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COMMENTARY

DISPUTE SETTLEMENT IN THE PUBLIC SECTOR

HARRY H. RAINS*

ONE of the most controversial, expanding, and challenging areas in labor law today involves the relations between public employers and their employees. Historically this area is in its infancy. Only seven or eight years have passed since President John F. Kennedy issued Executive Order 10988¹ which granted federal employees organizational rights. In the states, the legislation is of even more recent vintage. Many problems have arisen as collective bargaining in the public sector becomes more commonplace. Some of these problems stem from procedures which have been adopted to resolve labor disputes involving government employees. Other problems have arisen as a result of some unique characteristics of both parties in the bargaining process.

I. PROBLEMS ARISING FROM THE PROCEDURES ADOPTED TO RESOLVE DISPUTES IN THE PUBLIC SECTOR

In the private sector, when a collective bargaining impasse occurs, it is typically resolved by a work stoppage or a lockout. At present, however, the right to strike in the public sector is either prohibited by statute or held illegal per se in all states with the possible exception of Vermont.² Although numerous authorities have advocated at least a limited right to strike,³ legislatures and courts have concluded that the public's interest in receiving the uninterrupted service of public employees outweighs their right to engage in a work stoppage.

In place of the strike, radically different procedures have been adopted to resolve disputes in the public sector. These substitute procedures can be best explained by examining the provisions of a specific statute. New York's Taylor Law,⁴ the harbinger for the passage of statutes in many other states, first provides that when a collective bargaining impasse is deemed to exist⁵ a mediator shall be appointed "to assist the parties to effect a voluntary resolution of

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1. 27 Fed. Reg. 551 (1962).

2. This State appears to have granted a limited right to strike by statutory implication. In a statute limited to nonprofessionals (thus excluding teachers), Vermont has decreed that the right to strike is not available if the public health and welfare is thereby threatened. A distinct possibility exists, therefore, that if the strike would not threaten the public welfare, it would be legal. Act 198, § 30, 32, Vermont Laws of 1967.

3. See, e.g., Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931 (1969); Reports and Recommendations, June 1968, Governor's Commission to Revise the Public Employees Law of Pennsylvania, at 12.

4. N.Y. CIVIL SERVICE LAW, art. 14 (McKinney Supp. 1969).

5. An impasse exists "if the parties fail to achieve agreement at least sixty days prior to the budget submission date of the public employer." N.Y. CIVIL SERVICE LAW, § 209(1) (McKinney Supp. 1969).

their dispute.⁶ If the impasse is not resolved at this point, a fact-finding board is appointed.⁷ The fact-finding board takes evidence from both parties and makes findings which may take the form of public recommendations.⁸ If the dispute is then not resolved within twenty days of the budget submission date of the governmental unit involved, the fact-finders transmit the recommendations to the chief executive officer and to the employee organization involved.⁹ If the findings are not accepted by the parties, they are submitted to the legislative body of the governmental unit, together with the parties' recommendations for settling the dispute.¹⁰ The legislative body then holds a hearing at which the parties are required to explain their positions. It then takes "such action as it deems to be in the public interest, including the interest of the public employees."¹¹

Unfortunately, these procedures have built-in features which work against effective collective bargaining during the initial negotiation stage. An extreme example of these inherent weaknesses can be found by examining experiences encountered in resolving teacher disputes under the Taylor Law. The school boards have been designated as the legislative bodies to which disputes are ultimately submitted. Since the local board is also both the immediate employer and the adversary negotiator, this final submission procedure is equivalent to appointing a single party as defendant, judge and jury.¹² It has been claimed that this "procedure is inequitable and unbalanced, and weighted unfairly in favor of the employer."¹³ In practice, however, many school boards have accepted fact-finding reports which contain recommendations that were rejected by the board when it acted in its capacity as adversary negotiator. Employee organizations, aware of this phenomenon, are reluctant to seriously negotiate at the initial bargaining stage. Even the most unreasonable demands are left for the fact finder, the employee organization realizing it has nothing to lose and everything to gain by adopting this strategy.

