South Carolina Law Review

Volume 21 | Issue 5 Article 4

1969

Public Employee Strikes

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PUBLIC EMPLOYEE STRIKES

Calvin Coolidge, while still the Governor of Massachusetts, said in 1919 that "there can be no right to strike against the public safety by anybody, anywhere, any time."[1] This concise statement represented the general public feeling that strikes by public employees were simply intolerable,[2] and it continues to be the position of a majority of the states.[3] However, in other states, changing circumstances in the public employment area have forced governments to re-examine the policy of prohibiting strikes by public employees.

In recent years, the most spectacular growth industry in the United States has been government at all levels. Presently one sixth of the total work force is employed by some level of government.[4] By 1970 one out of every five employed persons will be a public employee, and by 1980 the ratio will have increased to one in every four.[5] The result of this rapid growth has been an erosion of the traditional civil service concept of prohibiting strikes against the government.[6] This break with tradition is shown by the recent upsurge of teacher strikes across the country. During the 1967-1968 school year, one hundred sixty three thousand teachers in twenty-one states went on strike.[7] This figure represented the loss of nearly one and one half million man-days of work, or approximately eighty per cent of the total work time lost since 1940.[8]

The following discussion of public employee strikes will examine the differences between public and private employees to explain the different treatment afforded them by various governments. Further this note will analyze the present statutes to

1. 1 LAB. L.J. 612 (1950).
2. LIFE, Mar. 1, 1968, at 4.
3. Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960); International Longshoremen's Ass'n. v. Georgia Ports Authority, 217 Ga. 712, 124 S.E.2d 733 (1962), *cert. denied*, 370 U.S. 922 (1962); Board of Educ. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965); Delaware River & Bay Authority v. International Org. of Masters, Mates, & Pilots, 45 N.J. 138, 211 A.2d 789 (1965); Gremminger v. Eyre, 417 Pa. 461, 208 A.2d 263 (1965); City of Pawtucket v. Teachers Local 930, 87 R.I. 364, 141 A.2d 624 (1958); City of Alcoa v. Electrical Workers Local 760, 203 Tenn. 12, 308 S.W.2d 476 (1957).
4. ATLANTIC MONTHLY, Jan., 1968, at 46.
5. Weisenfeld, *Public Employees—First or Second Class Citizens*, 16 LAB. L.J. 685, 687 (1965).
6. ATLANTIC MONTHLY, Jan., 1968, at 46.
7. U.S. NEWS & WORLD REPORT, Dec. 30, 1968, at 12.
8. *Id.*

determine their effectiveness in dealing with the problems created by the public employee labor movement, and propose new methods to improve the existing law.

I. PUBLIC EMPLOYMENT COMPARED WITH PRIVATE EMPLOYMENT

Although a constitutional right to strike has never been recognized, employees of private industry can and do strike. Until recently there has been little apparent desire on the part of public employees to organize and strike. The main reason for this inactivity has been that the poor working conditions and low salaries that prompted the labor movement in the private sector were not present in public employment. Now, however, in many areas the private employee enjoys many benefits not available to the public employee. This change has resulted primarily from the use of collective bargaining in the private sector. Collective bargaining has progressed at a slower rate in the public employment area.

Because of the public nature of a government, the options available to it in the event of a labor dispute are somewhat limited.[9] Government, as a business enterprise, is a monopoly operated for the benefit of all the people. The chief concern of a government is providing social services for its citizens. Private industries, however, are organized solely for the purpose of making a profit. Thus in the event of a strike, the private employer may choose simply to go out of business if this action would be the most feasible economically. A government, however, cannot simply go out of business because of the essential nature of the services which it provides.[10]

The ability of a government to meet the increased costs of employee demands may be somewhat less than the ability of a private employer to respond to an increase in the cost of doing business by passing it along to his customers. Generally a private company can increase its revenue by raising the price of its goods or services. This procedure would be relatively simple in most industries; although in a few highly competitive industries, it may be impossible. A government, however, relies mainly upon tax receipts to supply the bulk of its operating cash. Generally speaking, it is more difficult to raise taxes than to raise the price of a commodity, because politicians are fearful of the consequences of an unpopular tax increase.

9. Annot., 31 A.L.R.2d 1142 (1951); 70 W. VA. L. REV. 456 (1968).
10. Waldman, *Damage Actions and Other Remedies in the Public Employee Strike*, 20 N.Y.U. CONF. LAB. 259 (1967).

