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Public Employee Unionism in the Southeast: The Legal Parameters

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ARTICLES

PUBLIC EMPLOYEE UNIONISM IN THE SOUTHEAST: THE LEGAL PARAMETERS

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I. INTRODUCTION

The ten Southeastern States (Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North and South Carolina, Tennessee, and Virginia) have hardly been touched by the wave of public employee unionism that has swept the rest of the nation over the past two decades.[1] A few examples will illustrate how far these states depart from the norm: (1) In 1972, fifty percent of all public employees were organized in unions for collective bargaining purposes, but every Southeastern State was below that average.[2] A 1974 study limited to nonfederal public employees concluded that less than ten percent of the public employees in the Southeast belonged to unions.[3] (2) Perhaps because of the relative paucity of public employee union members, southeastern legislatures have been far more reluctant to extend statutory collective bargaining rights to public employees than their northern and western counterparts. Although some thirty states authorize most categories of public employees to bargain, only one Southeastern State, Florida, does so. On the other hand, of the thirteen states with no statutory coverage for public sector bargaining, six are in the Southeast.[4] (3) Nor does there seem to be as much actual bargaining, statutory or otherwise, in the Southeast. The percentage of city governments with collective bargaining agreements is far lower in the Southeast than in other areas of the country,[5] as is the percentage of public school systems with negotiation proce-

1. Nationwide, union membership among employees of state and local governments rose from 556,000 in 1964 to 1,710,000 in 1976—an increase of 307.6% while union membership among nongovernmental employees increased only 9.3% during the same period. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS—REFERENCE EDITION, Table 155 at 384 (1975) and Bureau of Labor Statistics, U.S. Department of Labor, *Directory of National Unions and Employee Associations,* 1977, cited in [1977] GOV'T EMP. REL. REP. (BNA) 726:24, 27. As used herein, the term "public employees" does not include persons employed by the federal government.

2. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1972 CENSUS OF GOVERNMENTS, Vol. 3, PUBLIC EMPLOYMENT (1974), *cited in* PUBLIC AFFAIRS RESEARCH COUNCIL OF LOUISIANA, COLLECTIVE BARGAINING IN THE PUBLIC SECTOR 2 (1975).

3. Jedel & Rutherford, *Public Labor Relations in the Southeast: Review, Synthesis and Prognosis,* 25 LAB. L.J. 483, 488 (1974). Jedel and Rutherford did not include Kentucky, Louisiana, Mississippi, or Virginia in their study.

4. McCann & Smiley, *The National Labor Relations Act and the Regulation of Public Employee Collective Bargaining,* 13 HARV. J. LEGIS. 479, 495-97 (1976). The six Southeastern States with no statutory coverage are Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia. *Id.* at 496 n.1.

5. Nelson & Doster, *City Employee Representation and Bargaining Policies,* 95 MONTHLY LAB. REV., Nov. 1972, at 43, 44, 46.

dures.[6] (4) Finally, the region has experienced far fewer strikes by public employees than other areas of the country. Of the 478 strikes against state and local governments in 1975, only 24, or 5% were in the Southeast; of the 318,500 workers involved, less than 12,000, or 3.7%, were in the Southeast.[7] Of the 121 teacher strikes in the 1974-75 school year, none occurred in the Southeast.[8]

This exemption from the pressures of public employee unionism is very likely to prove temporary. There are already strong signs of increasing militancy among public employees in the area. Well-established professional groups such as the state affiliates of the National Education Association are openly demanding collective bargaining, while other groups with no doubt about their status as unions have stepped up organizing efforts in the region.[9] A number of strikes by public employees have taken place in each of the ten states, notwithstanding statutory prohibitions.

It is thus safe to assume that there will be more public employee unionism in the Southeast in years to come, rather than less, more demands for collective bargaining, and even more strikes. Prudence would dictate that policy-makers in this region use the present lag in unionization to learn from the experiences of states in more advanced stages of labor relations and plan now for the pressures that are sure to come. Unfortunately, little of the sort is being done, either toward adoption of a method of collective bargaining or toward finding the means to prevent it.

This article attempts to fill a small portion of the gap in our knowledge of the subject by setting forth the current legal status of public employee unionism in the Southeastern States in the belief that a clearer understanding of where we are today will make possible a better judgment of where we ought to go tomor-

6. *Labor-Management Relations in the Public Sector: Hearings on H.R. 12532, H.R. 7684, H.R. 9324 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor,* 92d Cong., 2d Sess. 124, 137, 140 (1972) (statement of Donald E. Morrison, President, National Education Association) [hereinafter cited as *1972 Hearings*].

7. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, WORK STOPPAGES IN GOVERNMENT, Tables 5, 8, & 9 (1975), *reprinted in* [1977] GOV'T EMPL. REL. REP. (BNA) RF 71:1015, 1017, 1019.

8. D. COLTON, DO PUBLIC EMPLOYEE BARGAINING LAWS INCREASE TEACHER STRIKES? 5 (1977). Of the 1131 teacher strikes from the 1960-61 to 1974-75 school years, only 26, or 2.3%, occurred in the Southeast. *Id.*

9. *E.g.,* Newhouse, *Southeast Teachers Becoming More Militant,* The State (Columbia, S.C.), Aug. 22, 1976, § A at 14, cols. 1-3; [1977] GOV'T EMPL. REL. REP. (BNA) 723:17-22.

row. At the risk of eliminating any dramatic tension, it should be noted in advance that the organization of this study is starkly functional. The two succeeding sections discuss respectively federal and state legal authorities on the subject of public employee unionism. Federal constitutional provisions of course provide certain limitations on state action: it is quite clear, for example, that attempts to prohibit public employees from joining unions are violative of the first amendment protections of the freedom of association.[10] It is less widely known that two federal statutes already mandate collective bargaining by state and local agencies in at least some circumstances.[11]

It is much more difficult to describe state law governing public employee unionism because there is simply no uniformity on the subject in the Southeast. The ten states surveyed represent virtually every possible approach to the question along a spectrum ranging from a comprehensive bargaining statute administered by a specialized agency, Florida, to an absolute prohibition of collective bargaining, North Carolina. For ease of discussion, the states discussed are grouped into three categories according to whether the state permits or requires public sector collective bargaining, permits or requires "meet and confer" relationships, or prohibits all forms of bargaining.[12] The reader is warned that these groupings are at best loose. With the possible exclusion of Florida, there are exceptions and limitations to the general policies of each state, and again with the same exception, there is no single source for determining the legal status of public sector bargaining, for in most states piecemeal legislation is somewhat haphazardly supplemented by court decisions and attorney general opinions.

In each case, federal and state, three topics will be explored: (a) *unionization,* including the rights to join or refrain from joining unions and the legality of union security agreements; (b) *collective bargaining,* including recognition of a bargaining agent, negotiations with that agent, and the status of agreements arising out of such negotiations; and (c) *dispute resolution,* including the legitimacy of different means of settling disagreements over matters concerning public employment. The final section of this article provides a brief summary and conclusion.

10. *See* Part II A *infra.*
11. *See* Part II B *infra.*
12. *See* Parts III A, B, and C *infra.*

II. FEDERAL LIMITATIONS ON STATE ACTION

A. *Constitutional Provisions*

1. Unionization.—Public employees currently enjoy a virtually unlimited constitutional right to join unions, and public employers may neither prohibit nor punish the exercise of that right. This right stems from the first amendment's protection of freedom of association, which is made applicable to the states by the fourteenth amendment, and was initially established in cases involving membership in political or civil rights organizations.[13] In 1968 and 1969, a series of lower court cases explicitly guaranteed the right of public employees to participate in unions.[14] The first of the series was the Seventh Circuit Court of Appeals decision in *McLaughlin v. Tilendis,*[15] in which the plaintiff alleged that he was dismissed from his teaching position because of his membership in a union. The court held that he had stated a claim upon which relief could be granted under the Civil Rights Act of 1871[16] because public employees were protected by the first amendment:

> It is settled that teachers have the right of free association, and unjustified interference with teachers' associational freedom violates the Due Process clause of the Fourteenth Amendment. . . . Public employment may not be subjected to unreasonable conditions, and the assertion of First Amendment rights by teachers will usually not warrant their dismissal. . . . Unless there is some illegal intent, an individual's right to form and join a union is protected by the First Amendment.[17]

Subsequent decisions have uniformly recognized the right of pub-

13. *E.g.,* United States v. Robel, 389 U.S. 258 (1967) (federal government may not deny employment to an individual simply because of membership in the Communist Party); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (statute disqualifying Communist Pary members from public employment is unconstitutionally overbroad); Shelton v. Tucker, 364 U.S. 479 (1960) (state may not require teachers to supply a list of all organizations belonged to in the preceding five years); NAACP v. Alabama, 357 U.S. 449 (1958) (state may not require disclosure of private organization's membership lists); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (state may not bar a lawyer from practice because of membership in the Communist Party).

