The Journal of Law and Education

Volume 9 | Issue 2 Article 7

4-1980

A Union Perspective Labor: How to Cope with Collective Bargaining in Times of Fiscal Crisis

William T. Scott

James R. Sandner

A Michael Weber

How to Cope with Collective Bargaining in Times of Fiscal Crisis: A Union Perspective

WILLIAM T. SCOTT,* JAMES R. SANDNER,** AND A. MICHAEL WEBER***

Introduction

Much attention has been focused on the effects of the fiscal crisis on municipal government—its ability or lack thereof to function—with particular microscopic analysis on unions and their collective bargaining agreements, the resulting costs and long range impact of these contracts. The fiscal crisis is a product of numerous factors, including a weaker international economic market, inflation, recession, the energy crisis, the loss of employment in the central cities, federal fiscal policy that enables the federal government to withhold more funds from municipalities than it returns through services or programs,[1] and a national philosophy that encourages, supports and condones accumulated national debt of over $25 trillion.[2] Municipalities were in the forefront as borrowers, with banks and other financial institutions willing participants in the trading and holding of municipal securities.

For the purpose of this paper, the fiscal crisis is the result of constraints placed on municipal budgets due to many, if not all, of the above factors. With loose fiscal policy and reliance on substantial borrowing, most major older cities throughout the country were not dissimilar to New York. While financial retrenchment and the concomittant effects in these cities were not experienced, as when New York faced its financial crisis, theirs was soon to follow with similar results; high interest rates on municipal securities with some cities unable to enter the securities market; cutbacks in services; lay-off of employees; and others. And for the purposes of analyzing the fiscal crisis on collective bargaining, its full effect for New York started to be felt in 1972.

In the 1960's when the economy was expanding, all prospered; in the 1970's, with the advent of a shrinking economy, all systems and levels of local government were constrained to make changes never before contemplated.

* Assistant to the President of the United Federation of Teachers, NYSUT, AFT, AFL-CIO.

** General Counsel, New York State United Teachers.

*** Associate Counsel, New York State United Teachers.

[1] Seymour Melman, *The Federal Rip-off of New York's Money*, Public Employee Press, March 12, 1976.

[2] *Business Week*, October 12, 1974.

Profoundly affected by these changes was the process of collective bargaining. The experience of major cities throughout the country, and especially in New York, has had a ripple impact on all localities. In analyzing the changes experienced, we will not attempt to study or explain the phenomenon of the fiscal crisis, but only to show how the negotiation process has been altered, the reaction to this change, the change in parties, the resulting litigation and the prospects and forebodings for the future. Many of the views expressed and the experiences related arise from labor relations between the New York City Board of Education[3] and the United Federation of Teachers, Local, 2, NYSUT, AFT, AFL-CIO.[4] The reverberations of collective bargaining in the field of education in New York are felt around the country. It is for this reason that experiences of New York City are particularly useful in viewing the framework of public sector collective bargaining now and in the future.

Pre-Crisis Collective Bargaining

Collective bargaining in the public sector is less than twenty years old.[5] While public sector unions grew in the 1930's, public employees had none of the benefits and responsibilities enjoyed by their counterparts in the private sector. Although the United Federation of Teachers had a one-day strike in 1960, demanding a representation election, it was not until 1962 that a negotiated collective bargaining agreement was reached between the Board and the Union. The Union had traditional concerns about the terms and conditions of employment, and a major complication in both the achievement of bargaining and negotiating the contract was the extremely hierarchical nature of education—the reluctance of supervisors to part with any portion of their power over the working lives of teachers.[6] Grappling with the newness of bargaining collectively—of having to share power—created the stumbling blocks; monetary issues, in those days, did not. The 1960's represented the "great society," with the federal government expanding its services and the local governments following close behind.

Negotiations in the early and mid 1960's between the Board and the Union centered around the issues of salary, improvement in working conditions, relief from custodial and monitorial tasks, class size, duty free lunch and a grievance procedure.[7] While the final budgetary allocation came from the Mayor, in that the Board's budget was a portion of the entire municipal budget adopted by the City Council, the parties were relatively free to negotiate a contract with limited outside interference.

---

[3] The Board of Education of the City of New York will be referred to as the Board of Education, Board or Employers.

[4] The United Federation of Teachers, Local 2, AFT, AFL-CIO will be referred to as the UFT or union.

[5] Summers, "Public Employee Bargaining: A Political Prospective", 83 Yale L. Jour. 1156 (1974).

[6] 22 Buffalo L. Rev. 603, 604 (1973); Goldstein, Book Commentary on H. Wellington & R. Winter, Jr., "The Unions and the Cities" 202 (1971).

[7] Klaus, "The Evaluation of a Collective Bargaining Relationship in Public Education: New York City's Changing Seven-Year History", 67 Mich. L. Rev. 1033, 1038 (1969).

By 1965, the Union had successfully negotiated two agreements and had sought the right to be the exclusive collective bargaining representative for most Board employees, including classroom teachers in the regular day instructional program (teaching in dozens of licensed subject areas), guidance teachers, auxiliary teachers (who have become bi-lingual teachers in school and community relations), guidance counselors, laboratory specialists and technicians, school secretaries, and school social workers and psychologists.[8] With the growth of public employee organizations came the recognition of the responsibilities and obligations borne by municipal unions, and the need for passage of the Public Employees Fair Employment Act[9] became apparent. This law granted public employees the right to organize and collectively negotiate the conditions of their employment. Prior to this time, negotiations with the Union were not mandatory upon the Board, although in cities such as Chicago and Cleveland, as in New York, collective bargaining had taken place for years without specific authorization of law.[10]

As society prospered and funds for public education increased, so attitudes changed with respect to the administration of education and the appropriation of the budget for educational services, and a larger involvement was demanded by those affected by education and municipal expenditures. Consistent with this philosophy, 1969 added to the cast of negotiators a party that, as the 1970's showed, proved to be an important, and at times essential, one to the collective bargaining process—community school boards.[11] In addition to educational issues, concerns for increased pensions and step increments gained most attention during the 1969 negotiations. This concern was directly proportionate to the economic prosperity throughout the country.