There are other more pervasive problems inherent in the dispute settlement machinery. The legislative body, whether state or municipal, is far too preoccupied with larger problems, and is generally too understaffed to serve as the final step for the large volume of labor disputes that can and will arise. Also, as a political creature, the legislative body is subject to the weaknesses of its individual legislators, any number of whom may be compromised by a particular lobby or handcuffed by past campaign speeches. Party control may result

6. *Id.* § 209(3)(a).

7. *Id.* § 209(3)(b).

8. *Id.*

9. *Id.* § 209(3)(e).

10. *Id.*

11. *Id.*

12. Rains, *New York Public Employee Relations Law Pro and Cons on Proposed Amendments—Stalemate Procedures, Strikes and Penalties*, 20 LAB. L.J. 264, 277 (1969).

13. McKelvey, *Fact Finding In Public Employment Disputes: Promise or Illusion?* 22 IND. & LAB. REL. REV. 528, 539 (1969), quoting Donald H. Wallet, an attorney for many of the National Education Association affiliated teacher organizations in New York.

in fault finding which has little to do with the merits of the case. Further, it would be singularly impractical for the legislature to consider all impasses for final disposition simply because the legislature will not always be in session when emergencies arise.¹⁴

II. PROBLEMS ARISING FROM THE UNIQUE CHARACTERISTICS
OF THE PARTIES IN THE BARGAINING PROCESS

Collective bargaining in the private sector has a relatively long history and the participants have developed subtle negotiating and bargaining techniques. On the other hand, parties in public sector bargaining are new to the process, and their inexperience has resulted in amateurism or lack of sophistication which stands as a bar to effective bargaining. Employee representatives, for example, have displayed extreme sensitivity when contract demands were called "demands" by school board representatives. The acceptable term was "requests." Moreover, frequently voiced illogical demands or "requests" have also handicapped effective collective bargaining efforts.

In a similar vein, the very newness of the parties to the process of collective bargaining has caused other difficulties. Collective bargaining involves give and take on both sides. The membership of the newly organized employee organizations lacks the sophistication to realize that they must put some degree of faith in their leaders. As a result of this lack of faith, any compromise or a less than overbearing approach by the negotiator tends to be interpreted by the constituency as a sign of weakness. Public employee representatives who indulge in the give and take necessary to reach a fair agreement find themselves unpopular with their membership, and they find their tentative settlements rejected with militant derision.

On the management side, unique corrosive factors eat away at the negotiator's ability to engage wholeheartedly in the bargaining process. The spiraling cost of living and the corresponding dwindling of middle class savings, together with the emphasis on government aid to the poor, have tended to produce symptoms of frustration on the part of the so-called middle class element in society. It is these people who significantly influence the swing vote when a local government puts a request for school, police or other budget authorizations on the ballot. This somewhat alienated group, although ironically it includes many of the people who make up the employees' organization membership, tends to vent its general frustration by voting "no." Thus, settlements reached by union negotiators and expenditures needed by public managers are turned down.

Discouraged by the prospects that needed funds may not be authorized by the voters, the management negotiator also runs the risk that if he bargains in good faith, the settlement achieved might be attacked by the public as a "capitulation" (e.g. Governor Rockefeller's position after the New York City

14. Rains, *supra* note 12 at 276-78.

settlement of the 1968 sanitation strike). As already stated, if the funds for the negotiated increase must be authorized by ballot, the public frequently rejects that authorization. If the funds are simply diverted from other areas, the managers find themselves incurring the wrath of their constituents over diminished services and they risk defeat in the next election.

III. CURRENT PROPOSED SOLUTIONS TO PUBLIC EMPLOYEE DISPUTE PROBLEMS

Many proposals have been offered to solve the problems arising in public sector dispute settlement. Some involve major changes in the present system, while others entail only minor modifications. In the opinion of the author, none of them fully copes with the problems.