14. AFSCME v. Woodward, 406 F.2d 137 (8th Cir. 1969) (street department employees); McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) (teachers); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969) (firemen) (three-judge court).

15. McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968).

16. 42 U.S.C. § 1983 (1970).

17. 398 F.2d at 288-89 (citations omitted).

lic employees to join unions.[18]

This right has not been broadly interpreted by the courts. It does not imply, for example, a right for unions to be given the same privileges granted to other types of organizations. Recently, the Supreme Court held that a public employer is not constitutionally obliged to check off union dues at the request of union members even if deductions are routinely made for contributions to charities and other purposes.[19] Similarly, the Tenth Circuit held in 1972 that union members can claim no greater constitutional protections than nonmembers, and activities that would justify discharge in the absence of any union connection stand in no more sacred position with such a connection.[20] It is not clear whether the public employees' freedom of association includes the corollary right of nonassociation. Several states authorize or at least permit union security agreements between public employers and unions. These agreements have the effect of forcing unwilling employees to join or contribute money to unions representing a majority of the members of the bargaining unit. The Supreme Court has upheld compulsory unionization in the private sector,[21] and while the constitutional considerations may be stronger with regard to public employment, the Court has already upheld compulsory payment of fees to public sector unions.[22] Thus, it is by no means certain that the Court will strike down compulsory membership agreements.

2. *Collective Bargaining.*—A number of unions have argued that the right of public employees to join unions imposes an obligation on public employers to recognize and bargain with those

18. *E.g.*, Lontine v. Van Cleave, 483 F.2d 966 (10th Cir. 1973); Orr v. Thorpe, 427 F.2d 1129 (5th Cir. 1970); Vorbeck v. McNeal, 407 F. Supp. 733 (E.D. Mo.) (three-judge court), *aff'd mem.*, 426 U.S. 943 (1976); Johnson v. City of Albany, 413 F. Supp. 782 (M.D. Ga. 1976); Teamsters Local 822 v. City of Portsmouth, 90 L.R.R.M. 2145 (E.D. Va. 1975), *aff'd*, 534 F.2d 328 (4th Cir. 1976); Holder v. City of Columbia, 71 Lab. Cas. ¶ 53,128 (D.S.C. 1972); United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C.) (three-judge court), *aff'd mem.*, 404 U.S. 802 (1971); Melton v. City of Atlanta, 324 F. Supp. 315 (N.D. Ga. 1971); Bateman v. South Carolina State Ports Auth., 298 F. Supp. 999 (D.S.C. 1969).

19. City of Charlotte v. IAFF Local 660, 426 U.S. 283 (1976); *accord*, Local 995, Int'l Ass'n of Firefighters v. City of Richmond, 415 F. Supp. 325 (E.D. Va. 1976); United Steelworkers v. University of Ala., Civ. No. 75-H-1788S (N.D. Ala., Oct. 24, 1975), *quoted in* United Steelworkers v. University of Ala., 430 F. Supp. 996, 1003-04 (N.D. Ala. 1977); Storjny v. Rousakis, 88 L.R.R.M. 2458 (S.D. Ga. 1974).

20. Fisher v. Walker, 464 F.2d 1147 (10th Cir. 1972).

21. International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956).

22. Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

unions. Federal courts have bluntly and all but unanimously rejected this argument. Thus, two federal district courts have upheld a North Carolina statute that flatly prohibits collective bargaining in the public sector.[23] Even in the absence of such a statute, there is no constitutional right to bargain collectively with reluctant public employers.[24] Accordingly, a public employer is

23. Winston-Salem/Forsyth County Unit of N.C. Ass'n of Educators v. Phillips, 381 F. Supp. 644 (M.D.N.C. 1974) (three-judge court); Atkins v. City of Charlotte, 296 F. Supp. 1068 (W.D.N.C. 1969) (three-judge court).

24. Lontine v. Van Cleave, 483 F.2d 966 (10th Cir. 1973); United Steelworkers v. University of Ala., 430 F. Supp. 996 (N.D. Ala. 1977); Teamsters Local 822 v. City of Portsmouth, 90 L.R.R.M. 2145 (E.D. Va. 1975), *aff'd*, 524 F.2d 328 (4th Cir. 1976); United Steelworkers v. University of Ala., Civ. No. 75-H-1788S (N.D. Ala., October 24, 1975), *quoted in* United Steelworkers v. University of Ala., 430 F. Supp. 996, 1003-04 (N.D. Ala. 1976); Board of Educ. v. AFSCME Local 1644, 401 F. Supp. 687 (N.D. Ga. 1975); Newport News F.F.A. Local 794 v. City of Newport News, 339 F. Supp. 13 (E.D. Va. 1972); Melton v. City of Atlanta, 324 F. Supp. 315 (N.D. Ga. 1971); Bateman v. South Carolina State Ports Auth., 298 F. Supp. 99 (D.S.C. 1969); International Longshoremen's Ass'n v. Ports Auth., 217 Ga. 712, 124 S.E.2d 733, *cert. denied*, 370 U.S. 922 (1962); Cook County Police Ass'n v. City of Harvey, 8 Ill. App. 3d 147, 289 N.E.2d 226 (1972).

There have been only two brief exceptions to this string of rejections, of which the most significant was the decision of Judge Merhige in Richmond Educ. Ass'n v. Crockford, 55 F.R.D. 362 (E.D. Va. 1972). Plaintiff union in that case brought suit under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), alleging that the refusal of the defendant school board to recognize and bargain with it had a chilling effect upon the plaintiffs' first amendment rights of association. The defendant moved, *inter alia*, to dismiss for lack of jurisdiction and/or failure to state a claim upon which relief could be granted. Judge Merhige refused to dismiss, stating that "[t]he grant of approval to organize and associate without the corresponding grant of recognition may well be an empty and meaningless gesture on the part of the defendant School Board" and that plaintiffs had stated "a constitutional claim, which on the present status of the pleadings is sufficient under the Constitution and laws of the United States." 55 F.R.D. at 364.

Judge Merhige's suggestion that there is a constitutional obligation on public employers to recognize and bargain with unions of their employees has not, to put it mildly, received widespread approval. At the time it was issued it was in conflict with a recent decision of the same district court (though by a different judge), Newport News FFA Local 794 v. City of Newport News, 339 F. Supp. 13 (E.D. Va. 1972), and three years later the same court, by a third judge, without even mentioning the earlier case, rejected a claim identical to that urged in *Crockford*, Teamsters Local 822 v. City of Portsmouth, 90 L.R.R.M. 2145 (E.D. Va. 1975), *aff'd mem.*, 534 F.2d 328 (4th Cir. 1976). Indeed, no other court has seen fit to cite Judge Merhige's decision, and for all practical purposes its existence has been ignored. Even Judge Merhige appears to have changed his mind. *See* Local 995, Int'l Ass'n of Firefighters v. City of Richmond, 415 F. Supp. 325 (E.D. Va. 1976) (first amendment was not intended to force the state to aid union organizational activities). The *Crockford* case itself was settled after the ruling on motion for summary judgment and thus never proceeded to final determination. Telephone conversations with James Edward Betts and Michael Smith, counsel for the plaintiffs (Dec. 17, 1976). *See also* Indianapolis Educ. Ass'n v. Lewallen, 71 L.R.R.M. 2898 (S.D. Ind.), *preliminary injunction stayed pending appeal*, 72 L.R.R.M. 2071 (7th Cir. 1969), in which the court of appeals rejected the district court's suggestion that there was a constitutional right to engage in collective bargaining. *Cf.* New Jersey Turnpike Auth. v. AFSCME, 83 N.J.

free to refuse to bargain with a union even if the same or other governmental agencies do engage in bargaining,[25] or if some other categories of public employees are statutorily granted bargaining rights.[26] By the same token, if a government agency does choose to bargain exclusively with one union it does not violate any constitutional rights of other unions excluded thereby.[27]

3. Dispute Resolution.—Several plausible but unsuccessful arguments have been made that the Federal Constitution establishes certain rights governing settlement of disagreements between employers and employees. Several unions have argued, for example, that the thirteenth amendment's prohibition of involuntary servitude protects employees from governmental restrictions on strikes. The Supreme Court flatly rejected that argument in 1949, holding that a state prohibition of certain intermittent and unannounced work stoppages did not impose any compulsory service because it did not restrict any employee from terminating

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Super. 389, 200 A.2d 134 (1964) (New Jersey constitutional guarantee of the right of public employees to organize does not guarantee collective bargaining, but does impose an obligation on public employers to confer with the representatives of their employees and to consider their proposals).

25. Confederation of Police v. City of Chicago, 529 F.2d 89 (7th Cir.), *vacated and rem. on other grounds*, 427 U.S. 902 (1976); Beauboeuf v. Delgado College, 303 F. Supp. 861, 866 (E.D. La. 1969), *aff'd in part*, 428 F.2d 470 (5th Cir. 1970).