Fiscal Crisis

With the 1970's, the economy shifted from prosperity to restraint, and the waning of the conflict in Vietnam, among other factors, created severe unemployment. On August 15, 1971, President Nixon announced wage-price controls, freezing wages, prices and rents, and injected into collective bargaining an element new to the public sector negotiating process.[12] The 1972–1975 contract between the Board and the Union was negotiated under the restraint of the wage controls and the influence of the community school boards, with the question of their input and authority not yet tested. Although gains were

---

[8] Id. at pp. 1049–1050.

[9] N.Y. Gen. Laws, ch. 392 (1967). The law became known as the Taylor Law after Professor George W. Taylor of the University of Pennsylvania who headed the Governor's Committee on Public Employee Relations which developed the statute. This superceded the Condon-Wadlon Act which penalized striking employees with termination.

[10] Charles M. Rehmus, *Public Employment Labor Relations: An Overview of Eleven Nations* - Institute of Labor and Industrial Relations. The University of Michigan/Wayne State University, p. 32 (1975).

[11] N.Y. Gen. Laws Ch. 330 (1969); N.Y. Education Law, §2590 *et seq.*

[12] Arnold R. Weber, "Studies In Wage Price Policy", *In Pursuit of Price Stability: The Wage-Price Freeze of 1971.* The Brookings Institute (1973). *See, also,* Wilmington Education Association v. Board of Public Education in Wilmington, 389 F. Supp. 621 (1975).

appreciated concerning tenure rights, school safety and due process protection for teachers, 1972 was the first occasion that the Board made negotiation proposals to the Union. With the downturn in the economy, attention began to focus on the costs of public services. In 1973, the New York State Legislature, in both regular and extraordinary sessions, passed bills curtailing public employee pensions.[13] At the same time, a Permanent Commission on Pensions was established with the authority to review all existing pension plans and to make recommendations concerning them. The commission was also required to review and to comment on all proposed legislation relating to pensions costs or benefits. In addition, the Legislature passed and the Governor signed into law a bill which removed pension plan changes as a subject for collective bargaining.[14] As a result of a continuing national inflation and with municipal expenditures increasing, government increased its needs for short-term borrowing in order to continue to provide basic services to the public. Banks had been willing participants in this arrangement—it benefited them and their clients—but a growing discomfort with increasing municipal debt and antiquated accounting methods raised concern.

By the end of 1974 and beginning of 1975, New York City bond and note sales had soared to record proportions. During the three month period from April through June 1975, the City's need for debt sales reached the unbelievable figure of $1.5 billion. New York City's fiscal problems materialized and became generally known, and talk of default became prevalent. The rating agencies downgraded City obligations, focusing attention on the prospect of default. With the City unable to solve its financial dilemmas and with the possibility of default having reverberations of state and nation-wide proportions, the Legislature created the Municipal Assistance Corporation (MAC) in June of 1975.[15]

MAC was constructed as a financial transmittal agency for New York City, authorized to issue its own bonds backed by a dedicated revenue stream and without the required identification to a specific purpose. The prime purpose of MAC was to assist in the refinancing of existing City debt and to provide a source of revenue to a city unable to secure public funding required to provide vital services to its citizens. On paper, MAC bonds looked attractive, but to investors, the attraction was more apparent than real, even with such luminaries as Governor Hugh Carey and Felix Rohatyn, a partner in Lazard, Frères, Co., at the helm. One factor that did discourage investment in MAC bonds was the collapse of the Urban Development Corporation (UDC), although the state fulfilled all UDC obligations. This collapse was particularly germane to MAC bonds, since the bonds issued by UDC were "moral obligation bonds of the State of New York" and to this extent similar in nature to the MAC bond.

When in August 1975 it became apparent that MAC obligations were not to be the cure-all preventing municipal default, MAC notified the Governor of its inability to supply necessary funds to meet the September 1975 requirements of New York City. Accordingly, the State Legislature once again was obliged

[13] N.Y. Gen. Laws Ch. 382, 383 (1973).
[14] N.Y. Gen. Laws Ch. 1046 (1973).
[15] N.Y. Gen. Laws Ch. 169 (1975).

to come to the City's aid. This time, however, the legislative action had far-reaching ramifications for collective bargaining, not only in 1975, but for years to come. In September, 1975, the Financial Emergency Act (FEA) was passed.[16] Section 1 of the Act declared that "a financial emergency and an emergency period exists in the City of New York". Stringent controls were imposed over the financial affairs of the City, but Section 3 of the FEA stated that, "[n]othing contained in this Act shall be construed to impair the rights of employees to organize or to bargain collectively." Notwithstanding this pronouncement, the right to bargain collectively was never so much in doubt as it was in 1975.

The FEA created the Emergency Financial Control Board (EFCB), comprising the Governor of the State of New York, the State Comptroller, the Mayor of the City of New York, the City Comptroller and three members appointed by the Governor, with the power and authority to review and audit operations of the City of New York and to recommend measures to reduce costs and reduce expenditures. Most important was the EFCB's ability to review and reject all collective bargaining agreements between the City, covered organizations[17] and the unions. A three year financial plan acceptable to the EFCB was required to be developed by the City which would eliminate existing deficits and provide a balanced budget by 1978. In addition, a wage freeze was imposed which could only be waived by the EFCB.[18]

Collective Bargaining During the Fiscal Crisis

When the FEA was enacted, the Board and the Union for several months had been engaged in negotiations for an agreement covering the period September 1975—September 1977. But negotiators for the Board and the UFT were unable to agree to specific contract provisions because budgetary figures were unavailable.[19] The difficulty in reaching a contract was compounded by the layoff in August 1975 of 13,000 Board employees, far exceeding the layoff in mayoral and other covered agencies in the City. Contrary to authority vested in it by statute, as interpreted by the courts,[20] the Board refused to enter into a contract, notwithstanding the Union's agreement to work under the terms of the old agreement while the details of the new contract could be worked out. Fact-finders and mediators were called in from the Public Employment Relations Board to assist in the negotiations.

When the first day of school showed massive violations of the existing contract, and with the Board unwilling to enter into a new contract, a five-day strike ensued.[21]

[16] N.Y. Gen. Laws Ch. 868 (1975), as amended by N.Y. Gen. Laws Ch. 870 (1975).

[17] The term "covered organization" refers to any and all governmental agencies, public authorities or public benefit corporations which receive monies directly or indirectly from the City. The term specifically includes the boards of education and higher education of the City of New York. N.Y. Gen. Laws Ch. 870, Section 2 (1975).

