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Limited Right to Strike Laws: Can They Work When Applied to Public Education?

FROM THE PERSPECTIVE OF A SCHOOL BOARD ATTORNEY

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The topic assigned for analysis is somewhat akin to the tail of the dog. It appears to this author that the basic question that should be subject to study is whether or not collective bargaining as a concept is appropriate when applied to employer-employee relationships in public education.

The very nature of collective bargaining means joint determination by employees and employers to resolve the problems of the employment relationship. These problems in general grow out of concerns associated with wages, hours and working conditions. Through the mechanics of collective bargaining, the employer and the representative of his employees attempt to reach a meeting of the minds in the resolution of problems brought about by the dynamics of the interrelationship. Compromise, accommodation and concession are the by-words of the process and if through these the parties are unable to reach satisfactory adjustment the result can be a work stoppage or, when accomplished collectively, a strike. If the employer is the moving party in closing operations, the interruption of work is referred to as a lockout.

The threat of a strike or lockout in the private sector provides oft times the stimuli needed to bring the parties to a resolution of their disputes. Whether one likes to admit it or not, the strike is generally accepted as an

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integral part of the collective bargaining process without which, unions maintain, collective bargaining cannot function. By the same token, to a large extent the use of the lockout by a public employer is neither practical nor generally acceptable by constituencies. The demand for continuity of service by governments is one which is heard loud and clear by persons responsible for providing such services.

It is inevitable that collective bargaining creates conflict—the exerting of pressure by opposing parties upon each other in order to accomplish preestablished goals or limits as the case may be. In order to come close to fair and equitable agreements, it is necessary to establish balance at the bargaining table to as great a degree as possible. If one party can dictate terms because of an imbalance of power in its favor, then collective bargaining in its pure sense does not exist. If employees do not have the right to withhold services to a degree sufficient to exert some pressure on the employer, then the power at the bargaining table is tilted toward the employer who then can make decisions unilaterally restricted only by its own feelings of fairness and equity. If, however, a broad liberal right to strike is granted to employees in the public sector, excessive power is in their hands and the table is tilted toward them and with it the power to dictate terms again restricted only by their own consciences.

Public school operations are for all intents and purpose, monopolies; no adequate secondary source exists for the services which are being performed. In either case, be it an outright prohibition against the strike or a broad liberal right to strike, the necessary balance for collective bargaining in the public school sector cannot develop.

It has been advocated by many experts in the field of labor relations, as well as by many editorial writers upset with a rash of strikes in the public school area, that "interest arbitration" should be the solution to resolve disputes between the parties. "Interest arbitration" must be distinguished from "rights arbitration". The former relates to the resolution of a dispute or an impasse over the formation of the collective bargaining agreement or efforts to secure it; the latter contemplates the resolution of disputes arising out of a collective bargaining agreement already entered into. The use of "rights arbitration" is widespread and generally accepted.

The same, however, cannot be said for "interest arbitration". The primary reason for the paucity of acceptance of "interest arbitration" as a method of settling disputes involving the formation of collective bargaining agreements is that it negates the generally accepted concept of collective bargaining. Experience under a Pennsylvania Act[1] which provides for the use of final and binding interest arbitration to settle disputes existing between policemen and firemen and their respective governmental em-

[1] Collective Bargaining by Policemen or Firemen Act of June 24, 1968, PA. STAT. ANN. tit. 43, §217 (1968). Commonly referred to as Act 111.

ployers has proven its critic's fears to be well founded. Generally speaking, the results for governmental employers has been rather disastrous.

An arbitrator under this type of arbitration is to supplement the collective bargaining process by making accommodations for both parties after they have failed to reach agreement through their own bargaining efforts. He should attempt to arrive at conclusions which would reflect results which might have been expected had collective bargaining been carried through to its ultimate conclusion in comparable situations.

Worthy of note is a quote from a former Secretary of Labor expressing what he thought to be the general feeling for interest arbitrations:

> "Compulsory arbitration is the antithesis of free collective bargaining. Labor and representative management are in complete agreement in their opposition to measures compelling arbitration. Both are aware that the existence of compulsory arbitration laws not only eliminate free collective bargaining in situations where the parties are genuinely at odds, but will frequently encourage one or both of the disputants to make only a pretense of bargaining in anticipation of a more favorable award from an arbitrator than would be realizable through their own efforts."