26. Vorbeck v. McNeal, 407 F. Supp. 733 (E.D. Mo.) (three-judge court), *aff'd mem.*, 426 U.S. 943 (1976).

27. Memphis AFT Local 2032 v. Board of Educ., 534 F.2d 699 (6th Cir. 1976); Connecticut State Fed'n of Teachers v. Board of Educ. Members, 538 F.2d 471 (2d Cir. 1976); Federation of Del. Teachers v. De La Warr Bd. of Educ., 335 F. Supp. 385 (D. Del. 1971); Local 858, AFT v. School Dist. No. 1, 314 F. Supp. 1069 (D. Colo. 1970).

28. UAW Local 232 v. Wisconsin Employment Relations Bd. (Briggs & Stratton Corp.), 336 U.S. 245, 251 (1949). The Supreme Court recently limited the *Briggs & Stratton* precedent on the basis of the federal preemption doctrine, IAM v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976), but did not discuss the thirteenth amendment question. Professors Oberer and Hanslowe suggest that a more sophisticated attempt to create a constitutional right would rely on the concept of substantive due process. The argument, in their terms "as yet unvalidated by judicial imprimatur," would proceed as follows:

> A vital aspect of the concept of "liberty" or "property" in the case of employees is the freedom to take peaceful collective action against their employers concerning their conditions of employment. Without this freedom they lack the power, acting individually, to negotiate fair terms for the sale of their services; these services, representing in many instances the only significant economic asset, i.e., "property," employees possess, can, as a consequence, be said to be appropriated without just compensation, constituting a deprivation of property (and/or "liberty") without due process of law.

W. OBERER & K. HANSLOWE, LABOR LAW: COLLECTIVE BARGAINING IN A FREE SOCIETY 324 (1972).

his employment.[29]

Arguments for a right to strike in the public sector face the additional objection that such strikes have consistently been held illegal at common law. As a result, public employees have no constitutional right to strike[29] and only an authorizing statute can make such strikes legal.[30] Even the recognized first amendment right of public employees to form unions cannot be stretched to encompass this form of union action.[31] The Supreme Court inferentially rejected the argument for a constitutional right to strike by upholding a school board's dismissal of striking teachers in its recent decision in *Hortonville School District No. 1 v. Hortonville Education Association.*[32] With the exception of a very few recent enactments,[33] there is virtual unanimity among courts and legislatures alike that government employees do not have the right to strike.[34]

This is not to say that public employees are without rights governing resolution of disputes. To the contrary, the Supreme Court has very recently emphasized that public employees retain the rights they possess as citizens,[35] and that among those rights

29. *E.g.*, Kirker v. Moore, 308 F. Supp. 615 (S.D.W. Va. 1970), *aff'd per curiam*, 436 F.2d 423 (4th Cir.), *cert. denied*, 404 U.S. 824 (1971).

30. Bennett v. Gravelle, 451 F.2d 1011 (4th Cir. 1971), *cert. dismissed*, 407 U.S. 917 (1972); United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C.) (three-judge court), *aff'd mem.*, 404 U.S. 802 (1971); TVA v. Local 110, Sheet Metal Workers, 233 F. Supp. 997 (W.D. Ky. 1962); Rogoff v. Anderson, 34 App. Div. 2d 154, 310 N.Y.S.2d 174, *aff'd*, 28 N.Y.2d 880, 271 N.E.2d 553, 322 N.Y.S.2d 718 (1970), *appeal dismissed*, 404 U.S. 805 (1971); Lawson v. Board of Educ. of Vestal Cent. School Dist. No. 1, 62 Misc. 2d 281, 307 N.Y.S.2d 333, *aff'd*, 35 App. Div. 2d 878, 315 N.Y.S.2d 877 (1970).

31. United Steelworkers v. University of Ala., 430 F. Supp. 996 (N.D. Ala. 1977); Johnson v. City of Albany, 413 F. Supp. 782 (M.D. Ga. 1976); Teamsters Local 822 v. City of Portsmouth, 90 L.R.R.M. 2145, 2147 (E.D. Va. 1975) (dictum), *aff'd mem.*, 534 F.2d 328 (4th Cir. 1976).

32. 426 U.S. 482 (1976). Several years earlier, the Supreme Court spoke approvingly of a federal statute prohibiting strikes by federal employees. Arnell v. United States, 384 U.S. 158, 161 (1965) (dictum).

33. Eight states have authorized a limited right to strike for at least some public employees: Alaska, ALASKA STAT. § 23.40.200 (1972); Hawaii, HAW. REV. STAT. § 89-12 (Supp. 1975); Minnesota, MINN. STAT. § 179-64 (Cum. Supp. 1977); Montana, MONT. REV. CODES ANN. §§ 41-2202(2), -2209 (Cum. Supp. 1975); Oregon, OR. REV. STAT. §§ 243.726, .736 (1973); Pennsylvania, PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1975); Vermont, VT. STAT. ANN. tit. 16, § 2010 (Cum. Supp. 1976); and Wisconsin, [1977] GOV'T EMPL. REL. REP. (BNA) 738:12. *See generally* Collins, Miller & Tashman, *Labor Relations Law*, 1974/75 ANN. SURVEY AM. L. 193, 204-08; Barrett & Lobel, *Public Sector Strikes—Legislative and Court Treatment*, 97 MONTHLY LAB. REV., September 1974, at 19.

34. *See* Note, *The Strike and Its Alternatives in Public Employment*, 1966 WIS. L. REV. 549, 550, 554.

35. Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n,

are entitlements to due process and equal protection of the law.[36] It does mean, though, that public employees may not use the Constitution as a sword to force public employers to tolerate conduct that violates statutes, common law, or public policy.

B. Statutory Requirements

Public employers and their employees are specifically excluded from coverage under the major federal labor relations statute, the National Labor Relations Act[37] [hereinafter cited as NLRA], but two other federal laws directly affect public sector labor relations, namely the Railway Labor Act[38] and section 13(c) of the Urban Mass Transportation Act of 1964.[39]

1. The Railway Labor Act.—The Railway Labor Act [hereinafter cited as RLA] neither specifically includes nor excludes publicly owned railroads. The crucial term for purposes of coverage under the RLA is "carrier," which is defined somewhat tautologically as including, *inter alia,* any

> carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrig-

429 U.S. 167 (1976) (state may not prohibit public employee from speaking at a public meeting in opposition to portions of a collective bargaining agreement negotiated by union representing him).

36. *E.g.,* Perry v. Sindermann, 408 U.S. 593 (1972); Olshock v. Village of Skokie, 411 F. Supp. 257 (N.D. Ill.), *aff'd,* 541 F.2d 1254 (7th Cir. 1976). Even these rights are not interpreted broadly. In the recent *Hortonville* case, for example, the Court specifically stated that due process did not require that the decision to terminate teachers who struck in violation of a Wisconsin statute be made by some body other than the school board against whom they struck. Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 497 (1976). Similarly the Court has held that due process does not require a hearing prior to termination from public employment where neither contract nor relevant state law created a property interest in employment, Bishop v. Wood, 426 U.S. 341 (1976). *But cf.* Arnett v. Kennedy, 416 U.S. 134 (1974) (protection from discharge except for cause creates a property interest entitled to constitutional protection).

37. National Labor Relations Act, 29 U.S.C. §§ 151-168 (1970) [hereinafter cited as NLRA]. Section 2(2) of the NLRA, 29 U.S.C. § 152(2), states that the term "employer" "shall not include . . . any State or political subdivision thereof." Section 2(3), 29 U.S.C. § 152(3), states that the term "employee" "shall not include . . . any individual employed . . . by any other person who is not an employer as herein defined."

38. Railway Labor Act, 45 U.S.C. §§ 151-188 (1970).

39. Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c) (1970).

> eration or icing, storage, and handling of property transported by railroad.[40]

The silence of the RLA on the question of publicly owned railroads has occasioned a good deal of litigation because a number of states own and operate railroads as an integral part of maritime port facilities. Unions and states have thus had a large stake in determining whether port terminal railroads are subject to the RLA and, if so, whether other nonrailroad employees of the governing port authority are also covered by the RLA.

The definition quoted above certainly bears the inclusion of publicly owned railroads, but it took a long while for that inclusion to be firmly established. The decisive litigation arose over the status of the State Belt Railroad, which was owned by the State of California and operated along the San Francisco waterfront. In 1936, the Supreme Court was initially faced with the question of whether the State Belt was a common carrier subject to the Federal Safety Appliance Act,[41] which mandated the use of certain coupling devices on railroad cars. Relying on an earlier case[42] arising under the Hours of Service Act,[43] the Court stated that the proper test to be applied was the factual one of what activities the alleged "carrier" actually engaged in.[44] The State Belt, according to the Court, engaged in the same activities that privately owned common carriers engaged in and was therefore subject to the Safety Appliance Act. Subsequent state and federal cases held the State Belt to be subject to other federal laws, including the Federal Employers' Liability Act[45] and the Federal Carriers Taxing Act.[46]

When the question of the State Belt's coverage under the RLA finally arose, it would have been reasonable to assume that the railroad would be held a carrier for that act as well. It took two lengthy cases and seven years of litigation, however, before that was established. The first case was a declaratory judgment

40. 45 U.S.C. § 151, (1970).

