealth*, 344 Mass. 214, 181 N.E.2d 843 (1962); *Minneapolis Federation of Teachers Local 59 v. Obermeyer*, 275 Minn. 347, 147 N.W.2d 358 (1966); *New Jersey Turnpike Auth. v. American Fed'n*, 83 N.J. Super. 389, 200 A.2d 134 (1964); *City of Manchester v. Manchester Teachers Guild*, *supra* note 47; *IBEW v. Grand River Dam Authority*, 292 P.2d 1018 (Okla. 1956); *School Committee of City of Pawtucket v. Pawtucket Teachers Alliance*, *supra* note 47; *City of Alcoa v. IBEW*, 203 Tenn. 12, 308 S.W.2d 476 (1957); *South Atlantic & Gulf Coast Dist. of Int'l Longshoremens' Ass'n v. Harris County*, 358 S.W.2d 658 (Tex. Civ. App. 1962).

51. "Few cases involving the right of unions of government employees to strike to enforce their demands have reached courts of last resort." *Norwalk Teachers' Ass'n v. Board of Educ. of City of Norwalk*, *supra* note 8, at 274, 83 A.2d at 484.

52. See Comment, 16 DEPAUL L. REV. 151, 152 (1966); Comment, 61 NW. U.L. REV. 105, 117-18 (1966).

53. Letter from President Franklin D. Roosevelt to L.C. Stewart, President, National Federation of Federal Employees, August 16, 1937, in RHYNE, POWER OF MUNICIPALITIES TO ENTER INTO LABOR CONTRACTS 24 (1941).

54. *Board of Educ. of Community Unit School Dist. No. 2 v. Redding*, *supra* note 43, at 571-72, 207 N.E.2d at 430.

55. *City of Manchester v. Manchester Teachers Guild*, *supra* note 47.

56. *City of Los Angeles v. Los Angeles Bldg. & Constr. Trades Council*, *supra* note 38; *Norwalk Teachers' Ass'n v. Board of Educ. of City of Norwalk*, *supra* note 8; *Miami Waterworks Local No. 654 v. City of Miami*, *supra* note 11; *Board of Educ. of Community Unit School Dist. No. 2 v. Redding*, *supra* note 43; *Hansen v. Commonwealth*, *supra* note 50; *Minneapolis Federation of Teachers Local 59 v. Obermeyer*, *supra* note 50; *New Jersey Turnpike Auth. v. American Fed'n*, *supra* note 50; *City of Manchester v. Manchester Teachers Guild*, *supra* note 47; *IBEW*

sion rather than a rationale. In most cases which have reached courts of last resort, the situation had reached a degree of magnitude where there was cause for great concern. This point is demonstrated by the conclusion of the New York Court of Appeals in *Board of Education of the City of New York v. Shanker*, a case involving a general strike by New York City teachers:

From time immemorial, it has been a fundamental principle that a governmental employee may not strike. In this sensitive area, neither labor—the public employee—nor management—the governmental agency—in their mutual interdependence can afford the indulgence of arbitrary self-interest at the expense of the public.⁵⁸

It has been recently stated that the argument most strongly asserted in denying the strike right to public employees is that such a right would result in a delegation of powers to employees which properly belong to the governmental agency.⁵⁹ This argument, however, is appropriate only where the right to strike by public employees is proposed on the same basis as that right exists in the private sector. Collective bargaining had formerly been denied existence for this reason, but with few exceptions acceptance in limited form has been given. A limited right to strike could similarly avoid the defect of “delegation.” Since no absolute right to strike exists in the private sector,⁶⁰ it would indeed be an extreme and untenable position to maintain that public employees should have such unlimited right.⁶¹ Were the right to strike acceptable in the public sector, it would necessarily be subject to those same restrictions which the government may impose upon private employees.⁶² Subjecting the public welfare to such a weapon as a strike by its servants must be limited; yet strikes in the public sector can be limited without prohibiting its use in *every* form, by *every* unit of public employees, and in *every* situation.

It has been argued that a strike by public employees is a “[denial] of the authority of government.”⁶³ To violate *any* law is to deny the authority of the government which imposed it. Absent the statutory pro-

v. Grand River Dam Authority, *supra* note 50; School Committee of City of Pawtucket v. Pawtucket Teachers Alliance, *supra* note 47; City of Alcoa v. IBEW, *supra* note 50; South Atlantic & Gulf Coast Dist. of Int'l Longshoremens' Ass'n v. Harris County, *supra* note 50.

57. Cleveland v. Division 268 of Amalgamated Ass'n, *supra* note 43.

58. 283 N.Y.S.2d 548, 552 (1967).