Policy decisions in private industry are made by a relatively small number of persons who have a voice in the control of the business, whereas every citizen has some degree of control over the functions of his government.[11] Thus a government is more responsive to public opinion than a private business. Public sentiment during a public employee strike could be either sympathetic or antagonistic toward government. Any public inconvenience, such as a police strike, could cause the removal of the government officials in power by the elective process. On the other hand, if governments constantly appease their employees by meeting their demands, thereby avoiding strikes, the resulting rise in taxes could also cause the incumbent officials to lose their jobs. These political pressures place public officials in the very difficult position of trying to decide what procedure to follow in the event of a labor dispute, striving at all times to continue the services necessary for the public welfare.[12]

Underlying every theory against public employee strikes is the public policy argument against them. Governments have been called an extension of the will of the people, and it has been said to be against public policy for anyone to strike against the will of the people.[13] Public employees serve for the benefit of all the people and every public employee should do his part to make government function as efficiently and economically as possible.[14] Moreover an effectively organized strike by public employees could endanger the very life of the government itself. If policemen went on strike during a riot, or firemen during a disaster, complete panic could ensue. Thus governments are faced with this problem: they must try to promote good relations between themselves and their employees and at the same time insure the orderly and uninterrupted performance of their governmental functions and services.

II. PRESENT LAWS AND THEIR EFFECTIVENESS

The National Labor Relations Act[15] established as national policy the right of workers in industries affecting interstate

11. Annot., 31 A.L.R.2d 1142 (1951); TIME, Mar. 1, 1968, at 34.
12. Waldman, *Damage Actions and Other Remedies in the Public Employee Strike*, 20 N.Y.U. CONF. LAB. 259 (1967); Wall Street Journal, Mar. 10, 1967, at 8, col. 1.
13. Nutter v. City of Santa Monica, 74 Cal. App. 292, 168 P.2d 741 (1946); International Long Shoremen's Ass'n v. Georgia Ports Authority, 217 Ga. 712, 124 S.E.2d 733 (1962), *cert. denied*, 370 U.S. 922 (1962).
14. Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951); Annot., 31 A.L.R.2d 1142 (1951).
15. 29 U.S.C. § 151 (1964).

commerce to organize unions to improve their working conditions. However, the Act does not include government employees.[16] Federal employees, by statute,[17] are prohibited from taking part in any strike against the government. President Kennedy, by executive order,[18] directed federal agencies to recognize qualifying employee organizations. Qualifying organizations do not include those that assert the right to strike against the Government. There are federal employee unions today, but it has been held that they do not have the right to strike[19] and federal law imposes very stringent penalties upon striking employees.[20] Not only is the violation of this statute a felony, but also the statute provides for the dismissal of any employee who participates in any strike against the federal government.[21]

Although there has been very little controversy over the right of federal employees to organize and strike, the controversy is growing larger every day at the state and municipal level. It has been held that the National Labor Relations Act does not apply to municipal[22] or state employees[23] and as a result of this holding, many states have enacted statutes that prohibit strikes by public employees.[24] The purpose of these statutes is to prevent public strikes at all costs.

A policy consideration underlying all of the state no-strike statutes is the belief that harsh punishment will serve as a deterrent against any public employee strike. Thus these statutes

16. 29 U.S.C. § 152.2 (1964).
17. 5 U.S.C. § 7311 (1964).
> An individual may not accept or hold a position in the Government of the United States . . . if he . . . (3) participates in a strike or asserts the right to strike against the Government of the United States . . . (4) is a member of an organization of employees . . . that he knows asserts the right to strike against the Government of the United States . . . .

Id.
18. Exec. Order No. 10988, 3 C.F.R. 521 (1962). For an analysis of the order, see Barr, *Executive Order 10988: An Experiment in Employee-Management Cooperation in the Federal Service*, 52 GEO. L.J. 420 (1964).
19. Eustace v. Day, 198 F. Supp. 233 (D.D.C. 1961).
20. 18 U.S.C. § 1918 (1964). "Whoever violates § 7311 of title 5 shall be fined not more than $1000 or imprisoned not more than one year and a day, or both." *Id.*
21. 5 U.S.C. § 7311 (1964).
22. City of Alcoa v. Electrical Workers Local 760, 203 Tenn. 12, 308 S.W.2d 476 (1957).
23. International Longshoremen's Ass'n v. Georgia Ports Authority, 217 Ga. 712, 124 S.E.2d 733 (1962), *cert. denied*, 370 U.S. 922 (1962).
24. The following states have statutes prohibiting strikes by public employees: Fla., Hawaii, Mich., Minn., Neb., N.Y., Ohio, Pa., Tex., and Va.