Compulsory arbitration has been utilized for many years in Australia. Rather thorough analyses by various experts have resulted in no agreement as to its degree of success, but there is total agreement that it has not eliminated strikes. Those who advocate compulsory binding interest arbitration do so in the hope that strikes would be eliminated.

Therefore, with this brief run-down, we must ask ourselves whether we can have acceptable collective bargaining where there exists:

(1) an absolute prohibition against the strike
(2) a broad liberal right to strike
(3) "interest arbitration" requirements.

This author feels that viable collective bargaining does not and cannot exist in public education where any one or more of the above are in effect. This, however, does not answer the question as to whether or not the concept of collective bargaining, itself, is appropriate. If it isn't, what is? Probably no question in the area of public sector labor law has received more attention than this one. Even Solomon would have his problems.

The topic itself assumes the utilization of the collective bargaining process, and rightly so. The question posed is simply whether limited right to strike laws can work when applied to public education. As has been mentioned above, until a viable alternative for the collective bargaining process exists, it is necessary to modify that process to the extent necessary to make it work in the public sector.

Much can be accomplished by the imposition of limitations on the right to strike. Structuring these limitations, however, requires a considerable

amount of thought and study and the right combination may only ultimately be arrived at through the well known process of trial and error.

For this reason, a look at the Pennsylvania experience may be helpful. Under its Public Employe Relations Act,[2] three main limitations in collective bargaining exist:

(1) on subjects of bargaining[3]

(2) on the time when a non-prohibited strike may occur[4]

(3) on the length of a strike measured by the nature of its impact on the public.[5]

Elected governmental officials are, in essence, working in a fiduciary capacity in that they are placed in their positions to carry out policies for the overall public good, including the expenditure of monies in carrying out specific programs. It was therefore felt by the Act's framers that the determinations of policies inherent in governmental operations should be protected to the greatest extent possible from pressures by groups formed for and operating on the principle of serving the interest of its members. This was so because in general the self interest of unions and associations is not necessarily, and not usually, the same as the overall interest of the public at large. The efforts of unions and associations are geared to benefit the organizations themselves by obtaining benefits for their members. Elected governmental officials obviously are not unaware of the potential political impact which these bodies possess as a source of votes and funds at election time.

Sections were therefore inserted into the Act providing that employers were not required to bargain on inherent managerial rights[6] and that col-

[2] Public Employe Relations Act—Act of July 23, 1970, PA. STAT. ANN. tit. 43, §1101 (1970). Commonly referred to as Act 195.

[3] Section 702. Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employe representatives.

[4] Section 1002. Strikes by public employes during the pendency of collective bargaining procedures set forth in sections 801 and 802 of Article VIII are prohibited. In the event of a strike during this period the public employer shall forthwith initiate an action for the same relief and utilizing the same procedures required for prohibited strikes under section 1001.

[5] Section 1003. If a strike by public employes occurs after the collective bargaining processes set forth in sections 801 and 802 of Article VIII of this act have been completely utilized and exhausted, it shall not be prohibited unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public. In such cases the public employer shall initiate, in the court of common pleas of the jurisdiction where such strike occurs, an action equitable relief including but not limited to appropriate injunctions and shall be entitled to such relief if the court finds that the strike creates a clear and present danger or threat to the health, safety or welfare of the public....

[6] *See* Section 702, note 3 *supra*.

lective bargaining agreements in conflict or inconsistent with or contrary to any state laws were not permitted.[7]

The Pennsylvania Supreme Court has stated rather cogently[8]

> "School authorities must be given broad discretionary powers to ensure a better education for the children of this Commonwealth and any restrictions on the exercise of these powers must be strictly construed on the basis that the public interest predominates and private interests are subordinate thereto."

The Commonwealth Court of Pennsylvania, in a recent decision[9] interpreting the section limiting the scope of bargaining, characterized the Pennsylvania Act as follows:

> "This declaration [Public Policy Section] underscores two important factors. Act 195 is dealing in the public sector of labor relations and, secondly, it is intended to afford public employes a limited right of collective bargaining with public employers, subject, however, to the paramount rights of the public at large.
>
> "Since Act 195 deals with the public sector of labor relations and has as an integral part of its plan the limiting provisions to collective bargaining of Sections 702 and 703, it is unique and lends itself more to interpretation than to comparisons. Consequently, the myriad of National Labor Relations Board cases and Federal decisions dealing with statutes that do not contain such limitations to collective bargaining and generally dealing in the private sector of labor relations are of little precedent or real assistance, at least in the interpretation of Section 701."