One partial solution which has been proposed to encourage more meaningful bargaining at the initial stage, is to make the negotiating team's settlement binding on the union membership. Negotiators would be able to reach the best possible settlement without having to be concerned about crumbling support from the ranks.

This solution is probably unworkable, however, for at least two reasons. First, the union negotiator is still subject to eventual ouster from office and, if he senses a militant posture among the members, he will continue to be inflexible at the bargaining table for fear of binding the membership to a much resented package. Second, at least in the case of teacher disputes, this solution does nothing to prevent the negotiator from attempting to save his demands for the fact finder. The negotiator might still believe that his best course of conduct would be to hope that the school board would accept recommendations in the fact finder's report which had previously been rejected in negotiations.

A more elaborate proposal has been advanced by Theodore Kheel. Kheel would allow public employees the right to strike, with more troublesome strikes subject to an eighty day cooling off period before a work stoppage could begin.¹⁵ This limited strike concept has been proposed in various forms by many prestigious groups,¹⁶ but the proposal has serious problems. The determination of which strikes are to be permitted without the cooling off period could become a political issue. Also, some strikes which appear tolerable could, as time passed, become intolerable. Who could decide at what point the damage becomes intolerable?¹⁷

The concept of a cooling off period raises problems in its own right. The main purpose of the cooling off period is the continuation of normal operations after the old contract has expired. In the case of public employment, however, the contract expiration date normally will occur long after the budget submission date. This submission date, according to the Taylor Act, is the time at which a government's proposed budget must be submitted to the "legislative

15. Kheel, *supra* note 3.

16. *See supra* note 3.

17. *See Rains supra* note 12 for a more extended discussion of this problem.

body" for final action.¹⁸ An extended cooling off period may bring the parties beyond this budget submission date. After the budget has been submitted, negotiations tend to become somewhat strained, since the manager has already estimated his expenditures for the year, and any concession to the union which brings costs above the employer's estimation would have to be reallocated from another source. The limits already set on the budget would make the negotiations somewhat inflexible. Ill feeling on all sides would result.

The system of public expenditures and budget preparation is not consonant with the concept of the cooling off period which follows the expiration of a contract. Furthermore, present impasse procedures are, in effect, a public sector version of the cooling off period, with due regard to timing before budget vote dates. At a specified period before the budget submissions date, intensive negotiations begin, and impartial government mediators can be called in. As time begins to run out, successive emergency procedures may be invoked.

The cooling off period concept is also a psychological handicap to bona fide bargaining. The negotiators feel that they have more time in which to bargain and they hold on to extreme positions for a longer period, thus pushing the crisis up to the end of the cooling off period. We should try to prevent strikes by improving the quality of collective bargaining. It will serve no purpose to increase merely the quantity of such negotiating sessions.

Another approach to the problem of effective collective bargaining stresses the unfair labor practice aspect of any future legislation.¹⁹ Without unfair labor practice provisions, the employer, if he chooses to bargain in bad faith, would not be subject to censure until the eleventh hour, when the fact finder's report would be made public. Even then, no legal steps could be taken to remedy the situation, and the extent of discomfiture would be totally dependent upon the forcefulness of the particular fact finder and the degree of publicity given to his findings.

A sophisticated and truly helpful unfair labor practices section would be one which mandates a duty to bargain in good faith, sets out categories of activity which may be defined as bad faith, prescribes procedures for seeking remedies and permits enforcement of meaningful sanctions against both employers and employees.

Unfair labor practice provisions, while not the final answer to strike prevention, certainly appear to be a step in the right direction. Their existence can improve the bargaining atmosphere by making both parties feel protected. They may also help to prevent strikes by catching shoddy practices before they build up into an avalanche of ill will and mutual recrimination.