[18] New York, N.Y., Local Law 43, August 1, 1975.

[19] N.Y. Times, September 10, 1975, p. 30, col. 1.

[20] N.Y. Civil Service Law, §204, sub. 2; Board of Education v. Associated Teachers of Huntington, 30 N.Y. 2d 122 (1972); Board of Education, Yonkers City School District v. Yonkers Federation of Teachers, 49 A.D. 2d 753 (1976).

[21] N.Y. Times, September 9, 1975, p. 1, col. 8, and p. 30.

On the day the strike ended, Albert Shanker, president of the UFT, stated that a strike was useful against an employer with money, but that this employer had little if any money. That his statement accurately stated the fiscal retrenchment faced by the City was borne out on October 17, 1975 when a court order was before the New York Supreme Court Justice Irving H. Saypol for his signature declaring the City bankrupt. On that same day, the New York City Teachers' Retirement System purchased $150 million in MAC bonds to stave off default.[22]

The confusion was also fueled by the passage of the FEA on September 9, 1975, the first day of the strike. To further complicate the educational contract negotiations, other municipal unions, who arrived at two year agreements in 1974, had entered into a Wage Deferral Agreement in 1975 (known as the Americana Agreement), deferring certain wage increases until the end of the fiscal emergency period. Those unions which refused to agree to the Americana Agreement faced a wage freeze, thereby wiping out all potential salary increases[23] provided for under then existing agreements. With strong opposition from community school boards, a settlement was reached between the Board of Education and the Union which provided for some salary increases to senior teachers, the continuation of increment schedules, a shortening of the school day by two periods and a give-up by some teachers of two preparation periods per week. Although a contract was reached, it would be more than two years before the EFCB finally approved its terms and conditions.

In further response to the deepening fiscal crisis, the state legislature passed the Emergency Moratorium Act of 1975[24] which placed a three-year moratorium on the payment enforcement of short-term notes due in 1975 and 1976, including tax anticipation notes, bond anticipation notes, revenue anticipation notes and budget notes.[25] With MAC, FEA, EFCB and the bond moratorium imposing controls on or relating to collective bargaining, finding the employer to negotiate a contract with was at best difficult and, as it turned out, next to impossible. The catastrophic effects of bankruptcy were avoided,[26] but the resulting effects on collective bargaining were chaotic. The collective bargaining agreement arrived at in September 1975, seemingly the last step of the negotiation process, was nevertheless just the beginning. Where collective bargaining was once between the employer and employee organization, now the City, State and Federal Governments, MAC, EFCB, the state legislature, pension funds and clearing house banks all became crucial, if not legal, parties to contract negotiations.

When the City instituted massive budgetary cuts at the end of 1975, education's share was cut at twice the level as other governmental agencies.

---

[22] N.Y. Times, October 17, 1975, p. 1.

[23] N.Y. Times, August 30, 1975 at 8, col. 1.

[24] N.Y. Gen. Laws Ch. 874 (1975), as amended by N.Y. Gen. Laws Ch. 875 (1975).

[25] Comment, "*The Constitutionality of the New York Municipal Wage Freeze and Debt Moratorium: The Resurrection of the Contract Clause*", 125 University of Pennsylvania L. Rev. 167 (1976).

[26] Note, *Municipal Bankruptcy, the Tenth Amendment and the New Federalism*, 89 Harvard L. Rev. 1871, 1891 (1976).

The State Legislature, over the governor's veto, passed a bill, known after its sponsors in both houses as Stavisky-Goodman, mandating that City funds allocated to education bear the same proportional relationship to the overall city budget as they had during the previous three years.[27] Despite this action this bill and extensive discussion with the Board and the union, EFCB approval was elusive, and it became very evident that the contract was to be renegotiated, notwithstanding the fact that it had been previously negotiated.[28]

Protracted discussions ensued during 1976 with a tentative resettlement reached whereby the union would give up a number of contract gains and defer to a later date many others. The contract was extended for a year, until September 1978. The result was additional savings of $108 million.[29] Although the UFT had negotiated and renegotiated its 1975–1977 contract, a new stumbling block was on the horizon; one that would continue controls on collective bargaining for thirty years.

The City and State being unable to refinance the City's short-term debt that exceeded $4 billion, notwithstanding assistance from MAC, FEA and Emergency Moratorium Act, the federal government reluctantly passed the New York City Seasonal Financing Act of 1975.[30] For the City to receive loans from the federal government, a three-year financial plan, certified and approved by the EFCB, and a daily cash flow statement were required. The federal government also demanded that all collective bargaining agreements be consistent with EFCB wage policy resolutions and that no agreements would result in any increase in the financial plan submitted by the City.

On June 30, 1976, the Municipal Labor Committee (MLC) representing most city unions, negotiated with the City a Memorandum of Understanding providing for no increase in general wages, salary or fringe benefits unless gains in productivity could be realized. Cost of Living Adjustment (COLA) then in effect would be paid.

Since the UFT was not a party to the Memorandum of Understanding nor a member of the MLC, it was obliged to enter into a separate agreement to provide for similar productivity increases and a freeze on wages. Although the path to a finalized contract seemed clear, that belief was quickly dispelled when Stephen Berger, executive director of the EFCB, informed the Board and Union that the EFCB would approve no contract if the savings realized resulted in a loss of services.[31] Added to this was the most difficult issue of whether step increments were wage increases, notwithstanding an opinion from the Corporation Counsel, the head of New York City Law Department, that increments were not salary increases.

Negotiations continued through 1976 with representatives from the EFCB, Mayor's Office, and the Board of Education reanalyzing and renegotiating the terms of the contract previously agreed upon. During this prolonged period of

---

[27] N.Y. Gen. Laws Ch. 132 (1976).

[28] See note 19.

[29] This savings was in addition to $178 million already given up in the 1975 negotiations.

[30] New York Seasonal Financing Act, Public Law 94-143, December 9, 1975, H.R. 11700, PL 94-236 - Passed March 26, 1976.

[31] Berger letter dated August 25, 1976.

negotiations, input was received from many interested parties with either a particular point of view or an interest in a specialized area of education. These interested parties included the community school boards, the City Club, the Educational Priorities Panel,[32] the Black Caucus, the two United States Senators from New York, as well as political and community figures from all parts of the City and State.