usually impose severe penalties for violation of the no-strike provisions but neglect to provide any mechanism for the peaceful settlement of labor disputes.[25] This neglect has been called the fatal mistake of the states in their effort to curb public employee strikes.[26]

In an effort to correct such statutory deficiencies, the Condon-Wadlin Act of New York[27] was repealed. In its place, the Public Employees' Fair Employment Act, also known as the Taylor Law, was enacted.[28] The purpose of the Taylor Law was to promote good relations between government and its employees and at the same time to secure the uninterrupted operation of government.[29] The new law gives public employees the right to organize unions to represent them,[30] and requires the state or local government to recognize the unions and negotiate with them.[31] Further it creates an impartial fact finding board to help solve disputes between public employers and their employees,[32] and it imposes stringent penalties on violaters, including fines of up to ten thousand dollars a day, and loss of the dues check-off privilege for a period not longer than eighteen months.[33]

The effectiveness of the Taylor Law has been tested several times in the two years that the law has been on the books, and the results have been disappointing.[34] During the New York City sanitation workers strike, tons of garbage piled up on the streets resulting in a major health emergency. Finally after the

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25. ATLANTIC MONTHLY, Jan., 1968, at 46.
26. Weisenfeld, *Public Employees—First or Second Class Citizens,* 16 LAB. L.J. 685 (1965); 70 W. VA. L. REV. 456 (1968).
27. N.Y. CIV. SERV. § 108.2 (McKinney 1959).
> No person holding a position by appointment or employment in the government of the state of New York, or in the government of the several cities, counties, towns or villages thereof . . . shall strike; (4) Any public employee who violates the provisions of this section shall thereby abandon and terminate his employment and shall no longer hold such position . . . .

Id.
28. N.Y. CIV. SERV. §§ 200-12 (McKinney Supp. 1969).
29. *Id.* § 200.
30. *Id.* § 202. "Public employees shall have the right to form, join, and participate in . . . any employee organization of their own choosing." *Id.*
31. *Id.* § 203. "Public employees shall have the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and administration of grievances arising thereunder." *Id.*
32. *Id.* § 205.
33. *Id.* § 210 2(f).
34. Collins, *Labor Relations Law, 1967 Survey of N.Y. Law,* 19 SYRACUSE L. REV. 308 (1967).

union had been fined and its president sentenced to jail, an agreement was reached to submit the dispute to binding arbitration.[35] In the 1967 New York City teacher strike, the impartial board set up by the Taylor Law recommended a sizeable wage increase for the teachers; however, the American Federation of Teachers rejected the board's recommendation and struck the New York City schools in open defiance of the Taylor Law.[36] The strike involved forty-six thousand teachers, and more than four hundred thousand pupils stayed away from school.[37] Under tremendous pressure, the New York Supreme Court issued an injunction against the strike, but the local union ignored the injunction. As a result of this defiance, the union was fined and its president sentenced to jail.[38] In both of the above instances, the procedures set up by the Taylor Law failed to prevent the strikes and the governments involved finally had to resort to the use of an injunction to end the strikes.

The injunction is more frequently used as a weapon against striking employees than the harsh punishments prescribed by the statutes.[39] Most of the old statutes provided for the dismissal of striking employees,[40] but this penalty was impractical. For example, a school system could not hope to replace all the teachers in the system if they were dismissed as a result of a strike. Accordingly school administrators would seek an injunction against an illegal strike rather than exercise their statutory authority to dismiss the striking teachers.[41] These injunctions are often disobeyed by the striking organizations. If the injunction is ignored, the court which issued it may of course use its contempt power to compel obedience. Under its contempt power the court could imprison union officials or levy fines against the defiant union; however, the effectiveness of a fine in ending the strike is doubtful. In the New York City teacher strike a fine of ten thousand dollars per day was imposed upon the striking union. Although this fine seemed quite large, after it had been passed on to the union members it amounted to less than one dollar per day per member. Moreover the incarceration of the union leaders can often lead to an undesirable result. During the

35. FACTS ON FILE, Feb. 2-10, 1968, at 63.
36. N.Y. CIV. SERV. § 210.1 (McKinney Supp. 1969).
37. N.Y. Times, Sept. 12, 1967, at 1, col. 8.
38. Board of Educ. v. Shanker, 54 Misc. 2d 941, 283 N.Y.S.2d 548 (Sup. Ct. 1967); 70 W. VA. L. REV. 456 (1968).
39. Annot., 31 A.L.R.2d 1142 (1951).
40. N.Y. CIV. SERV. § 108 (McKinney 1959).
41. Annot., 31 A.L.R.2d 1142 (1951); TIME, Sept. 29, 1967, at 77.