The difficulty with unfair labor practice provisions is that the handling of charges and defenses under such a system will invariably take so long that strikes will often have crippled the public long before the problem can be re-

18. N.Y. CIVIL SERVICE LAW, § 209(3)(e) (McKinney Supp. 1969).

19. An unfair labor practice provision was recently adopted by New York. *Id.* § 209(a).

solved. But since the provisions might have at least some ability to help prevent the rigid inflexibility of the employee representatives, unfair labor practice provisions merit serious and favorable consideration.

Still another solution to the current system of final submission has been championed by advocates of a "Labor Court." It would seem this solution has little of substance to offer. Is the labor court merely a method of institutionalizing binding arbitration, of giving such arbitration the trappings of judicial majesty? Is there really any power that this court would have that ordinary courts could not have under a revised Taylor Act? If the previous answer is no, might this not be an ostentatious method of simply giving labor disputes their own decongested court calendar?

While none of the suggestions is bad, each (binding arbitration, arbitration with judicial safeguards, increased power of courts, more practical court calendars for labor cases) should be dealt with on its own merits and not under the vague blanket heading of "Labor Court." Most important, the court cannot act in a vacuum and without legislative guidelines. Therefore, to give even a modicum of effectiveness to this proposal, other approaches, such as unfair labor practice provisions, would first have to be considered.

IV. NEW SOLUTIONS TO PUBLIC EMPLOYEE DISPUTE PROBLEMS

In addition to the numerous proposals already mentioned, two new suggestions are offered to deal with the problems.

As a preliminary step a simple innovation is recommended. It is urged that state legislatures mandate two-year contracts for all employees in the public service. Ours is a fast-paced society, and changes occur constantly. Nevertheless, it is submitted that this does not justify the annual suspense and suffering inflicted upon the public and, incidentally, on the parties' negotiating teams. The standard use of two-year contracts would nearly halve the number of strikes and strike threats.

If the aforementioned proposal has simplicity and directness of approach to recommend it, then what follows is commended for precisely the opposite reasons—its complexity and its very deviousness in approaching the problem.

The penalty system, the limited right to strike and the cooling off period have all been criticized for the same reason—none of them gives to the negotiators an incentive to bargain more maturely and more realistically. They do nothing to create a situation in which both parties feel the urgent need, above all else, to be "reasonable" for their own immediate personal gain. In order to achieve this goal, it is suggested that the fact-finder be called in when an impasse has developed, and that he be empowered to arrive at one of two binding recommendations: that the last firm counterproposal of the employer is the more reasonable when compared with the last firm demand of the union, or vice versa. It is recommended that the fact-finder's conclusion be phrased in the form of a binding decision, thus, in effect, ending the dispute

by irrevocably choosing one side over the other. The effect of this proposal would be felt at every bargaining table. It is reasonable to assume that each side will trim its unrealistic positions and speak not to mollify its extreme factions, for it can no longer afford that luxury, but to state a position at the point of submission to fact finding which may reasonably be acceptable to an impartial party. If both parties are moved to such point of reason they can at that point resolve their differences voluntarily.

Throughout the short life-span of public bargaining, it has been the practice of both parties—whether because of amateurism, volatile rank and file, ill will or other factors—to short circuit the whole negotiating process and proceed right to the fact finder with positions virtually as rigid as they were at the very first meeting. Each side has seemed incapable or unwilling to give an inch, and each proposal and counterproposal has emerged sounding like just so much grist for the propaganda mill. When the problem has come before the fact finder, he has found himself confronted with two totally divergent extreme and unrealistic positions, irreconcilable and immovable, and totally incapable of mutually satisfying resolution. The fact finder's frequent answer has been to compromise, by recommending a course of action that proceeds directly down the middle road. This type of recommendation has had no relevance to the equities of the situation, since the two positions are so polarized and since there are so many unnecessary side demands and rejections. The confused fact finder must choose in a vacuum, unaware of what the parties really need or desire. The parties, aware of this situation, have done everything within their power to maintain the most extreme position possible, believing that the fact finder will come to rest closer to their position if their demands remain far afield.