41. Safety Appliance Act, 45 U.S.C. §§ 2, 6 (1970).

42. United States v. Brooklyn Terminal, 249 U.S. 296 (1919).

43. Hours of Service Act, 45 U.S.C. §§ 61-66 (1970).

44. United States v. California, 297 U.S. 175, 181 (1936).

45. Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1970). *See* Maurice v. State, 43 Cal. App. 2d 270, 110 P.2d 706 (1941).

46. Federal Carriers' Taxing Act of 1937, ch. 405, §§ 1-30, 50 Stat. 435-40 (omitted from 1970 code and now covered by certain sections in Title 26 of the Internal Revenue Code). *See* California v. Anglim, 129 F.2d 455 (9th Cir. 1942).

action filed in the California courts by the State to determine its rights and obligations under a collective bargaining agreement entered into by the Board of State Harbor Commissioners, which managed the State Belt Railroad. The California Supreme Court held that although the railroad did in fact engage in interstate commerce, Congress did not intend to apply the RLA to state owned and operated railroads because issues usually subject to negotiation in the private sector were in this case set by legislation and administrative regulation rather than by contract; the court further held that the contract in question was void as a matter of state law.[47] The Supreme Court denied certiorari.[48]

A year later, the Fifth Circuit Court of Appeals was faced with the same issue, this time arising out of a private suit brought against a railroad owned by the State of Louisiana. In *New Orleans Public Belt Railroad Commission v. Ward,*[49] that court rejected the California decision and held that a railroad engaged in commerce was subject to the RLA notwithstanding public ownership. After that ruling, one of the unions representing the State Belt's employees decided to force a federal court test of the California court's ruling. Accordingly, it first attempted to file a grievance with the National Railroad Adjustment Board [hereinafter referred to as the NRAB] on the basis of a contract with the State Belt. That body deadlocked on the jurisdictional issue,[50] and in a suit brought by the union to compel the NRAB to act, the Supreme Court held that the RLA was applicable and that California practice had established the legality of the contract.[51]

The Supreme Court's decision in *California v. Taylor*[52] finally established the principle that states that own and operate railroads must bargain collectively with the representatives of their employees, but did not provide any guidance for determining which state employees were covered by the RLA. Clearly those actually engaged in the operation of the railroad were covered, but the status of the other employees of the government agency was left unanswered. Longshoremen load and unload

47. State v. Brotherhood of R.R. Trainmen, 37 Cal. 2d 412, 416-22, 232 P.2d 857, 860-63, *cert. denied,* 342 U.S. 876 (1951).

48. 342 U.S. 876 (1951).

49. New Orleans Pub. Belt R.R. Comm'n v. Ward, 195 F.2d 829, 831 (5th Cir. 1952).

50. California v. Taylor, 353 U.S. 553, 556 (1957).

51. *Id.* at 557 n.2, 562-67.

52. *Id.*

trains, for example, and pilots guide ships to railroad docks. Whether an unwilling state could be forced to bargain with longshoremen's and pilots' unions as well as with the railway brotherhoods was left open.

The leading cases on this question involved the Alabama State Docks Department[53] and the North Carolina State Ports Authority.[54] The Alabama State Docks Department conceded that the terminal railroad it operated was a carrier subject to the RLA and that it had accordingly entered into collective bargaining agreements with railroad unions on behalf of employees of the terminal railroad as early as 1950.[55] Many years later, however, when longshoremen demanded the same rights under the RLA, the docks department refused. The National Mediation Board [hereinafter the NMB] held, without a hearing and without making findings of fact or conclusions of law, that because the nonrailroad operations of the port were under common control with a carrier, *i.e.*, the railroad, the entire department was a carrier subject to the RLA.[56] The docks department objected vigorously and refused to cooperate with the NMB. The United States filed suit to resolve the issue, but won only a partial victory. The federal district court held against the government, but the Fifth Circuit Court of Appeals reversed, holding that the NMB's determination could not be reviewed before the election and certification of the union, if it could be reviewed at all, and allowed the parties to proceed on that basis.[57]

This was not the end of the matter. A suit filed in the Alabama circuit court attempted to establish that nonrailroad docks department employees were entitled to bargain collectively with the public employer, but the court held exactly the opposite. The court took note of the NMB determination but gave it "no weight" because of the NMB's failure to hold a hearing or make findings of fact and conclusions of law.[58]

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53. *See* notes 55-58 and accompanying text *infra.*

54. *See* notes 59-64 and accompanying text *infra.*

55. United States v. Feaster, 410 F.2d 1354, 1357-58 n.5 (5th Cir.), *cert. denied,* 396 U.S. 962 (1969). Alabama law authorizes such agreements, but only for employees engaged in railroad operation. ALA. CODE tit. 38, § 17 (1958).

56. *See* United States v. Feaster, 410 F.2d 1354, 1356-57 (5th Cir.), *cert. denied,* 396 U.S. 962 (1969).

57. United States v. Feaster, 376 F.2d 147 (5th Cir.), *cert. denied,* 389 U.S. 920 (1967); United States v. Feaster, 410 F.2d 1354 (5th Cir.), *cert. denied,* 396 U.S. 962 (1969).

58. Raines v. Feaster, 72 L.R.R.M. 2647, 2651 (Ala. Cir. Ct. 1969).

A contrary result was reached in the North Carolina dispute. A North Carolina statute[59] authorized that state's ports authority to enter into collective bargaining agreements in accordance with the RLA, but the authority refused a request to bargain with the International Longshoremen's Association [hereinafter the ILA] on behalf of dock employees, warehousemen, and security guards. The ILA obtained a determination by the NMB that the authority was a carrier under the RLA by virtue of its operation of a terminal railroad and that the ILA represented the employees in question.[60] The union's request for an injunction to force the authority to bargain was denied by the federal district court for lack of jurisdiction,[61] but on appeal the Fourth Circuit Court of Appeals held not only that the NMB determination that the authority was a carrier was reviewable, but also that it was correct.[62] After two more years of litigation, the authority was ordered to bargain with the ILA, and that order was upheld on appeal.[63] Having exhausted its legal objections, the authority entered into negotiations, and a contract was executed in June of 1975.[64]

Long before the Alabama and North Carolina decisions, one other Southeastern State, South Carolina, specifically authorized its ports authority to negotiate contracts in accordance with the RLA with its railroad workers.[65] Pursuant to this authorization, the railroad has for many years been party to a contract with the United Transportation Union and remains today the only South Carolina governmental agency legally engaged in collective bargaining. The railroad officials believe themselves subject to the RLA and accordingly are prepared to use RLA grievance proce-

59. N.C. GEN. STAT. §§ 143-223 (1974).

60. *See* International Longshoremen's Ass'n v. North Carolina Ports Auth., 463 F.2d 1, 2 (4th Cir. 1972).

61. International Longshoremen's Ass'n v. North Carolina State Ports Auth., 332 F. Supp. 95 (E.D.N.C. 1971).

62. International Longshoremen's Ass'n v. North Carolina Ports Auth., 463 F.2d 1 (4th Cir. 1972).

63. International Longshoremen's Ass'n v. North Carolina State Ports Auth., 370 F. Supp. 33 (E.D.N.C. 1974), *aff'd*, 511 F.2d 1007 (4th Cir. 1975).

64. Letter to the author from Edwin M. Speas, Jr., Special Deputy North Carolina Attorney General (Jan. 13, 1977). A new contract was signed on July 1, 1976, which remains in effect as of this writing. *Id.* (A copy of each letter cited in this article is on file with the South Carolina Law Review.)

65. S.C. CODE ANN. § 54-3-210 (1976). This authority has since been transferred to the South Carolina Public Railways Commission, which now operates the terminal railroad. *Id.* at § 58-19-40.

dures should an appropriate case arise.[66]

The situation in the other Southeastern States with terminal railroads is less certain. The Georgia Ports Authority has broad statutory power to enter contracts and to engage in other activities,[67] but the only court decision on point held that its power did not extend to collective bargaining agreements.[68] That decision dealt with nonrailroad port employees, however, and is arguably not binding with regard to employees clearly covered by the RLA. The point is unlikely to be tested in the near future, though, for none of the Georgia terminal railroad employees is represented by a union.[69] Georgia owns an inland railroad as well, the Western and Atlantic, whose track runs from Atlanta to Chattanooga, Tennessee. The state leases the railroad to a private company, the Louisville and Nashville, and thus has not been faced with the problems of collective bargaining.[70] Mississippi, too, grants its ports authority broad contract power,[71] but the fact that all such contracts over $2,500 must be let out for public bid indicates that the law would not include labor agreements.