New York teacher strike, the president of the union, Albert Shanker, was jailed.[42] Not only was this action unsuccessful in ending the strike, but it also served to make Shanker a martyr to the striking teachers. Therefore even an injunction may be a relatively ineffective weapon against large groups of public employee strikers.

In summary the existing laws are generally somewhat archaic in design, and extremely rigid and inflexible in operation. They prescribe penalties for violating their provisions without setting up the machinery for solving the problems which led to the violations. Moreover the alleged deterrent effect of the harsh penalties has not materialized, as is shown by the sharp increase in the number of public employee strikes. Public employees want to have some degree of control over their working conditions, and they are rightfully entitled to it. The present statutes, with the possible exception of the Taylor Law, offer public employees no alternative to the illegal strike.

III. THE PROBLEM IN SOUTH CAROLINA

South Carolina, although it has no statutes dealing with the problem of public employee strikes, would undoubtedly follow the lead of the other states by prohibiting any strikes by public employees.[43] The reason given for this conclusion is that the compensation of public employees is regulated by legislative appropriations, and as the legislature carries out the will of the people, any strike to force demands upon the legislature would be against public policy. This is the traditional view concerning public employee strikes.[44] South Carolina cannot consider itself immune from public employee strikes. Certain groups, such as teachers in some localities, have already taken steps toward unionization.[45] The recent conflicts with the non-professional hospital workers in Charleston further show the urgent need for a well defined state policy dealing with the problem of public employee strikes.

If South Carolina's right to work law[46] is construed to apply to public employees, there could be no restrictions on union

42. Board of Educ. v. Shanker, 54 Misc. 2d 941, 283 N.Y.S.2d 548 (Sup. Ct. 1967).
43. [1963-1964] S.C. ATT'Y GEN. ANNUAL REP. 298.
44. Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951); International Longshoremen's Ass'n v. Georgia Ports Authority, 217 Ga. 712, 124 S.E.2d 733 (1962), *cert. denied*, 370 U.S. 922 (1962).
45. The State, Oct. 26, 1968, at 1 B.
46. S.C. CODE ANN. §§ 40-46 (1962).

membership as a condition of employment, either to require membership or to prohibit it. Some authorities feel that a right to work statute does not apply to government employees.[47] Texas, which also has a right to work law, holds that state employees may join unions, but that they do not have the right to strike.[48] Several other states are in accord with this position[49] which represents the modern trend.[50]

Unions are not a prerequisite to any public employee strike. The recent teacher strike in Florida was conducted by the Florida Education Association, which is similar to the South Carolina Education Association. Both organizations are members of the National Education Association (NEA), which has long prided itself on being a "professional" organization. The NEA has traditionally opposed any strikes by teachers, but has recently authorized the invoking of "sanctions" against school systems. These sanctions take the form of discouraging both present and prospective employees from teaching in the particular school system, and they are designed to put pressure on governments to act promptly to remove the possible causes of strikes. Recently some South Carolina teachers have investigated the possibility of requesting the NEA to impose sanctions on South Carolina. These actions, along with the confrontations in Charleston, show an urgent need for legislation to set up a peaceful procedure to settle labor disputes with public employees before they ever reach the strike stage.

IV. POSSIBLE SOLUTIONS TO THE PROBLEM

The public employee strikes that have taken place so far have proved to be highly successful for the strikers.[51] As a result of these successes, there will be an almost certain rise in the number of public employee strikes. To combat this rise, it will be necessary for governments at all levels to set up procedures to settle disputes and thereby avoid strikes.