The parties must be discouraged from substituting this "stalemate" settlement mechanism for bona fide collective bargaining. Both sides must be forced to "put their cards on the table," instead of waiting until the final step to wrest an extra measure of victory from the chaos of exaggerated demands and unreasonable confrontation. A logical method of achieving this is one which would limit the fact finder to the last firm proposal of either party. It is hoped that the onus thus placed upon each party to arrive at a position more reasonable and acceptable than his adversary's will result in the positions of the parties actually meeting on some middle ground, eliminating the need for impasse procedures and thus demonstrating the value of good faith negotiations.

Even if the psychological atmosphere created by this step does not prevent an impasse from arising, the resolution of such impasse will be simpler and more meaningful as a result of the constructive talks that have already paved the way. The fact finder, or arbitrator, will have a clear idea of what is really essential to the parties and of what each can forego with impunity. He will be faced with a clear choice, and his choice will be final.

The main drawback to this recommendation is the binding arbitration feature of the fact finder's decision. There has been much criticism of the concept of binding arbitration by those who imply that it faces insurmountable legal and constitutional obstacles. If there are any legal obstacles to compulsory arbitration, they have been greatly overstated.

The old cases, which held that governmental bodies could not delegate their decision making functions to any private board, have been rejected in the more forward looking cases.²⁰ Although there is a strong chance that the present state of the law might allow arbitrators the leeway to resolve even non-monetary issues,²¹ for the purpose of furthering general acceptance of this proposal only purely monetary disputes need be subject to binding fact finding. Specifically, the fact finder would have the power, in matters of purely financial import only, to reach a final determination by choosing the last offer of the more reasonable side.

Criticism of the concept of binding arbitration has proved incorrect. It was suggested that compulsory arbitration would result in the hardening of partisan positions and the substitution of arbitration for any sort of collective bargaining. We now know that this has happened anyway. The type of restricted compulsory arbitration suggested is specifically designed to eliminate the problem that its detractors thought it might cause.

Professor Taylor's more recent analysis of arbitration attacks the policy of submitting disputes to a board which acts without the checks and balances of elected government, and which spends the public's funds without considering the broad effect of its decision on the entire financial structure of the state or city.²² These arguments are far from overriding. While the arbitrator's discretion is limited to a simple choice between two alternatives, the result is extremely effective arbitration, the mere threat of which will ad-

20. *See, e.g., Norwalk Teachers Ass'n v. Board of Education of the City of Norwalk*, 138 Conn. 269, 83 A.2d 482 (1951). In this case, the court stated that a city may sign a collective bargaining agreement submitting all "non-policy" disputes to arbitration. The court made it clear that matters of salary adjustment, special compensation and similar financial details could be decided by outside arbitrators, while problems involving the qualifications and disciplining of teachers could not be decided by anyone outside the school board. For this reason, the court continued, a general agreement to arbitrate would be illegal, since it would cover many disputes the resolution of which would require discretionary power to deal with policy matters. The important thing to note, though, is that an agreement to arbitrate all purely financial matters would not be illegal or unconstitutional under this landmark decision.

21. This belief is based in part on statements such as the following:

While the administration of the Public Employees' Fair Employment Act rests with the Public Employees Relations Board, it is my opinion that there is no limitation on the power of local boards to consent to binding arbitration in the event that an impasse situation is reached. This is not, of course, to be construed as indicating any position on the question of whether boards should consent to such arbitration.

Letter from Robert D. Stone, Counsel, New York State Education Department to Mona Glazer, February 28, 1968, on file at the Buffalo Law Review.

22. Address, American Management Association Conference on Collective Bargaining in the Public Sector, June 6, 1969.

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vance the objectives of good faith bargaining. The benefit to the parties and to the public which would result from the encouragement of good faith bargaining in the public sector would more than outweigh the possible harm which might result if the arbitrator is infrequently forced to decide between two extreme alternatives.