Strikes are also limited as to the time at which they may occur. The Act specifically provides time frameworks for bargaining, mediation and fact-finding tied into the "budget submission date",[10] i.e., the date at which budgets must be submitted to governmental bodies for adoption. With few exceptions, the date for Pennsylvania school districts is June 30th. Any strike occurring during the periods mandated under the Act for the

[7] Section 703. The parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of the Commonwealth of Pennsylvania or the provisions of municipal home rule charters.

[8] Smith v. Darby School District, 388 Pa. 301, 314, 130 A.2d 661, 668–69 (1957).

[9] State College Educ. Ass'n v. Pennsylvania L.R.B., 9 Pa. Cmwlth. Ct. 229, 236, 306 A.2d 404, 409 (1973).

[10] Section 301—Sub-section 12. "Budget submission date" means the date by which under the law or practice a public employer's proposed budget, or budget containing proposed expenditures applicable to such public employer is submitted to the Legislature or other similar body for final action. For the purposes of this act, the budget submission date for the Commonwealth shall be February 1 of each year and for a nonprofit organization or institution, the last day of its fiscal year.

express purposes mentioned above are absolutely prohibited, and all that must be shown for injunctive relief is that the work stoppage which is occurring is a strike as that term is defined in the Act.[11]

Court injunctions in these cases have been easily obtained since the factual situation is rather clearly cut and subject to rather definitive testimony.

Public employees may strike (with certain exceptions not pertinent here) after the mandated procedures have been exhausted. The strike may continue until it presents a clear and present danger or threat to the public health, safety or welfare.[12]

Court injunctions in this area have not been so easily obtained where school districts are involved. Consistency has not been the rule in the lower courts. To a large extent, the length of time strikes were permitted to extend varied along geographical and political lines. Where private sector unionism was extensive, strikes were tolerated for a longer time than in areas where unionism was not as widespread.

Three cases have reached Pennsylvania's Commonwealth Court. The decisions are somewhat in conflict, but reading each in its entirety leads one to the conclusion that the standards established by the Act[13] will be more liberally construed than was intended.

In two of the cases it was stated:

> "However difficult it may be to envision a strike of public employes which would not constitute a threat to the public welfare, this court has nonetheless unanimously held that the Act did not intend that courts should enjoin strikes by public employes because they produce effects normally incident to a strike. Armstrong School District v. Armstrong Education Association, 5 Pa.Cmwlth. 378, 291 A.2d 120 (1972). Compare Philadelphia Federation of Teachers v. Ross, Pa.Cmwlth., 301 A.2d 405 (1973)."

It was the effects normally incident to a strike which were intended to be blunted by the standards of health, safety or welfare. To determine otherwise is to eliminate the impact of the limitations. If these effects were not meant to be limited in their scope, the Legislature would simply not have provided for such standards in the first instance. The case involving the Philadelphia teachers,[14] resulted in a decision more in keeping with the Act's design.

The Pennsylvania Act came into being on July 23, 1970, with an effective operational date ninety days thereafter, i.e., October 21, 1970. There

[11] *See* Section 1002, note 4 *supra.*

[12] *See* Section 1003, note 5 *supra.*

[13] *Id.; see also* Bellefonte Area Educ. Ass'n v. Board of Educ. of the Bellefonte Area Sch. Dist., 9 Pa. Cmwlth Ct. 210, 304 A.2d 405 (1973).

[14] Philadelphia Federation of Teachers v Ross. PA Commonwealth 301 A2d 405 (1973) No. 46 CD 1973; and No. 558 CD 558.

are 505 school districts in the state, with very close to 100% being organized for bargaining purposes. Since the effective date through the end of the last school term, there have been 123 strikes in the school systems. During the present rounds of negotiations, approximately 26 strikes have occurred with more likely since some 90 contracts have yet to be consumated. Michigan, with its law prohibiting strikes, at this writing has 34 of its districts on strike. It is interesting to note that the percentage of "recidivism" is very low in Pennsylvania. Only one of the striking districts is a repeater.