It seems clear, therefore, that the Southeastern States operating terminal railroads must bargain upon suitable request with unions representing railroad employees, and several are authorized to do so. In addition, the three Southeastern States in the Fourth Circuit—Virginia and the Carolinas—must bargain upon suitable request with unions representing other ports authority employees performing functions related to the railroad, but only North Carolina does so at the present time.

2. *Urban Mass Transportation Act of 1964.*—The existence of collective bargaining rights for public transit employees in states that are among those most firmly opposed to public sector bargaining stands as a curious byproduct of national concern for an unrelated problem—and of state concern for the federal dollar.

Even in states with generally low levels of union membership, most employees of privately owned public transportation

66. Telephone conversation with William J. Betz, General Manager of the South Carolina Public Railways Commission (July 6, 1977).

67. GA. CODE ANN. §§ 98-205(5), (9), (10), (13) (Cum. Supp. 1976).

68. International Longshoremen's Ass'n v. Georgia Ports Auth., 217 Ga. 712, 718, 124 S.E.2d 733, 737, *cert. denied,* 370 U.S. 922 (1962).

69. Telephone conversation with Samuel Lloyd, Traffic Manager of the Georgia Ports Authority (May 5, 1977).

70. Telephone conversation with David O. Benson of the Georgia Public Service Commission (May 5, 1977).

71. MISS. CODE ANN. § 59-5-37 (Cum. Supp. 1976).

systems engaged in collective bargaining by the 1960's, chiefly through the Amalgamated Transit Union [hereinafter referred to as the ATU].[72] By that time, the heydey of public transportation was over, and once profitable companies were drifting toward bankruptcy. A number of state and local governments thought the services of these companies important enough to be continued and arranged to take over ailing operations.[73] At the same time, there were several attempts to provide federal financial aid for urban mass transit systems.[74]

One disturbing aspect of this trend was sharply brought home to labor in 1962. Two years earlier, Florida's Dade County had established the Metropolitan Dade County Transit Authority to develop a unified transportation system under county ownership.[75] In 1961, pursuant to this plan, the county agreed to purchase the bus transportation system owned by W.D. Pawley, the employees of which had long bargained collectively through their representative, the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America [hereinafter referred to as Amalgamated]. When the takeover plans became known, the Amalgamated requested the county government to recognize it as the exclusive bargaining representative for county employees utilized in operating the transit system, to enter into a collective bargaining agreement covering those employees, and to assume the existing collective bargaining agreement. At the time, Florida law appeared to prohibit any governmental agency from bargaining with a union. The county therefore filed a complaint for declaratory relief in the Florida courts to establish its obligations under Florida law. Almost simultaneously, on Decem-

72. *See generally* Barnum, *National Public Labor Relations Legislation: The Case of Urban Mass Transit*, 27 LAB. L.J. 168 (1976). Such employees were covered by the NLRA, NLRB v. Baltimore Transit Co., 140 F.2d 51 (4th Cir.), *cert. denied*, 321 U.S. 795 (1944), and Barnum estimates that 95% of all private transit companies were unionized. Barnum at 170.

73. Until the early 1960's, most urban transit systems were privately owned, but by 1974 publicly owned systems "employed 84 percent of the workers, earned 86 percent of the operating revenue, and carried 90 percent of revenue passengers." Barnum, note 72 *supra*, at 168, *citing* AMERICAN PUBLIC TRANSIT ASSOCIATION, '74-'75 TRANSIT FACT BOOK 11 (1975).

74. Such legislation was introduced yearly beginning in 1960. Barnum, note 72 *supra*, at 169.

75. The following discussion is drawn from the decision of the court in Dade County v. Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees, 157 So. 2d 176 (Fla. Dist. Ct. App. 1963), *appeal dismissed*, 166 So. 2d 149 (Fla. 1964), *cert. denied*, 379 U.S. 971 (1965).

ber 19, 1961, the Amalgamated filed an unfair labor practice charge with the NLRB. On March 2, 1962, the NLRB's Regional Director informed the parties that the NLRB had decided not to issue a complaint on the charge because it appeared that the county was the employer and was exempted from the NLRA by section 2(2) of that Act. The Regional Director said, however, that the charge would not be dismissed pending completion of the pending litigation in the Florida court. His decision was affirmed on appeal to the NLRB's General Counsel.[76] The Florida Circuit Court for Dade County then issued a decree holding, *inter alia,* that relevant Florida law barred the county as transit employer from bargaining with the union.[77]

This decision and similar problems in other cities had the effect of depriving transit employees of the collective bargaining and other NLRA rights they had previously enjoyed and quite understandably alarmed organized labor.[78] The ATU and other labor orgainizations responded by lobbying for amendments to the mass transportation bills before Congress to require that any system receiving federal aid continue the collective bargaining rights of employees of private transit systems acquired by government agencies. Their efforts resulted in section 13(c) of the Urban Mass Transportation Act of 1964, which provided that:

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76. *See* Division 1267, Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees v. Ordman, 320 F.2d 729, 730 (D.C. Cir. 1963). By section 3(d) of the NLRA, 29 U.S.C. § 153(d) (1970), the NLRB's General Counsel is given "final authority, on behalf of the Board, in respect of the investigation of charges and the issuance of complaints . . . and in respect of the prosecution of such complaints before the Board."

77. The decree is quoted in the decision of the Florida District Court of Appeal in Dade County v. Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees, 157 So. 2d 176, 177-78 (Fla. Dist. Ct. App. 1963), which affirmed. The Union was unsuccessful in subsequent legal action. The United States District Court for the District of Columbia dismissed the Amalgamated's complaint seeking a judgment that the transit system and county were not exempt from the NLRA, and the Court of Appeals for the District of Columbia affirmed the dismissal, Division 1267, Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees v. Ordman, 320 F.2d 729 (D.C. Cir. 1963). The Florida Supreme Court dismissed the Amalgamated's appeal of the state action without opinion, 166 So. 2d 149 (Fla. 1964), and the United States Supreme Court denied certiorari, 379 U.S. 971 (1965). *See* Bilik, *Close the Gap: NLRB and Public Employees,* 31 OHIO ST. L.J. 456, 476-77 (1970).

78. The ATU lost bargaining rights in Dallas and San Antonio, Texas, J. Elliott, Report of the International President to the Fortieth Convention Amalgamated Transit Union 4 (1975), *quoted by* Barnum, note 72 *supra,* at 175, and Nashville, Tennessee, *Labor-Management Relations in the Public Sector, Hearings on H.R. 8677 and H.R. 9730 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor,* 93d Cong., 1st Sess. 267 (statement of Rep. William D. Ford) [hereinafter cited as *1973-74 Hearings*], as well as Dade County.

> (c) It shall be a condition of any assistance under this chapter that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for . . . (2) the continuation of collective bargaining rights . . . .[79]

Section 13(c) posed philosophical and practical problems for a number of state and local governments. Philosophically, several were opposed to the very concept of public sector collective bargaining. Practically, a number of public employers were prohibited by statute or judicial ruling from bargaining with their employees.[80] Neither philosophical nor practical problems proved insurmountable, however, and we thus have the anomoly of some public employees bargaining collectively in the Southeastern States where such bargaining is generally illegal. Two different paths have been taken to this end. Four of the ten Southeastern States have passed legislation that specifically refers to section 13(c) in guaranteeing collective bargaining rights.[81] Quite surprisingly, all of these statutes go far beyond section 13(c) requirements and provide for mandatory arbitration of negotiation disputes.[82] Two even provide for dues checkoff for recognized unions.[83] Several other states have chosen a method which is ideologically easier to reconcile with a public policy opposed to collective bargaining by adopting the Memphis formula. Under this approach, the governmental agency owning the system contracts with a private management concern to operate the system, and that private concern can then bargain with the union without injury to the conscience of the government owner.[84] A recent ex-

79. 49 U.S.C. § 1609(c) (1970). In the original act the quoted provision was numbered section 10(c), but it has subsequently been renumbered without substantive change.

80. *E.g.*, North Carolina, N.C. GEN. STAT. § 95-98 (1975), and Florida, Dade County v. Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees, 157 So. 2d 176 (Fla. Dist. Ct. App. 1963), *appeal dismissed*, 166 So. 2d 149 (Fla. 1964), *cert. denied*, 379 U.S. 971 (1965).

81. ALA. CODE app. § 1247(200) (Supp. 1971); LA. REV. STAT. ANN. § 23:890 (West Cum. Supp. 1977); TENN. CODE ANN. § 6-3802 (Cum. Supp. 1976); VA. CODE § 15.1-1357.2 (Cum. Supp. 1977).

82. ALA. CODE app. § 1247(200)(b) (Supp. 1971); LA. REV. STAT. ANN. § 23:890(E) (West Cum. Supp. 1977); TENN. CODE ANN. § 6-3802 (Cum. Supp. 1976); VA. CODE § 15.1-1357.2 (Cum. Supp. 1977).