Finally in February 1977, the agreement was extended for an additional year, until September 1978 and the EFCB approved the first two years of the contract.

The terms of the third year of the contract were left open to further negotiation with respect to deferral of increments but all restrictions and give-ups contained in the contract were to be continued through the third contractual year, in addition to new give-ups. In other words, for the school year 1977–1978, the extended year of the contract, the benefits were withheld pending EFCB approval but all the restrictions and penalties were imposed.

Under the terms of the resolution adopted by the EFCB, the Union and the City were given until December 1, 1977 to develop a solution to the increment question acceptable to the EFCB. Failure to resolve this problem within the prescribed time limit would result in the EFCB imposing additional wage deferrals.

After considerable effort to resolve the impasse, approval of the third contractual year was presented to the EFCB for its consideration at a meeting in December 1977. This meeting marked the end of one city administration with the new one not yet in office. When agreement could not be reached between the incoming and the outgoing administration, the EFCB once again refused to give needed approval to the contract. Once again, the parties went back to the table.

In late 1977 and the winter and spring of 1978, it became increasingly apparent that the City of New York would not eliminate its deficit condition by June of 1978, and in fact would need additional federal assistance to avoid bankruptcy. Faced with the continuing fiscal crisis, New York City labor leaders realized the need for new approaches to collective bargaining. If employees were to get needed pay raises to combat inflation and if the City were to have the money for such raises and still be able to avoid bankruptcy, cooperation between unions and between the unions and the City would have to reach new levels. Much had been asked of the municipal unions over the preceding three years and much had been given—wage deferrals, pension reductions, layoffs and perhaps most significant, the public employee pension systems made available to the City more than $3 billion through the purchase of City notes and bonds. Without this money the City of New York would most certainly have been in bankruptcy. Once again, the unions were con-

[32] The Educational Priorities Panel was comprised of Alliance for Children, ASPIRA of New York, Citizens Committee for Children, The City Club of New York, City-Wide Confederation of High School Parents Associations, Community Council of Greater New York, Community Service Society, League of Women Voters, New York Urban Coalition, Parents Action Committee for Children, Public Education Association, Queensboro Federation of Parents Clubs, Queens Lay Advocate Service, Urban League, United Parents Associations, Women's City Club of New York, Inc.

strained to reach out to the City in the interest of mutual survival. It was in the mutual interest of the unions to quickly seek agreement on labor contracts for the period subsequent to July 1978 and to work with the City in providing funding for such agreements.

Accordingly, the unions representing 220,000 City employees agreed to a new and untried method of bargaining. It was to become known as coalition bargaining—a means by which all unions would attempt to bargain for a Coalition Economic Agreement (CEA) which would apply equally to all participating unions. The actual bargaining would be done by representatives of the Municipal Labor Committee and the United Federation of Teachers with constant communications with all participants. Any agreements reached would apply only to economic matters, while working conditions would be decided on a second bargaining tier, between the union and each employing agency.

Among the conditions to be fulfilled before coalition bargaining could begin was the requirement that all outstanding contracts covering periods prior to July 1978 be concluded. This requirement was one of two incentives that eventually led to the conclusion of the UFT contract for 1975–1978.

The second incentive arose from the need for the City to again seek financial assistance from the federal government. When this need became apparent in the spring of 1978, Congressional and Treasury sources firmly indicated that before any decision with respect to aid would be made, all labor contracts would have to be in place. Since the unions had indicated that coalition bargaining for 1978–80 contracts would not begin until all 1975–78 contracts were concluded, the City and the EFCB had a compelling reason to finalizing the earlier UFT contract. Under these circumstances the contract, with minor adjustments, was approved by the EFCB at its meeting of February 1978.

With the resolution of outstanding contracts, the City and the unions were ready to begin negotiations for new agreements.

To comply with the Federal mandate to extend the life of the EFCB, the State Legislature adopted the Financial Emergency Act of 1978, which extended a modified EFCB for thirty years, or until 2008.[33] The life of the EFCB could be shortened dependent upon the ability of the City to enter the public market for the sale of securities, and to achieve and maintain a balanced budget.

Under the newly adopted Act, the EFCB may review labor contracts but only for the purpose of determining that they are within the limits of the financial plan, the Mayor participates in the selection of the director, and the comptroller of New York City is given additional duties and responsibilities.[34]

Once the preliminary requirements for coalition bargaining and for the Federal loan guarantees had been met, the City and the unions established the ground rules for coalition bargaining. Excluded from coalition bargaining were the Metropolitan Transit Authority and the Transit Union, as well as the police and fire unions, although the police and fire superior officers were included in the coalition.

---

[33] N.Y. Gen. Laws Ch. 201 (1978).

[34] Id., Section 16.

On April 1, 1978, the Metropolitan Transit Authority negotiated a contract with the Transit Union, the terms of which Mayor Koch had stated would be applicable to the coalition.[35] Contrary to this statement, the Mayor subsequently said there could be no connection between the two. However, by May 1, 1978, with pressure being exerted by the federal government, as well as a number of banks, a coalition agreement was reached granting a yearly increase of four per cent (beginning in the fourth month of each contract year) and a payment of a $750 non-pensionable cash "bonus" in each year in addition to the continued payment of old COLAs.[36]

By June 1978, the UFT and Board had agreed upon the terms and conditions of specific concern to education—Tier II. This procedure was intended to develop an expeditious resolution of the collective bargaining agreements with the union, the City and the various City agencies. However, as of the day of this writing, the City has yet to support the education contract and has refused to seek EFCB approval. Just what influence the federal government will exert on collective bargaining will only be determined over the next months and year.

Apropos of the legislation,[37] President Carter signed the bill guaranteeing MAC and City notes in New York City on August 8, 1978. In his speech at City Hall, he stated, in part:

> The bill that I will sign today represents a mutual concern and a spirit of cooperation, the same spirit that our Nation must bring to bear as we seek to control other problems—problems such as inflation and energy and inefficiency in government.
>
> * * *
>
> The credit for these achievements belongs to many different groups of individuals. New Yorkers have rallied to your City's colors. Groups that are usually thought of as natural enemies or competitors have worked together constructively toward a common goal. Labor and business, bankers and bureaucrats, Democrats and Republicans, politicians and ordinary citizens—all have joined together to take care of long neglected problems.[38]
>
> * * *

That a spirit of cooperation existed on the part of the unions cannot be gainsaid, and that the financial retrenchment and potential fiscal distress and chaos could not have been avoided without support from labor organizations must be recognized and accepted. While municipal unions around the country have been, and will continue to be, responsible and necessary parties during periods of fiscal retrenchment, litigation has and will spring from relationships that seek to impose unequal restraints on the parties.