59. Comment, 61 Nw. U. L. REV. 105, 119 (1966).

60. UAW v. Wisconsin Employment Relations Board, *supra* note 12; Dorchy v. Kansas, 272 U.S. 306 (1926).

61. Anderson, *supra* note 10, at 948.

62. 29 U.S.C. § 176 (1964); 29 U.S.C. §§ 151-68 (1959).

63. Norwalk Teachers' Ass'n v. Board of Educ. of City of Norwalk, *supra* note 8, at 276, 83 A.2d at 485.

hibition, where is the denial? A strike by public employees for the purpose of enforcing their reasonable demands within the statutory discretion delegated to the employer is not a denial of the authority of government. Rather, it is a means of compelling an employer to accede to certain demands which are within the scope of its legally constituted duty of providing a certain service at a certain cost; that cost being a variable factor proportionate to the breadth of the particular employer's discretion. To seek to enforce demands, the satisfaction of which is *beyond* the power of the employer to grant, *would* be to "deny the authority of government." In such a case, the employer would have no control over the strike. The demands would, of necessity, require satisfaction by an authority—ultimately the legislature—to whom access by coercion of this type is impermissible as an exception to the democratic process. Where the employer is called upon to improve the lot of its employees and that objective is properly within its power, the authority of government is *not at issue*. "The primary difficulty seems to be the common conception of a strike of government employees as a general strike against 'the state' rather than a strike of clerks in the Veterans' Bureau or of firemen in Brushville, Indiana."⁶⁴ However invalid the distinction between "governmental" and "proprietary" functions of government might be, one distinction must be sustained. The government, as sovereign, cannot be related to a private employer. A public employee, however, for purposes of collective bargaining, is not an agent of the state or a servant of the people—*he is an employee*.

A final argument of the conclusory type which denies the strike right asserts "the sound and demanding notion that governmental functions may not be impeded or obstructed."⁶⁵ This is a truism which merely restates a difference between private and governmental employers but fails to state why such a distinction is a basis for complete denial of the strike right to the public employees. There is no compelling reason to deny, absolutely, the right to strike to employees of a hospital operated by the government while employees of a private hospital may strike with impunity, subject only to injunction in emergency situations.⁶⁶ This argument must fail, when employed to assert an absolute denial of the strike, whenever employees of a governmental agency have counterparts in private business and industry:

There is no difference in impact on the community between a strike by employees of

64. Note, 54 HARV. L. REV. 1360, 1365 (1941). See also *Anderson Fed'n of Teachers v. School City of Anderson*, *supra* note 25 (dissenting opinion).

65. *Board of Educ. of Community Unit School Dist. No. 2 v. Redding*, *supra* note 43, at 572, 207 N.E.2d at 430 (1965).

66. *St. Joseph's Hosp. v. Wisconsin Employment Relations Bd.*, 264 Wis. 396, 59 N.W.2d 448 (1953).

a public utility and employees of a private utility; nor between employees of a municipal bus company and a privately owned bus company; nor between public school teachers and parochial school teachers. The form of ownership and management of the enterprise does not determine the amount of disruption caused by a strike of the employees of that enterprise.⁶⁷

It has been suggested that this argument would be useful in limiting the strike power of such private sector counterparts,⁶⁸ but in view of the judicial history of the private sector strike, such a prospect is unlikely.

The rationale underlying any argument which would deny rights to public employees which are "fundamental"⁶⁹ to private sector employees must contain a rational basis for distinguishing between the sectors. While the above arguments—sovereignty, public policy, denial of the authority of government, and the nonexistence of the right to impede the functions of government—may serve to limit, *incidentally*, the right of public employees to strike, two arguments have been made which, because of their reasonable basis for distinction, must *necessarily* limit such right: absence of the profit motive and the necessity that certain public services not be interrupted.

In *Board of Education of Community School District No. 2 v. Redding*,⁷⁰ the Illinois Supreme Court based its distinction between employers in the public sector and those in the private sector on the absence of the profit motive in the former. This is an essential difference. In private industry, the balance sought to be achieved is the bargained-for sharing of the profits by the employer and the employee. Since there is no profit in government, it is argued, there must necessarily be no right to strike. This would be a valid argument if raised in opposition to a proposal for the right to strike in the public sector as it exists in the private sector—the so-called "unlimited" right to strike. Employees in private industry are not limited by law with respect to the reasonableness of their demands, but may demand wage increases which, if agreed to by the employer, would result in the failure of the employer's business. Absent a refusal to bargain on the part of the bargaining representative, the employee may strike until such increase is accepted by the employer or until the employer ceases to exist. Such power in the hands of organized public employees would be, to say the least, disastrous. However, to cite this as an absolute denial of the right to strike is to reach a conclusion far beyond the force of the argument. A strike power limited by a "reasonableness" requirement—a requirement

67. *Anderson Fed'n of Teachers v. School City of Anderson*, *supra* note 25, at 582, 251 N.E.2d at 21 (dissenting opinion).