Organizational strikes have posed absolutely no problems. Teachers, long before the advent of the law, were members of teacher unions or associations, be it either an affiliation with the Pennsylvania State Education Association or the Pennsylvania Federation of Teachers. While elections have generally been held, no anti-association or anti-union campaigns of any consequence have taken place. Certification of representatives for bargaining purposes has been quite easily obtained.

The strikes that have occurred have been the result of bargaining impasses. During the first year of operation, many impasse strikes took place during prohibited times,[15] and were enjoined without too much problem. Strikes during these prohibited times no longer pose problems because their number has been reduced to a minimum. The same, of course, cannot be said for strikes occurring after impasse procedures were exhausted, i.e., bargaining, mediation and fact-finding where such was ordered by the Pennsylvania Labor Relations Board. It is upon these strikes that the health, safety and welfare standard is imposed.

It is not uncommon for some persons affiliated with public sector labor relations to take a position that the Act is not working utilizing as a criteria the number of strikes which have or are taking place. Others have taken the position that these strikes are the indicia of a viable collective bargaining process.

Obviously, there have been more strikes by school teachers than were expected, in fact, only 17 out of the total of 140 have been outside the educational area. It is felt that the number of strikes are excessive and demonstrate a failing either in the Act's structure, its implementation, or both. However, it is also believed time will reduce their number to an acceptable minimum.

In addition to purely bargainable matters, teacher groups have insisted upon bargaining on matters upon which employers are not required to bargain.[16] An appellate court decision[17] has found a teacher group was

[15] *See* Section 1002, note 4 *supra.*

[16] *See* Section 702, note 3 *supra.*

[17] State College Educ. Ass'n v. P.L.R.B., *supra* note 9.

guilty of committing an unfair practice by such insistence on some twenty-three subject areas which included items such as class size, class load, scheduling, and preparation time. With this decision and some active timely enforcement in this area by the Labor Board strikes over such subject matter shall result in a diminution.

Another step in the educational area has taken place which will have an impact on the school districts' ability to take a strike from the standpoint of economics. Prior to this year, districts labored under a system which extended a financial loss beyond the year in which a strike took place in that a diminution in state reimbursement resulted not only for the year of the strike but subsequently as well if a full 180 pupil days were not provided. The Department of Education has now restricted financial loss to the year of the strike. This ruling has a two pronged effect, first it has stiffened the backs of school boards which tend to increase the likelihood of a strike but it has at the same time taken away from the teachers part of the impact which was caused by their striking tending to make the teachers hesitate. Perhaps a statistician would call this a neuter. Related, however, is another development which will eventually lead to a reduction in both the number and length of strikes. Teachers as well as many boards were of the opinion that 180 days of school were mandated by the state's Public School Code. This meant that days teachers struck to a large extent would have to be made up to comply with the law. This would negate any real financial loss to teachers. Engaging therefore in a strike really did not cause them damage to the extent suffered by the boards or communities. The appellate court has recently determined the 180 day standard is not mandatory.[18] Bargaining for the 1973–74 or subsequent school years has resulted in impasses over which strikes are occurring, but strikes are of shorter duration since teachers are learning that now a financial loss is attaching to their activity.

There are many factors which bear on the number of strikes to date. Some of these factors may be eliminated by a growing awareness of the collective bargaining process by the parties.

The first factor contributing to the number of strikes has been mentioned heretofore, *i.e.*, the fact that teachers were not feeling a financial impact when they struck. Hopefully, this has been equitably resolved by actions of the State Department of Education and the Courts.

The second contributing factor has been the reluctance of the Pennsylvania State Education Association to accept the fact that under the Pennsylvania Act the school boards and their administrators can keep inviolate policy making decisions. Hopefully, it will recognize the appellate court decision in this regard but so far this year such is not the case and confron-

[18] Root v. Northern Cambria Sch. Dist., Nos. 1208 & 1309 Cmwlth Dkt. 1972 (decided August 28, 1973).

tation on this front is continuing. The Act does make a provision for "meeting and discussing" on matters of policy where decisions affect or impact on wages, hours and working conditions.[19] This provision was meant to provide the teachers a forum so that they would have an opportunity to convince school districts by logic the strengths of their position—to attain goals by the use of the mind rather than by the way of coercion.