---

[35] N.Y. Times, April 4, 1978, p. 1.

[36] During these negotiations, the issue of when deferred payments would be paid became a question which, to resolve the present negotiations, was referred to arbitration. *Infra,* note 75.

[37] New York City Loan Guarantee Act of 1978, H.R. 12426, PL 95-339, approved August 8, 1978.

[38] *Weekly Compilation of Presidential Documents,* Volume 14, Number 32, August 14, 1978, pp. 1397-1400.

Litigation

The cases having broad implications for collective bargaining during this fiscal period of distress were the initial challenges to MAC, FEA and the Emergency Moratorium Act.

The FEA was challenged as an unconstitutional grant of state monies to assist a municipal corporation for a public purpose without particular provision in the statute for the reimbursement of said funds. The act appropriated $250 million to the City and $500 million to MAC and in return, the State took back equivalent amounts of City and MAC notes. The majority of the Court of Appeals affirmed the lower court in *Wein v. State of New York*,[39] holding that the FEA was a valid extension of the credit of the state to the City of New York. Although the act was upheld, over a strongly worded dissenting opinion, the court's ruling raised a question when it stated:

> For the reasons to be stated, it is concluded that there has been no constitutional violation, but it is also apparent that the State in avoiding violation has been driven to the brink of valid practice.[40]

While upholding the constitutionality of the act and expressing the accepted theory that a State may give or lend money to assist a municipality, the assistance "must distinctly specify the sum appropriated and the object or purpose to which it is to be applied".[41] The dissent, however, questioned whether the state actually had money to give, since it had $3.38 billion in outstanding notes.[42]

In a related act to stave off default, the State Legislature passed the Emergency Moratorium Act which imposed a three-year moratorium on actions to enforce the city's short-term obligations upon those bond holders who refused to exchange their short-term city obligations for long-term MAC bonds. In *Flushing National Bank v. MAC*,[43] that action was attacked on the ground that the moratorium violated the state's constitutional provision giving faith and credit to short-term obligations. The majority held the Act to be unconstitutional, but a strong dissent was voiced in support of the act. Part and parcel of the faith and credit, the court stated, is the requirement to pay and pay punctually the notes as they become due. This the act did not do. Whether or not the act would have survived challenge if there was no bar to judicial actions is unclear, but previous holdings indicate that it would have.[44] However, this may be a difference without a distinction.

Analysis by the courts of terms and conditions of collective bargaining agreements in light of these various fiscal monitors was inevitable. However, an indirect upholding of the wage freeze provision of the FEA and the direct approval of a wage increase to policemen was the mixed result of a suit brought

[39] Wein v. State of New York, 39 N.Y. 2d 136 (1976).

[40] Id. at p. 142.

[41] Id. at p. 146.

[42] Id. at p. 154.

[43] Flushing National Bank v. MAC, 40 N.Y. 2d 731 (1976).

[44] Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 430 - 434 (1934).

by the Patrolmen's Benevolent Association.[45] There, the PBA and the City, having failed to enter into a collective bargaining agreement in July 1974, submitted their dispute to an impasse panel, which on April 30, 1975, granted the police an 8% salary increase for the first year of the contract, 1974–1975, and a 6% increase for the second year, 1975–1976. The panel's decision was accepted by both parties, but when the FEA was passed and a wage freeze imposed, the City stopped paying the increase. The PBA had previously brought an action to confirm the impasse panel award and the City failed to serve its answer and therefore defaulted.

The PBA then sued and the courts held in its behalf, on the theory that a judgment upholding an impasse panel award which granted salary increases was enforceable, but increases voluntarily negotiated were nevertheless unenforceable.

The dissent viewed the two examples as analogous and posited, in pertinent part:

> A judgment does not create new rights but defines and determines what rights already exist. That the terms "agreements or other analogous contracts" embrace judgments obtained for the enforcement thereof has been determined previously and effectively by this very court in *Jacobs v. Newman* (254 N.Y. 298).[46]

Notwithstanding the reasoning in the dissent, the wage freeze was held not to apply to judgments confirming awards of increases in salary. The issue of the wage freeze's application on collective bargaining agreements was directly faced and upheld in the Subway-Surface Supervisors Associations case.[47]

In a unanimous decision, the Court of Appeals held constitutional the suspension of wage increases during the emergency financial period. The court reasoned that the impairment of contract was prospective in nature and therefore not unconstitutional.[48] Since the services were not yet performed that were to be represented by the wage increases, the intrusion was of a limited nature. The court distinguished that challenge and the bond moratorium challenge by viewing the wage freeze as effecting a contract that is still executory while the other was being fully performed.[49] However, recently the California Supreme Court held illegal the wage freeze imposed upon public employees' salary increases that was occasioned by the passage of California's Proposition 13 in *Sonoma County Organization of Public Employees v. County of Sonoma, et al. and State of California, et al.*[50] The state's highest court struck the wage freeze, holding that no emergency existed and contrasting the situation to that of New York City.

While the sanctity of the collective bargaining agreement appeared to be in

---

[45] Patrolmen's Benevolent Association of the City of New York v. City of New York, 41 N.Y. 2d 205 (1976).

[46] Id. at p. 212.

[47] Subway-Surface Supervisors Association v. New York City Transit Authority, 44 N.Y. 2d 101 (1978).

[48] Id. at p. 112.

[49] Id. at p. 114.

[50] Sonoma County Organization of Public Employees v. County of Sonoma, et al. and State of California, et al.,—Cal. 3d—, Cal. Rptr.—, —P. 2d—(1979).

doubt, the upholding of a no-layoff provision in a collective bargaining agreement dispelled that fear. In *Matter of the Board of Education of the Yonkers City School District v. Yonkers Federation of Teachers*,[51] the Court of Appeals, in reversing the lower court's decision, upheld a demand for arbitration of a job security clause which prevented the Board of Education from laying off any teachers during the period of the contract, regardless of budgetary reasons or arbitration of programs.