68. *Supra* note 59, at 124.

69. *UAW v. Wisconsin Employment Relations Bd.*, *supra* note 12.

70. *Supra* note 43, at 567, 207 N.E.2d at 430 (1965).

that no wage demand by public employees may exceed the wage rate of employees similarly employed in the private sector—would be a partial solution. This could, of course, apply only where the public employee has a private sector counterpart. Where there is no counterpart, as in such purely governmental functions as police and fire protection, the wage standard may be predetermined by a committee composed of representatives of the employer and the bargaining representative of the employees, possibly before an appropriate legislative committee. Such determination need not be different than the existing procedures employed in many states today: arbitration,⁷¹ binding arbitration,⁷² compulsory arbitration,⁷³ and legislative fact-finding.⁷⁴ The “profit motive” argument has less force when the issues involved in the dispute are noneconomic. Where the subject of bargaining is safety conditions, job security or general conditions of employment, there is no reason to distinguish between public and private sector employees except, again, to limit the demands of public employees to those matters which are within the discretion of the employer.

The strike has been labelled an “economic” weapon and therefore inapplicable to the public sector because the governmental employer is not ruled by the balance sheet. The striker in the private sector bases his effectiveness on his ability to motivate the employer to resolve the impasse situation through fear of economic detriment resulting from a shutdown of his operations. The prime concern of the public employer, aside from inconvenience or danger to the public, is the political effect of the strike. While the public employer suffers no economic loss, its officers must answer to the public and to those persons to whom they owe political allegiance. The results which have been and are being effected by strikers in the public sector refute the statement by one commentator that “since this is a political matter, a system of political settlement is preferable to an impasse resolution mechanism which depends upon economic coercion.”⁷⁵ Preferable to whom? The same commentator also states, however, that the “strikes, when they do occur, make the headlines because of their great political—if not economic—impact on the public.”⁷⁶ The strike, from the standpoint of the employee, is the appropriate method, but only if used properly. Because of the difference between public and private sector strikes, each must be utilized differently to achieve a different pur-

71. See, e.g., NEB. REV. STAT. § 48-824 (1968).

72. See, e.g., R. I. GEN. LAWS ANN. §§ 28-9.3-9, 29-9.4-10 (1969).

73. See Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931, 936-37 (1969).

74. N. Y. CIV. SERV. LAW § 209(3)(e) (McKinney Supp. 1968).

75. Anderson, *supra* note 10, at 954.

76. Anderson, *supra* note 10, at 947.

pose. Private sector employees attempt to maximize the effect of the strike by forcing losses upon the employer; the plant is shut down and production ceases. The purpose of the public striker is not to inconvenience or endanger the public, but to cause the employer to incur public and official disfavor. Thus anything more than a moderate inconvenience to the public is self-defeating. The public striker seeks to make the headlines in such a way that his position is well publicized. This is the inherent limitation on the strike: only good publicity will render the strike effective—only reasonable demands will elicit good publicity.

The second reasonable basis for distinguishing between public and private sector strikes is the "necessity that there be no interruption in the operation of public functions because of the serious consequences which would ensue."⁷⁷ This reasoning, although appropriate in all cases involving strikes by employees whose presence on the job is essential to public health and safety, has been curiously absent in the majority of the decisions. The argument, validly and properly sustaining limitations on the right to strike, fails to sustain the absolute prohibition of a right to strike. Were this argument to gain currency as the most practical basis for enjoining a strike, its proponents would be hard-pressed to advocate the continuance of the present prohibitive policy. Proponents of the limited right to strike assert, as their basic proposition, that public employees whose services are not "essential" to the public health and safety should be permitted the use of the strike weapon. The Governor's Commission to Revise the Public Employee Law of Pennsylvania, in its report of June, 1968, proposed such a policy:

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.⁷⁸

Thus far, one court has confronted an argument of this type. The Supreme Court of New Jersey held that a differentiation between essential and non-essential government services would be the subject of such intense and never-ending controversy as to be administratively impossible.⁷⁹ The

77. *City of Manchester v. Manchester Teachers Guild*, *supra* note 47, at 509-10, 131 A.2d at 61.

78. GOVERNOR'S COMMISSION TO REVISE THE PUBLIC EMPLOYEES LAW OF PENNSYLVANIA, REPORT & RECOMMENDATIONS 14 (June, 1968).

79. *Delaware River & Bay Auth. v. Int'l Organization of Masters, Mates & Pilots*, 45 N.J. 138, 148, 211 A.2d 790, 794 (1965).

degree of accuracy attainable in resolving such controversies is open to question; although a certain degree of arbitrariness would still exist, the arbitrary classification of policemen and zoo keepers as "essential" *would* be abated.