83. ALA. CODE app. § 1247(200)(c) (Supp. 1971); LA. REV. STAT. ANN. § 23:890(F) (West Cum. Supp. 1977).

84. *See* Barnum, note 72 *supra*, at 173, 175.

ample of the operation of the Memphis formula is the case of Charlotte, North Carolina. A government agency owned the local transit system but contracted with City Coach Lines, a private company, to operate it. Employees of the system struck in late 1976 during contract negotiations, but city officials were able to maintain a careful hands-off approach until the parties resolved the dispute.[85] Still other states, not yet faced with pressing bargaining demands, have passed legislation giving the acquiring governmental authorities broad powers to enter contracts and to do all things necessary to obtain federal aid.[86] In such cases, a broad interpretation of the law would allow collective bargaining if a need arose,[87] but no decision need be made until such time.[88]

However indirect the bargaining may be, it seems to have satisfied the proponents of section 13(c). Officials of the ATU have repeatedly stated that the section brought about collective bargaining in virtually every case of public acquisition of a private transit system.[89] Moreover, southeastern public employers seem to have accepted it without complaint, and one commentator has even suggested that section 13(c) could provide a model for extension of bargaining rights to other employees of state and local governments.[90]

3. Conclusion.—Certain other federal statutes have a very limited effect on labor relations in the public sector. Political subdivisions are persons within the meaning of the secondary boycott provisions of the NLRA, for example, and are thus enti-

85. Jetton, *Public Union OK Sought by Workers*, The Charlotte Observer, Mar. 9, 1977, § B at 1, cols. 5-6.

86. GA. CODE ANN. § 95A-302(g) (1976) (department has authority "to do all things necessary, proper, or expedient to achieve compliance with the provisions of and requirements of all applicable Federal-aid acts and programs"); KY. REV. STAT. § 96A.200 (1970); N.C. GEN. STAT. § 136-44.20 (Cum. Supp. 1975) ("all things required under applicable federal legislation"); S.C. CODE ANN. §§ 58-25-50(d), (j), (n) (1976).

87. This has happened recently in Louisville, Ky. Letter to the author from Martin Glazer, Assistant Ky. Attorney General, Jan. 5, 1977.

88. Thus, the Georgia Department of Transportation states that since the applicable statute does not require collective bargaining agreements, "we have not done anything in the way of collective bargaining pursuant to this (or any other) statute." Letter to the author from Thomas D. Moreland, Georgia Commissioner of Transportation, Dec. 29, 1976.

89. *See, e.g.*, the statements of ATU Presidents John Elliott and Don Maroney and ATU attorney Buddy Cohen cited by Barnum, note 72 *supra*, at 175.

90. Barnum, note 72 *supra*, at 176. The one Southeastern city to challenge section 13(c) recently lost its challenge. City of Macon v. Marshall, 96 L.R.R.M. 2797 (M.D. Ga. 1977).

tled to certain protections.[91] An argument can be made as well that, despite the careful exclusion of public employers, public employees, and public employee unions from the Landrum-Griffin Act,[92] some unionized public employees may be protected by that Act in certain circumstances.[93] In both cases, however, the impact on labor relations policies of state and local governments is extremely limited.

In fact, it is fair to say that the impact of all federal legislation in this area has been rather limited. Certainly a few state agencies and subdivisions bargain with particular groups of employees as a result of the RLA and the Urban Mass Transportation Act, but given the fact that other strong unions have been able to force similar agencies to bargain even in the complete

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91. Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4) (1970), declares it an unfair labor practice for a labor organization

> (4)(i) to engage in, or to induce or encourage any individual engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> . . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful any primary strike or primary picketing;

See NLRB v. Local 313, IBEW, 254 F.2d 221 (3d Cir. 1958).

92. Section 3(e) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 402(e) (1970), defines "employer" to exclude "any State or political subdivision thereof." Section 3(f), 29 U.S.C. § 402(f) (1970), defines "employee" to include any individual employed by an employer, and, as noted above, governments are not employers. Section 3(i), 29 U.S.C. § 402(i) (1970), defines "labor organization" to include only groups which exist for the purpose "in whole or in part, of dealing with employers."

93. *See* Sullivan, *Unionized Public Employees: An Argument for Inclusion Under the Landrum-Griffin Act*, 4 VAL. L. REV. 289 (1970). Sullivan argues in part that the Act covers public employees because a number of unions have memberships consisting of both public and private employees. *Id.* at 294-96. While public employee members of such unions certainly benefit indirectly from the fact that such mixed unions are subject to the Act, *id.* at 295 n.35, the courts have not found that such employees have direct rights under the Act. In fact, the only federal court to rule directly on the point specifically rejected the argument and dismissed a suit by a public employee brought under the Landrum-Griffin Act for lack of jurisdiction. Embry v. Federation of State Employees, 64 L.R.R.M. 2335 (N.D. Ga. 1966).

absence of statutory protection, one may doubt whether those two laws really changed existing power relationships. In any event, there is no evidence that bargaining with railway and public transit workers has encouraged bargaining with other categories of employees in which the vast majority of public employees are to be found.

III. THE CURRENT LEGAL STATUS OF PUBLIC SECTOR BARGAINING IN THE SOUTHEAST

Definitive statements about the current legal status of public sector bargaining in the Southeastern States are difficult to make for two reasons: 1) A few of the states have very little authority of any sort on the subject, while others have only very dated or advisory authority on the question and 2) in almost all of the states, actual practices depart widely from the norm set by legal authority.

With those caveats and with the qualifications mentioned in the following discussion, it is nevertheless possible to categorize the Southeastern States according to the legitimacy of public sector collective bargaining under the best available expressions of public policy. Thus, it can be said with some assurance that three of the Southeastern States, Florida, Louisiana, and Mississippi, either require or permit collective bargaining leading to binding contracts; that three more, Alabama, Georgia, and Kentucky, permit "meet and confer" arrangements not involving binding agreements; and that the remaining four, the Carolinas, Tennessee, and Virginia, prohibit all forms of collective bargaining.[94]

A. States in Which Public Collective Bargaining is Legal

1. Florida.—Florida is the only Southeastern State with a comprehensive statute establishing collective bargaining for government employees. In part this might be a reflection of liberal attitudes brought by recent immigrants from northern states where public sector unionism is a widely accepted fact, but it is

94. Even this last group of states does not prohibit discussions with unions. The prohibitions go only to such essential attributes of what is commonly understood to be collective bargaining such as exclusive recognition of a bargaining representative, signing of a formal contract, and delegation of the public employer's exclusive power to change the terms and conditions of employment. The line between such states and the "meet and confer" states is sometimes very thin indeed.

most assuredly due in large part to historical accident and judicial pressure.

Prior to 1968, it was firmly established that public employers in Florida had no obligation to bargain with representatives of their employees,[95] even though a 1959 statute gave public employees who complied with provisions of the statute relating to strikes "the right to present proposals relative to salaries and other conditions of employment through representatives of their own choosing."[96] It was equally firmly established that public employee strikes were prohibited,[97] and there was reason to believe that public employers lacked the authority to bargain collectively even if they desired to do so.[98]

In 1968, however, Florida adopted a revised constitution, article I, section 6 of which provides:

> Right to work.—The right of persons to work shall not be denied or abridged on account of membership in any labor union or labor orgainization. The right of employees by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

There is little support in the legislative history for the belief that the second sentence of section 6 was intended to extend bargaining rights to public employees,[99] but that is the way the Florida Supreme Court interpreted the words in *Dade County Classroom Teachers Association, Inc. v. Ryan.*[100] The court accordingly

95. Miami Water Works Local 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194 (1946); Local 1526, International Longshoremen's Ass'n v. Broward County Port Auth., 183 So. 2d 257 (Fla. Dist. Ct. App. 1966); Dade County v. Amalgamated Ass'n of Street, Electric Railway and Motor Coach Employees, 157 So. 2d 176 (Fla. Dist. Ct. App. 1963), *appeal dismissed,* 166 So. 2d 149 (Fla. 1964), *cert. denied,* 379 U.S. 971 (1965). *See also* [1961-1962] FLA. ATT'Y GEN. BIENNIAL REP. 428; [1959-1960] FLA. ATT'Y GEN. BIENNIAL REP. 241, 246-47. The status of public sector unionization in Florida prior to the enactment in 1974 of a comprehensive bargaining statute is thoroughly discussed in McGuire, *Public Employee Collective Bargaining in Florida—Past, Present and Future,* 1 FLA. ST. U.L. REV. 26, 34-59 (1973). *See also* Commentary, *Florida's Public Employee Unions: How Long Must They Wait?,* 25 U. FLA. L. REV. 802 (1973).

96. FLA. STAT. ANN. § 839.221(2) (West 1969) (repealed 1974). *But see* Pinellas County Classroom Teachers Ass'n v. Board of Pub. Instruction, 214 So. 2d 34, 36 (Fla. 1968) (section 839.221(2) grants public employees "the right to bargain as a member of a union or labor organization.") (dictum).