The Board refused to arbitrate the issue because, it claimed, of the City of Yonkers' severe financial stringency. That city, as was true in New York, was placed under the fiscal controls of a Financial Emergency Act[52] when the City's financial condition was declared to be a disaster. A control board was created to oversee the city's efforts to regain financial solvency.

The Board argued that it was the legislative intent evidenced in the FEA that permitted abolition of positions. The court disagreed, stating that the act should not be construed to impair the rights of employees to bargain collectively and that attrition would be a primary recourse to reduce the work force. This latter theory has recently gained more support as a cost-efficient approach to financial savings as compared to laying off of employees.[53] The court held that when the no-layoff clause was negotiated between the Board and Union, both parties were acting within the parameters of the law. In addition, a no-layoff provision relieves a fear of being put out of a job which is critical to the maintenance of efficiency of public employment.[54]

The related issue of reduction in force by use of furloughs was the center of a controversy between Civil Service Employees Association and the County of Monroe.[55] The County Legislature enacted a ten-day furlough for all county officers and employees for the year 1976. Between the institution of the litigation and the review of it by the Court of Appeals, no action had been taken, so the court did not render a decision on grounds of mootness. It did, however, reverse the Appellate Division's finding that the legislation was valid and lawful. The dissent voted to retain jurisdiction and modify the lower court's holding. It does seem clear though, by the court's action, that where there is no statutory authority to furlough employees, as contrasted to layoff or abolition of position, the courts will not countenance such action. A different determination might result where there is apparent statutory authority to furlough employees and the absence of a limiting collective bargaining agreement.[56]

---

[51] In the Matter of the Board of Education of the Yonkers City School District v. Yonkers Federation of Teachers, 40 N.Y. 2d 268 (1976), *see, also*, Yonkers School Crossing Guard Union v. City of Yonkers, 39 N.Y. 2d 964 (1976) Matter of Bowen, 40 N.Y. 2d 264 (1976). *But see,* Professional Staff Congress/CUNY v. Board of Higher Education, NYLJ, January 29, 1976, p. 38, col. 4, where unpaid furloughs were upheld where there was no job security clause.

[52] N.Y. Gen. Laws Ch. 871 (1975).

[53] N.Y. Times, February 11, 1979, p. 46, col. 2.

[54] 40 N.Y. 2d at p. 275.

[55] Koenig v. Morin, 43 N.Y. 2d 737, rev'g 56 A.D. 2d 254 (1977).

[56] Professional Staff Congress/CUNY v. Board of Higher Education of the City of New York, New York Law Journal, Jan. 29, 1976, p. 38, col. 3 (Sup. Ct. Kings Co.).

The terms and conditions of a collective bargaining agreement need not be as specific as was the case in *Yonkers, supra*, to result in a job security agreement being upheld. *In the Matter of the Arbitration between Whitney Point Central School* and *Whitney Point Teachers Association*,[57] the contract provision in question provided that "all conditions of employment shall be maintained at not less than the highest minimum standards in effect in the District at the time this Agreement is argued provided that such conditions shall contribute to the improvement of the general educational program". An arbitrator's award was rendered ordering the school district to retain two full-time teachers at full salary whose positions had previously been reduced to half time with a corresponding reduction in salary. The court held that the article in the contract was reasonably susceptible to the construction given to it by the arbitrator and that the fact that it might have been subject to a different interpretation did not provide a basis for judicial intervention with the award.

Other provisions in collective bargaining agreements have been upheld as well by the courts, notwithstanding pleas of fiscal distress. During the 1975–1977 negotiations between the Board and UFT, the parties agreed to shorten the school day by two periods per week in conjunction with certain teachers giving up two preparation periods during that time. The school boards association challenged that provision of the contract on the theory, *inter alia*, that educational policy issues could not be included in a collective bargaining agreement. The Court of Appeals, in *New York School Boards Association v. Board of Education*,[58] rejected this claim and upheld the power of the Board and UFT to negotiate hours of instruction in the public school system so long as there was no proscription in state law or commissioner of education regulations prohibiting negotiations on this subject. In its opinion, the court stated the prevailing law:

> The city board, under the quoted statutes, has the primary responsibility for city-wide educational policy. Thus, even without more, it would appear to lie within the province of the city board to fix the number of the hours of instruction. But there is more. "Minimum" standards are not, or at least need not be, the same as minimum hours of instruction. Indeed, in some contexts the terms minimum may set an upper limit which may not be exceeded, like the eight-hour day in private industry. As noted earlier, the Chancellor has the responsibility for fixing "minimum" standards. Moreover, the number of hours of class teaching is not solely a matter of instruction policy. It is also a function of budgetary considerations and also a term or condition of teacher employment. Both budget and collective teacher agreements are the responsibility of the city board. Thus, apart from pursuing pedagogical goals, the city board would inevitably have the responsibility, consistent with their own and State minimum educational standards, to determine the number of the hours of instruction, because of their effect on budget and collective agreements.
>
> * * *

[57] In the Matter of the Arbitration between Whitney Point Central School, and Whitney Point Teachers Association, 43 N.Y. 2d 663, aff'g 55 A.D. 2d 439 (1977).

[58] New York School Boards Association v. Board of Education, 39 N.Y. 2d 111 (1976).

> The city board was free to negotiate with the teachers' union regarding the hours of instruction. As noted above, the number of hours of instruction is generally a term or condition of teacher employment for purposes of collective negotiation under the Taylor Law (Civil Service Law, art 14). In *Matter of Susquehanna Val. Cent. School Dist. (Susquehanna Val. Teachers' Assn.)* (37 N.Y. 2d 614), the court held that, in the absence of prohibition in statutory or decisional law, or countervailing public policy, a board of education is free to bargain voluntarily about any term or condition of employment. There is no statute or controlling decisional law which prohibits bargaining over the length of the school day. And, absent a failure to maintain minimum educational standards mandated by a higher authority, there is no applicable public policy suggested which prohibits a board of education from reducing the hours of instruction as part of a collective agreement.[59]

While the shortened school day case found the Board and the Union on the same side, they were soon pitted against each other when, because of financial constraints, contract violations became pervasive. The parties had previously negotiated a provision in the contract providing for sabbatical leaves after certain periods with the Board. Teacher sabbaticals, in fact, long antidoted teacher collective bargaining. In December 1975, the Board cancelled all sabbatical leaves and recalled all teachers, notwithstanding the fact that certain sabbaticals were for restoration of health.