An alternative to the categorization of services in terms of essentiality would be to permit all public employees, with the exceptions of police and fire prevention services whose essentiality is not questioned,⁸⁰ the right to strike under those limitations applicable to the private sector (*i.e.*, the Taft-Hartley provision for injunction in time of emergency).⁸¹ Application of labor relations statutes to public employees of the nonessential class would have the double effect of utilizing workable standards for the definition of the respective rights and duties of public sector employers and employees, and also removing the arbitrary "prior restraint" method of attempting to control labor disputes by across-the-board prohibition.⁸²

CONCLUSION

Although the validity of the arguments offered to sustain the absolute strike prohibition is continuously under attack, the practical results which the policy has engendered must inevitably lead to its abolition or revision. Under Executive Order 10,998,⁸³ a labor organization which sanctions the use of the strike by public employees may not be the bargaining representative of a unit of federal employees. Nevertheless, the Executive Board of the American Federation of State, County and Municipal Employees, though not within the purview of the Order, issued the following statement of policy which directly confronts uniform state policy and federal law:

[AFSCME] insists upon the right of public employees—except for police and other law enforcement officers—to strike. To forestall this right is to handicap free collective bargaining process [W]here one party at the bargaining table possesses all the power and authority, bargaining becomes no more than formalized petitioning.⁸⁴

Such a statement, equating the need for the strike right in the public to that

80. *Supra* note 78.

81. 29 U.S.C. § 176 (1964).

82. "Public employees have been excluded from the coverage of the National Labor Relations Act since its inception, and it has been understood that states could legislate with respect to state and local employees. But until recently it was generally thought that labor relations statutes were inappropriate for public employees. This assumption is being subjected to increasingly critical analysis today." Getman, *Indiana Labor Relations Law: The Case for a State Labor Relations Act*, 42 IND. L.J. 77, 80 (1967).

83. *Supra* note 9.

84. Clary, *Pitfalls of Collective Bargaining in Public Employment*, 18 LAB. L.J. 406, 408 (1967).

in the private sector, combined with the failure of proposed and existing alternatives to the strike, has brought the necessity of such an "ultimate weapon" into clear perspective. So-called alternatives⁸⁵ to the strike are, in practice, not alternatives but merely methods of minimizing the possibility of the impasse—they should be regarded as nothing more. Improved bargaining techniques, various forms of arbitration and mediation, and even compulsory arbitration have been suggested and adopted. Were these "alternatives" adequate for the purpose of preventing strikes they would solve not only the strike problem in the public area, but also many of the prolonged work stoppages occurring in private industry.

Absent a legitimate basis for granting strike immunity to the public employer, a limited right to strike should be recognized; arguments which require limitations upon such activity should not be continued in use as vehicles for prohibiting strikes. Many of the arguments, when used to prohibit the strike, are compelling when applied to police and fire prevention officers; but when zoo keepers and street sweepers strike, courts will find it more difficult to speak in terms of "paralysis" of government and the "intolerable" nature of the situation. Allowing such distinctions to be made by the courts is tantamount to demanding the use of arbitrary standards. The distinctions to be made between employees in terms of essentiality, while by no means clear-cut, should properly be subjected to legislative determination. Within the public sector, essentiality of a particular service would immediately draw most public employees into certain, broad, predeterminable categories.

First, employees responsible for the public safety would be least affected by the right to strike; such employees must be denied the use of such a weapon. The only permissible alternative to legislative prohibition would be impracticable: legislative silence on the strike issue with unlimited injunctive powers vested in the courts in such situations. Secondly, those employees whose services are required in order to continue the operations of government—employees of the courts, city halls, police departments—who, while able to evade the denomination of essentiality, must be limited in their use of the strike weapon because of the undue burden upon the government *qua* government. The limitation in this case is based upon the distinction between the employer as government and the government as employer. While the right to strike should not be denied to such employees, it requires limitations. An appropriate limitation would be in the form of a time stricture. Mechanics in a police motor pool, for example, if permitted to strike for a week, might enter the ranks of the essential, while continuous sallies of day-long strikes or walk-outs might impede the

85. See generally Kheel, *supra* note 73.

functions of the department to such a degree that they would be considered merely as a serious inconvenience rather than a threat to public safety. Third, those employees⁸⁶ whose duties involve service to the public should be permitted to strike "subject to provisions reminiscent of the Emergency Dispute procedures of the Taft-Hartley Act where the governor of each state is given authority to invoke an 80-day cooling-off period."⁸⁷ Finally, there are those employees—employees of public parks, zoos, parking lots and golf courses—whose absence from work would cause slight public inconvenience. While these employees would suffer most by the strike, due to lack of public attention and concern, the public would suffer little. Such employees should enjoy the right to strike as it exists in the private sector.

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86. *E.g.*, transit workers, teachers and highway maintenance personnel.

87. Note, 16 DEPAUL L. REV. 151, 164 (1966).