One solution is to increase the fines imposed for violating a

47. [1963-1964] S.C. ATT'Y GEN. ANNUAL REP. 298.
48. Dallas Ind. School Dist. v. State Employees Local 1442, 330 S.W.2d 702 (Tex. 1959).
49. Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951); Springfield v. Clouse, 356 Mo. 1239, 206 S.W. 539 (1947); Broadwater v. Otto, 370 Pa. 611, 88 A.2d 878 (1952); Transit Local 1338 v. Dallas Pub. Transit Bd., 430 S.W.2d 107 (Tex. 1968).
50. Annot., 31 A.L.R.2d 1142 (1951).
51. Atlanta Journal & Constitution, Mar. 24, 1968, at 2 D; N.Y. Times, Dec. 19, 1967, at 41, col. 4.

prohibition against strikes. Proponents of this theory point to the large fines imposed on John L. Lewis and the United Mine Workers, which effectively ended the 1946 coal miners walkout.[52] Underlying the theory of greater fines is the idea that if strikes cannot be prevented, they can at least be made unprofitable to the unions. In addition to increased fines, the check-off privilege may be conditioned upon the absence of strikes (*i.e.*, in the event of a strike the privilege would automatically be suspended). These two procedures were embodied in New York's Taylor Law.[53] They are, however, limited in their ability to prevent strikes because they do not take effect until a strike has begun.

Many people argue that although certain public employee strikes are intolerable, others may be tolerated. This theory draws a distinction between various jobs that are held by public employees. The proponents of this theory argue that whereas a strike by police officers could not be tolerated, a strike by municipal golf course employees would scarcely affect the public. This standard has received some mention by the courts;[54] however, serious doubts can be raised concerning its usefulness. For example, on what side of the standard should teachers or clerical workers be placed? These employees could be considered indispensible under one set of facts, whereas under other circumstances, their absence would have little effect (*e.g.*, strikes by school teachers could be tolerated during summer school but not during the regular school term).[55]

Compulsory arbitration is often suggested by some people.[56] Both labor and management oppose it in the private sector, but there are indications that both employers and employees would accept it in the public employment area.[57] For compulsory arbitration to work, governments would have to first recognize the right of the workers to organize. Once this right is recognized, governments must then agree to negotiate with the labor organi-

52. United States v. United Mine Workers, 330 U.S. 258 (1947). Although this strike was not a public employee strike originally, the Court found that the workers in the mines seized by the United States government were employees of the federal government.

53. N.Y. CIV. SERV. § 210.3 (McKinney Supp. 1969).

54. International Bhd. of Electrical Workers v. Salt River Project Agricultural Improvement & Power Dist., 78 Ariz. 30, 275 P.2d 393 (1954) (where the court found that employees of an agricultural district could strike); Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen, 54 Cal.2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960) (held that transit workers could strike).

55. SATURDAY REVIEW, Dec. 7, 1968, at 27.

56. LIFE, Mar. 1, 1968, at 4.

57. TIME, Mar. 1, 1968, at 34.

zations. The results of such negotiations would have to be binding on both parties if strikes are to be prevented; however, some courts have held that a public employer cannot bargain away its continuing legislative discretion, and therefore it may not enter into collective bargaining agreements.[58] Thus a collective bargaining agreement between a public employer and its employees may be invalidated on the ground that is an illegal delegation of legislative power.

The greatest single need of the public employee is the right of collective bargaining. This right must be limited, however; the rules for private and public employment cannot be the same. Powerful deterrents need to be set up to prevent any abuse of power by a public labor organization. No law can completely eliminate the possibility of a strike; however, some machinery should be set up to entertain the legitimate complaints of public employees. Governments can no longer in good faith refuse to deal collectively with their own employees, and at the same time impose a statutory duty upon private employers to deal collectively with their employees.[59] Although there are differences between the structures of private and public employers, the plight of the worker is still the same. They have essentially the same needs and desires concerning their work, be it public or private. In the final analysis, whatever procedure for peaceful settlement is set up, the future success of that procedure will depend upon the skill, enterprise, and goodwill of the opposing parties on both sides of the dispute.

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58. State v. Brotherhood R.R. Trainmen, 37 Cal. 412, 232 P.2d 857 (1951), *cert. denied*, 342 U.S. 876 (1951); Fellows v. La Tronica, 151 Colo. 300, 377 P.2d 547 (1963); Norwalk Teachers Ass'n v. Board of Educ., 138 Conn. 269, 83 A.2d 482 (1951); Springfield v. Clouse, 356 Mo. 1239, 206 S.W.2d 539 (1947).

59. Waldman, *Damage Actions and Other Remedies In The Public Employee Strike*, 20 N.Y.U. CONF. LAB. 259, 271 (1967).