The Union demanded arbitration of the contract violation and sought a court injunction to prevent imminent contract violation. The lower court stayed the arbitration, but the Appellate Division reversed, holding, in *Board of Education v. Reuther*,[60] that the teachers were entitled to pursue their right to arbitrate contract violations notwithstanding their judicial efforts. No appeal was taken and the parties proceeded to arbitration, with the teachers eventually receiving an award holding that the Board had violated the contract and ordering the parties to be made whole.

A similar result was reached in a case where the employer claimed that the contract provision pertaining to sabbatical leaves was unenforceable because of the intervening passage of an earlier Moratorium Act[61] which declared a moratorium on all sabbatical leaves. In *Associated Teachers of Huntington v. Board of Education, Union Free School District, Town of Huntington*,[62] the Court of Appeals confirmed an arbitration award granting sabbaticals on the theory that:

> The collective bargaining agreement created existing rights to sabbaticals for association members. Those rights were extant on April 12, 1971 when the Moratorium Act took effect. The introductory paragraph of Article XVI-J (of the collective bargaining agreement) is mandatory in tone: 'the Board shall adhere to the following policies in respect to granting sabbatical leaves'. The board is thus obligated to apply the criteria enumerated in the succeeding paragraphs, and while

---

[59] Id. at pp. 121–122.

[60] Board of Education of the City School District of the City of New York v. Reuther, 58 A.D. 2d 637 (1977).

[61] N.Y. Gen. Laws Ch. 124 (1971).

[62] In the Matter of Associated Teachers of Huntington v. Board of Education, Union Free School District No. 3 Town of Huntington, 33 N.Y. 2d 229 (1973).

discretion in the board is discernible, it is circumscribed by the implicit requirement for good faith appraisal of the various applications.[63]

In another challenge over a contract provision, the collective bargaining agreement between the Board of Education and UFT contained a provision regulating class size with a maximum number of students established per class, and a limited exception to the rule. When the Board violated this section of the contract during the 1975–1976 school year, a number of grievances were successfully filed.

In New York City, where the Board's share of the municipal budget was disproportionately reduced as compared to other municipal agencies, a bill was enacted by the State Legislature, over the Governor's veto, mandating that the Board receive the same percentage of the expense budget as it had received over the previous three years.[64] When the city refused to comply with the statute, the Board initiated suit, with the Board and the Union again as allies.

The Court of Appeals reversed the lower courts and declared the statute constitutional.[65] The underlying legislation was necessitated when, as the Assembly Committee report stated, the New York City school system was bearing a disproportionate share of the budget reductions necessitated by the City's financial plight, and that education, not inherently a municipal service but a State responsibility, was suffering from the fact that it was funded through the municipal budget. Also of note was the fact that the Legislature overrode a Governor's veto for the first time in more than 100 years.

Another approach in response to school boards' claim of an inability to comply with wage increases has been the filing of improper practice charges before the state Public Employment Relations Board. Such a case was brought against the Yonkers Board of Education[66] when it deliberately abrogated its collective bargaining agreement with the union. The gravamen of the charge was that the Board had refused to pay negotiated wage increases, contending that the Yonkers City Council had failed to provide additional needed monies to the Board.

The Board offered testimony that, in effect, it could not afford to pay for the provisions of the contract, but could only afford the expenditure for mandatory and essential services. However, the testimony revealed that upwards of $1 million was being utilized for non-mandated or non-essential services. Therefore, the improper practice charge was sustained.

Various and novel attempts have been made to close fiscal budget gaps with disregard for employees and their collective bargaining agreements. In *Nassau Chapter, Civil Service Employees Association v. County of Nassau*,[67] the union negotiated a contract on behalf of its members which provided for

[63] Id. at p. 233.

[64] Note 27, *supra*.

[65] Board of Education of the City School District of New York v. City of New York, 41 N.Y. 2d 535 (1977).

[66] In the Matter of Board of Education of the City School District of the City of Yonkers and Yonkers Federation of Teachers, AFT, AFL-CIO, 8 PERB 4545. *See, also,* Board of Education of the City of Buffalo and Buffalo Teachers Federation, 4 PERB 4517.

[67] Nassau Chapter, Civil Service Employees Association v. County of Nassau, 88 Misc. 2d 289 (1976).

annual step increments after five years of service and for various years thereafter. When the County Executive forecast a $4 million budget deficit, he unilaterally suspended all step increments to employees earning more than $25,000. The employer contended that in a time of fiscal emergency, rights of contracts, and those covering municipal employees, must be subordinated to the greater good of the municipality. The court held, however, that the classification at bar was violative of the constitutional guidelines and arbitrary and unjustifiably discriminatory.

In Erie County, a suit was commenced to compel payment to non-union employees, who, by legislative edict, were granted similar pay increases to those received by union employees as a result of a collective bargaining agreement.[68] The County legislature had in the past voluntarily granted non-union employees the same pay raise won by union employees. In 1976, the County experienced financial difficulties and decided to withhold salary increases from all non-union personnel. This action was challenged as a violation of the equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution. The discrimination common to the petitioners there, the withholding of the salary increases, was founded solely upon petitioners' non-union status. The court found that this involuntary exclusion from the collective bargaining process had no relevancy whatsoever to the county's fiscal situation and held the county's action to be unconstitutional, null and void.

Pension systems were directly affected by the fiscal crisis, with their authority, control and power to invest or not invest quickly tested. Since pension systems consist of employee members selected from the membership of the collective bargaining agents, their influence, opinion and vote is indirectly related to the negotiation process. And during the fiscal crisis, the pension systems were jealously viewed as a needed source of help.

It was of no surprise then that a provision of the FEA mandated the State Comptroller to purchase at face value MAC bonds in the amount of $125 million from the funds of the State Employees' Retirement System and the State Patrolmen's and Firemen's Retirement System.[69] That very action was challenged on its face in *Sgaglione v. Levitt*[70] on the grounds, *inter alia*, that the comptroller would be divested of his discretion in determining how to invest funds under his charge. The Court of Appeals struck down that section of the FEA as violative of the constitutional non-impairment clause protecting pension funds and concluded that the Legislature was powerless in the face of this clause to mandate that the comptroller mindlessly invest in whatever securities it directs, good, indifferent or bad.