97. FLA. STAT. ANN. § 839.221(1) (West 1969) (repealed 1974).

98. Miami Water Works Local 654 v. City of Miami, 157 Fla. 445, 451, 26 So. 2d 194, 197 (1946); [1959-1960] FLA. ATT'Y GEN. BIENNIAL REP. 241.

99. The evidence on the question is discussed in McGuire, note 95 *supra,* at 42 n.64.

100. 225 So. 2d 903 (Fla. 1969).

urged the legislature to "enact appropriate legislation setting out standards and guidelines and otherwise regulate the subject within the limits of said Section 6."[101]

Several attempts were made by the legislature to comply with the court's directive in the following years,[102] but no bill was passed by 1972. In the meantime, Dade County teachers renewed their legal attack, this time seeking a writ of mandamus to compel the legislature to enact implementing legislation. The Florida Supreme Court denied the teachers' petition, but bluntly warned the legislature that if no bill were enacted, the court would "have no choice but to fashion such guidelines by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of the constitution and comply with our responsibility."[103] The following year, the court appointed a special commission to recommend such guidelines[104] and in March of 1974 that commission submitted a report urging that the court appoint a special master in public sector labor relations cases and providing guidelines to be followed by the master.[105] Before the court acted on the report, however, the Florida Legislature passed the Public Employees Relations Act [hereinafter referred to as PERA].[106]

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101. *Id.* at 906. The court held, however, that the plaintiff union could bargain only on behalf of its members. *Id.* at 906-07. *See also* OP. FLA. ATT'Y GEN. 070-101 (Aug. 5, 1970); Local 532, AFSCME v. City of Fort Lauderdale, 273 So. 2d 441 (Fla. Dist. Ct. App. 1973) (by implication).

102. McGuire, note 95 *supra,* at 56-58.

103. Dade County Classroom Teachers Ass'n, Inc. v. Legislature, 269 So. 2d 684, 688 (Fla. 1972).

104. "Order Appointing Supreme Court Public Employees' Rights Commission" (November 28, 1973), discussed in Fleming, *Are Public Unions Second Class Citizens? No: They Are Businesses Which for a Price Bargain for Governmental Employees,* 48 FLA. B.J. 93, 93 (1974).

105. Recommendations of the Supreme Court Public Employee's Rights Commission (March 1974), *discussed in* Jedel & Rutherford, note 3 *supra,* at 487.

106. Public Employee Amendments, ch. 77-343, § 447.201, 1977 Fla. Sess. Law Serv. 1280 (Harrison) (amending FLA. STAT. ANN. § 447.201 (Harrison 1977)). For the sake of accuracy, it should be noted that the legislature had extended bargaining rights to certain groups of public employees before passage of PERA. For example, FLA. STAT. ANN. §§ 447.20 to .35 (West 1973) (repealed by PERA) dealt specifically with firefighters. Some teachers were given bargaining rights in 1969 and 1971. Chapter 69-1424, 1969 Fla. Laws 2332 (those in counties with population between 390,000 and 450,000); Chapter 71-686, 1971 Fla. Laws 910 (Hillsborough County). While these acts were not explicitly repealed by PERA, they do seem to have been superseded by it because PERA's § 447.603 allowed local option only where "substantially equivalent rights and procedures" are adopted by a political subdivision and approved by the Public Employment Relations Commission (PERC) before becoming law. PERC v. City of Naples, 92 L.R.R.M. 2329 (Fla. Dist. Ct. App. 1976); PERC v. Police Local 28, 92 L.R.R.M. 2331 (Fla. Dist. Ct. App. 1976). Five

PERA has been fully discussed elsewhere,[107] but its importance as the only comprehensive statute enacted in the Southeast merits at least summary treatment here.

(a) Unionization.—At one time, Florida sought to restrict union membership by at least some public employees in some unions.[108] The "Right to Work" provision of the 1968 Revised Constitution of Florida[109] was held applicable to public as well as to private employees,[110] however, and the legislature has since statutorily acknowledged the right of public employees to organize.[111] Similarly, employees are protected in their right to refrain from joining or participating in labor organizations,[112] and public employers, therefore, may not require employees to join or contribute to a labor organization.[113] Public employers must nevertheless deduct union dues and fees from the wages of consenting employees who are represented by certified unions, subject only to negotiation over costs of administration.[114] PERA seems to apply to all but a few narrow categories of public employees. Section 447.203(2) defines "public employer" to include "the state or any county, municipality, or special district or any subdi-

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such local option arrangements have been approved to date, and several more are under consideration, but recent amendment of the law prohibits adoption of local option on or after July 1, 1977. Existing approved arrangements are allowed to remain in effect until they run out. Public Employee Amendments, ch. 77-343, § 447.603, 1977 Fla. Sess. Law Serv. 1280 (Harrison) (amending FLA. STAT. ANN. § 447.603 (Harrison 1977)).

107. *See* Craver & La Peer, *The Legal Obligations of Governmental Employers and Labor Organizations Under the Recognition—Certification Provisions of the Florida Public Employees Relations Act*, 27 U. FLA. L. REV. 705 (1975).

108. FLA. STAT. ANN. § 839.221 (West 1969) (repealed 1974). This section prohibited membership by public employees in any organization asserting the right to strike against a government employer, and Chapter 69-1424, § 1, 1969 Fla. Laws 2332, prohibited administrators and supervisors in the Palm Beach County Public School System from joining any organization which acted as collective bargaining representative for teachers.

109. FLA. CONST. art. 1, § 6 (1968).

110. Dade County Classroom Teachers Ass'n v. Ryan, 225 So. 2d 903 (Fla. 1969); *accord*, Florida Educ. Ass'n/United v. PERC, 346 So. 2d 551 (Fla. Dist. Ct. App. 1977).

111. Public Employee Amendments, ch. 77-343, § 447.301, 1977 Fla. Sess. Law Serv. 1280 (Harrison) (amending FLA. STAT. ANN. § 447.301 (Harrison 1977)).

112. FLA. CONST. art. 1, § 6 (1968) ("The right of persons to work shall not be denied or abridged because of membership or nonmembership in any labor union— . . . ."); Public Employee Amendments, ch. 77-343, §§ 447.301(1), (2), 1977 Fla. Sess. Law Serv. 1280 (Harrison) (amending FLA. STAT. ANN. §§ 447.301(1), (2) (Harrison 1977)); FLA. STAT. ANN. §§ 447.501(2)(a), (b) (Harrison 1977); Florida Educ. Ass'n/United v. PERC, 346 So. 2d 551 (Fla. Dist. Ct. App. 1977).

113. Florida Educ. Ass'n/United v. PERC, 346 So. 2d 551, 552 (Fla. Dist. Ct. App. 1977).

114. Public Employee Amendments, ch. 77-343, § 447.303, 1977 Fla. Sess. Law Serv. 1280 (Harrison) (amending FLA. STAT. ANN. § 447.303 (Harrison 1977)).

vision or agency thereof which the commission determines has sufficient legal distinctiveness properly to carry out the functions of a public employer."[115] This language covers virtually all governmental authorities in the state and has even been held to apply to Florida's judiciary.[116] Section 447.203(3) defines as a "public employee" any person employed by a public employer, with a few exceptions, of which the most important are those persons designated as managerial or confidential employees upon application of the public employer to the Public Employees Relations Commission [hereinafter referred to as PERC].[117]

A union that desires to represent a group of public employees for collective bargaining must first register with the PERC created by PERA.[118] The registration provisions are not unduly onerous[119] and seem to reflect the same concern for possible abuses of employee rights that prompted Congress in 1959 to pass the Labor-Management Reporting and Disclosure Act.[120] Failure to

115. Public Employee Amendments, ch. 77-343, § 447.203(2), 1977 Fla. Sess. Law Serv. 1280 (Harrison) (amending FLA. STAT. ANN. § 447.203(2) (Harrison 1977)).

116. OP. FLA. ATT'Y GEN. 075-183 (June 19, 1975). The Florida Legislature is not included, however. Public Employee Amendments, ch. 77-343, § 203(3)(e), 1977 Fla. Sess. Law Serv. 1280 (Harrison) (amending FLA. STAT. ANN. § 447.203(3)(e) (Harrison 1977)).

117. The others excluded are:

(a) Those persons appointed by the governor or elected by the people, agency heads, and members of boards and commissions.

(b) Those persons holding positions by appointment or employment in the organized militia.

(c) Those individuals acting as negotiating representatives for employer authorities.

. . . .

(e) Those persons holding positions of employment with the Florida Legislature.

(f) Those persons who have been convicted of a crime and are inmates confined to institutions within the state.