Circulating among the Michigan school teacher groups is a paper advocating that strikes over demands including those on policy should be accompanied by extremes in disruption and violence. This only points up the immaturity of the perpetrators of such plans and is the best argument against negating a no strike law.

For some unknown reason the state leaders of the Education Association feel they are more capable of determining school policy than school administrators which simply leads into the third contributing factor.

While the teacher groups are highly organized for collective bargaining, the same cannot be said of the school districts. The Pennsylvania State Education Association has its regional and district service representatives spread throughout the entire commonwealth. Each of these attempt to press the policies established at state headquarters. Demands are pretty much the same to the crossing of the "t's" to the dotting of the "i's" be the group located in the North, East, South or West. While the Pennsylvania School Board Association conducts seminars with frequency throughout the state, the internal controls and financial resources are lacking. The school districts in general were not as well prepared for the advent of collective bargaining and far too many do not use qualified labor relation personnel to act for them. The collective bargaining concept has not been too easily accepted, particularly in geographical areas where historically no such relationship generally existed in the private sector. While many school districts have developed sophistication in their bargaining relationships, the general rule is that neither teacher groups nor boards have yet developed the understanding and know-how required for stable operation of a collective bargaining process. Only time with its attendant trials and tribulations can cure this defect.

Fourthly, the teacher groups all too often misread public attitude. Quite frequently, as is true of most elected bodies, criticism is the rule rather than the exception. The public wants the best in service for the taxes it pays; taxes which it feels are much too high to start with. However, where negotiations are likely to create higher taxes public sentiment generally has supported and quite frequently demands strong positions by school boards.

Only the most liberal of constituencies support teachers in this regard unless inequities are almost unconscionable. When public opinion strongly supports the school boards, a certain amount of frustration and belligerence

[19] *See* Section 702, note 3 *supra*.

develops among the teachers and their defiance becomes much more deeply seated. In addition, too often the public, the boards and the teachers panic before and during the strike when wiser heads should prevail. The boards are also rather sensitive to publicity and over react. Much too much attention to news media coverage is given which tends to cement positions and eliminates the flexibility necessary for quick settlements.

Fifthly, the Pennsylvania Labor Relations Board has not utilized expedited procedures available to it to eliminate strikes over unfair practices committed during the collective bargaining processes.[20] The reason for this refusal escapes this author. Many of the strikes which have occurred could have been eliminated or minimized in length had the Board developed internal procedures for obtaining restraining orders where the unfair practice charges were promptly filed. As it is, several months generally elapses before such cases are determined at which time matters may for all practical purposes be moot. This may have to be corrected by legislation.

Sixthly, the mediation process has not been permitted to develop to the extent necessary to accomplish its purpose. This is in no way meant to cast aspersions on the quality of the mediators, only the quantity. Mediation has been unable to be as effective as it should be since it does not have sufficient personnel to meet the demands placed upon it. Mediation provides one of the most effective tools in minimizing strikes both as to length and number.

Public school teachers get no special treatment under our law they are treated the same as other professionals—accountants, doctors, engineers, or nurses to name but a few. Equality of treatment is the bedrock upon which the law was structured and it is extremely unlikely that time will change this attitude.

Can limited right to strike laws work in public education? To repeat—if not what else? If we presume that collective bargaining is a desirable concept then a broad grant of the right to strike, a total prohibition of such a right, or compulsory binding interest arbitration would render it somewhat meaningless. Obviously, we have had our problems with a limited right to strike under our Pennsylvania law, but eventually through the development of a better understanding by teacher groups, school boards and the public many of these problems can be eliminated. Through trial

[20] Section 1401. Notwithstanding any of the provisions of Article XIII, the board upon the filing of a charge alleging the commission of an unfair labor practice committed during, or arising out of the collective bargaining procedures set forth in sections 801 and 802 of Article VIII of this act, shall be empowered to petition the court of competent jurisdiction for appropriate relief or restraining order.

Upon the filing of any such petition the board shall cause notice thereof to be served upon such person and thereupon the court shall have jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper.

and error we will be able to determine where additional legislation is needed to cure some of the defects.

Strikes will never be eliminated but they must be minimized. When and how the necessary balance will be equitably developed is a matter of conjecture. But it will eventually come about and the limitations imposed along with the rights granted if properly administered, will permit general acceptability. There does not seem to be any viable alternative.