Another attack was mounted against investments by the New York City Teachers' Retirement System and four other pension systems in MAC and City bonds in the principal amount of $2.53 billion on the grounds that the trustees of these funds breached their fiduciary obligations to retired benefi-

---

[68] In the Matter of Scime v. County Legislature of Erie County, 90 Misc. 2d 764 (1977).

[69] N.Y. Gen. Laws Chs. 868, 869, 870 (1975).

[70] Sgaglione v. Levitt, 37 N.Y. 2d 507 (1975).

ciaries and that the legislation was itself unconstitutional. Plaintiffs were retired professors formerly employed by the Board of Higher Education of the City of New York who were receiving lifetime pensions and annuities. Although these funds were to be fully funded based on the funds' investments, in actuality, the City's continuing cash contributions were a far more significant source of funds. Trustees of the fund consisted of the President of the Board of Education, the comptroller, two mayoral appointees and three members elected by the contributors - teachers.

In *Withers v. Teachers' Retirement System,*[71] testimony at the trial showed that the trustees had voted in favor of the MAC investments because the threat of the City's imminent bankruptcy made it likely that in such a situation, the city would no longer make the contributions necessary to sustain pensions to retirees. This belief was fortified by MAC officials, Felix Rohatyn, George Gould and Herbert Elish, who stated that without pension funds participation, the City would go bankrupt. To overcome the problems faced in *Sgaglione,* special legislation was passed authorizing the trustees of the funds to consider, "in addition to other appropriate factors recognized by law," the extent to which their investments would, *inter alia,* maintain the ability to the City to make future contributions and to satisfy future obligations to pay pension and retirement benefits.[72]

The court rejected plaintiffs' argument and dismissed the complaint. The court recognized that the investment of pension funds in City or MAC bonds was crucial to the funds because if the City was declared bankrupt, it would be unable to continue contributions to the pension funds.[73] The pension funds were not only responsible to retirees, but also to those who would retire in the future. This latter group was more than three times as large as the former. The actions of the trustees were held to be prudent under all the circumstances.[74]

During the coalition bargaining in 1978 between New York City and the municipal unions, one issue that arose was when the wages and salary deferred in 1975 in the Americana Agreement would be payable. When the City took the position that the deferrals were due on June 30, 1978 if, and only if, certain conditions were met (the City having a balanced budget and the ability to enter the securities market) and not thereafter, this belief ran contrary to the unions' understanding. The Unions understood that the deferrals would be paid when the conditions were met, but that might be on or well after June 30, 1978. To resolve the dispute, both parties agreed to submit the issue to the Office of Collective Bargaining (OCB). An OCB panel, consisting of Arvid Anderson, Eric Schmertz and Walter Eisenberg, rendered an award in the favor of the coalition unions, holding that the City was obligated to repay the deferrals when the conditions were met, but not before July 1, 1982.[75]

---

[71] Withers v. Teachers' Retirement System, 447 F. Supp. 1248, aff'd—F. 2d—*per curiam* (2d Cir. Jan. 18, 1979).

[72] N.Y. Gen. Laws Ch. 890 (1975).

[73] Note, *Public Employee Pensions In Times of Fiscal Distress,* 90 Harvard L. Rev. 992 (1977).

[74] Note, *Executory Labor Contracts and Municipal Bankruptcy,* 85 Yale L. Jour. 957 (1976).

[75] In the Matter of the Coalition Unions and the City of New York, Docket No. A-743-78.

A case tangentially related to collective bargaining, but interesting nevertheless, is *Kuntz v. New York State Emergency Financial Control Board For the City of Yonkers*[76] where an action was brought to compel the financial control board to notify the local school district that it had not disapproved a contract between plaintiff and the School District of the City of Yonkers. The significance of the case is that plaintiff was the school district's attorney retained for the specific purpose of negotiating a collective bargaining agreement with the teachers union at a time when the City of Yonkers was under the control of a FEA. Since all contracts were required to be approved or rejected by the EFCB, retained counsel's agreement was also subject to review.

Conclusion

The repercussions of the fiscal crisis have made lasting marks on collective bargaining. In analyzing the actions of unions and their leaders during this period of financial retrenchment, what can be learned, and what of the future?

Collective bargaining in the public sector has obviously been altered in such a way that will continue to test the ability of employers and unions effectively to negotiate terms and conditions of employment. Yet, unresolved fiscal crisis resulting in bankruptcy could not have been avoided without cooperation between management and labor.

Throughout this experience, much has been asked of the unions; many sacrifices have been made, many fought hard for benefits given up or deferred. From the outset of the financial difficulties suffered by municipalities, unions have responded to the problem. Where the unions have been made part of the solution, the collective bargaining process has worked. But this spirit can only exist where honest efforts are made by all parties to the negotiation process. All parties to the process must have the utmost concern for municipal survival.

In New York City when municipal debt reached such a level of unmarketability that banks refused to buy or sell the obligations, and the potential for bankruptcy was evident, the unions waived and deferred numerous contract gains previously fought for and enjoyed. Employee pension systems invested substantial funds in municipal securities to stave off default, even though this exercise of their fiduciary authority was criticized. Unquestionably, the potentially devastating effect of a municipal default was avoided largely by the efforts of the unions.

The question which must continue to be answered by all whom the collective bargaining process touches is how to achieve the necessary flexibility to avoid chaos during periods of financial retrenchment and the concomittant restraint. Is it efficacious to "take on the unions" to obtain the desired results? Will that approach stave off fiscal disaster and shed favorable light on municipal government and city living?

We submit the recent experiences prove that the success attained to date in New York was through accommodation and not confrontation. What can be

[76] Kuntz v. New York State Emergency Financial Control Board for the City of Yonkers, 66 A.D. 2d 795, 410 N.Y.S. 2d 900. (1978).

learned from New York and other municipalities is that collective bargaining and the negotiation process must survive and prevail to avoid financial disaster. Where one of the parties was intransigent in the continuing negotiation process, the resulting litigation to a large extent was most unfavorable to the resulting party.

Responsible leaders from all sides of this process should be encouraged by the experiences of New York that efforts to utilize the assistance and aid of responsible unions and their leaders is paramount to survive any fiscal crisis.