Public Employee Amendments, ch. 77-343, § 447.203(3), 1977 Fla. Sess. Law Serv. 1280 (Harrison) (amending FLA. STAT. ANN. § 447.203(3) (Harrison 1977)). "Confidential employees" are defined in Public Employee Amendments, ch. 77-343, § 447.203(5), 1977 Fla. Sess. Law Serv. 1280 (Harrison) (amending FLA. STAT. ANN. § 447.203(5) (Harrison 1977)), and "managerial employees" are narrowly defined by recent amendment to the law, Public Employee Amendments, ch. 77-343, § 447.203(4), 1977 Fla. Sess. Law Serv. 1280 (Harrison) (amending FLA. STAT. ANN. § 447.203(4) (Harrison 1977)).

118. Public Employee Amendments, ch. 77-343, § 447.305, 1977 Fla. Sess. Law Serv. 1280 (Harrison) (amending FLA. STAT. ANN. § 447.305 (Harrison 1977)).

119. Among the requirements are adoption of a constitution and bylaws, filing of annual reports that list the names and addresses of officials and parent or affiliated organizations and deal with the financial affairs of the organization, and payment of a registration fee not in excess of $15. *Id.* at (1)-(5).

120. 29 U.S.C. §§ 401-531 (1970).

comply with those provisions results in an automatic prohibition on requests for recognition and petitions for elections.[121]

(b) Collective bargaining.—PERA establishes a complex system of rules governing the initiation and operation of collective bargaining. For the sake of comprehension, this system is discussed in several subdivisions.

(1) Recognition, unit determination, and certification.—A union complying with the registration requirements discussed above may receive certification from PERC as the exclusive bargaining agent of a group of employees in one of two ways. If the union represents a majority of the employees in an appropriate unit,[122] it may request voluntary recognition by the public employer. If the employer is satisfied both as to the union's majority status and the appropriateness of the unit it seeks to represent, it must grant the requested recognition. Following recognition, the union is required to petition PERC for formal certification, which shall be granted subject only to a review of the appropriateness of the unit.[123] Alternatively, if the employer refuses to recognize the union, the employee organization may petition PERC for a secret ballot election and for certification upon selection by a majority of the employees voting.[124]

Once certified, the employee organization becomes the exclusive representative of all employees in the unit. The exclusivity principle prohibits the employer from recognizing or bargaining with any other employee organization on behalf of employees in

121. Public Employee Amendments, ch. 77-343, § 447.305(6), 1977 Fla. Sess. Law Serv. 1280 (Harrison) (amending FLA. STAT. ANN. § 447.305(6) (Harrison 1977)).

122. Standards for determining the appropriateness of a bargaining unit are spelled out in *id.* at § 447.203(8) and *id.* at § 447.307(4) and in section 8H-300.31 of PERC's rules and regulations, [1977] 4 LAB. REL. REP. (BNA) 19:220i. On this and other matters concerning recognition and certification, see Craver & La Peer, note 107 *supra*.

123. Public Employee Amendments, ch. 77-343, § 447.307(1), 1977 Fla. Sess. Law Serv. 1280 (Harrison) (amending FLA. STAT. ANN. § 447.307(1) (Harrison 1977)).

124. *Id.* (2), (3). These sections seem to prohibit petitions for elections unless the union has first requested voluntary recognition, which it cannot do unless it can claim to represent a majority. A recent court decision read the provisions more liberally, though, and allowed a union to obtain an election without making such a request where it met the requirement in subsection (2) that it possess signed authorizations of at least 30% of the employees in the proposed unit. School Bd. of Marion County v. PERC, 341 So. 2d 819 (Fla. Dist. Ct. App. 1977). PERC may review the appropriateness of the unit, but only to approve or disapprove; it may not change the unit and certify the revised unit. City of Titusville v. PERC, 330 So. 2d 733 (Fla. Dist. Ct. App. 1976); School Bd. of Marion County v. PERC, 330 So. 2d 770 (Fla. Dist. Ct. App. 1976). Election procedures are spelled out in sections 8H-300.1-.31 of the regulations, [1977] 4 LAB. REL. REP. (BNA) 19:220-:220i.

the unit, but it does not prohibit individual employees from presenting grievances to the employer for adjustment "if the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and if the bargaining agent has been given reasonable opportunity to be present at any meeting called for the resolution of such grievances."[125]

(2) The duty to bargain in good faith.—From the perspective of employers and unions alike, the most important element of a collective bargaining statute is the imposition of the obligation to bargain in good faith. It is therefore worth considering the nature and extent of this obligation under Florida law.

(i) PERA imposes a bargaining obligation on both the employer and the employee orgainization following certification.[126] The obligation is a limited one, however, the parties being obliged "to meet at reasonable times, to negotiate in good faith, and to execute a written contract with respect to agreements reached concerning the terms and conditions of employment."[127] They are not obliged to reach any agreement. To the contrary, "neither party shall be compelled to agree to a proposal or be required to make a concession" except for substantive matters provided elsewhere in PERA.[128] Several incidents of bad faith are specified, such as refusing to meet at reasonable times and places, refusing requests to provide public information and refusing to reduce a total agreement to writing,[129] but beyond this the statute does not extend, and the parties are left in some doubt about just what is required to prove their "good faith." Federal law imposes a similar obligation,[130] though, and it is likely that the federal experience will provide a determinative influence on similar cases arising under PERA.

(ii) The matters about which the parties must bargain are left similarly vague. PERA's section 447.309 (1) lists them as "the wages, hours, and terms and conditions of employment of the public employees within the bargaining unit."[131] "Wages and

125. Public Employee Amendments, ch. 77-343, § 447.301(4), 1977 Fla. Sess. Law Serv. 1280 (Harrison) (amending FLA. STAT. ANN. § 447.301(4) (Harrison 1977)).

126. *Id.* § 447.309(1). Refusal to bargain in good faith is declared to be an unfair labor practice for employers, § 447.501(1)(c) and for employee organizations, *id.* § 447.501(2)(c).

127. Public Employee Amendments, ch. 77-343, § 447.203(14), 1977 Fla. Sess. Law Serv. 1280 (Harrison) (amending FLA. STAT. ANN. § 447.203(14) (Harrison 1977)).

128. *Id.*

129. *Id.*

130. NLRA § 8(d), 29 U.S.C. § 158(d) (1970).

131. Public Employee Amendments, ch. 77-343, § 447.309(1), 1977 Fla. Sess. Law

hours" is a relatively clear phrase, but "terms and conditions of employment" is a broad, almost unlimited one. Here again, federal experience will provide some guidance,[132] but Florida will almost certainly face many of the same disputes about the legitimate scope of public sector bargaining previously encountered by other states.[133] PERA does arguably exclude two major areas from the scope of bargaining, namely statutes and ordinances relating to retirement[134] and civil service rules and regulations.[135] Section 447.309(5) requires that a collective bargaining agreement contain all the terms and conditions of employment except for the statutes and ordinances relating to retirement, the applicable merit and civil service rules and regulations, and section 447.601 states that PERA shall not be construed to modify merit or civil service system laws. The issue is hardly settled, however, for section 447.601 itself indicates that in cases of direct conflict PERA will govern, and PERA's section 447.309(3) requires a chief executive officer negotiating a clause in conflict with existing law to propose an appropriate amendment to the government body having amendatory power. Where merit systems limit common union objectives, such as the use of seniority as the primary criterion for promotion, unions may be expected to negotiate changes in those systems and seek suitable implementing legislation.

(iii) The process of collective bargaining, a matter left open to the parties' own devices by federal law, is carefully defined in PERA. The chief executive officer of the employer or his representative is instructed to "consult with, and attempt to represent the views of the legislative body of the public employer."[136] Any agreement reached is to be reduced to writing, signed, and then presented for ratification by the public employer and by

Serv. 1280 (Harrison) (amending FLA. STAT. ANN. § 447.309(1) (Harrison 1977)).

132. NLRA § 8(d), 29 U.S.C. § 158(d) (1970), requires bargaining about "wages, hours, and other terms and conditiors of employment."

133. *See, e.g.*, W. GERSHENFELD, J. LOEWENBERG & B. INGSTER, SCOPE OF PUBLIC-SECTOR BARGAINING (1977); Blair, *State Legislative Control over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Municipal Employees*, 26 VAND. L. REV. 1 (1973); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969).

134. Public Employee Amendments, ch. 77-343, § 447.301(2), 1977 Fla. Sess. Law Serv. 1288 (Harrison) (amending FLA. STAT. ANN. § 447.301(2) (Harrison 1977)).

135. Public Employee Amendments, ch. 77-343, § 447.309(5), 1977 Fla. Sess. Law Serv. 1292 (Harrison) (amending FLA. STAT. ANN. § 447.309(5) (Harrison 1977)).

136. Public Employee Amendments, ch. 77-343, § 447.309(1), 1977 Fla. Sess. Law Serv. 1291 (Harrison) (amending FLA. STAT. ANN. § 447.309(1) (Harrison 1977)).

bargaining unit employees.[137] The chief executive officer is required to propose necessary funding requests and legislative changes to the legislative body, and if they fail to approve all of his proposals, he is instructed, in effect, to do the best he can with what he has.[138] If either the legislative body or the employees fail to ratify the agreement, it is returned to them "for further negotiations."[139]

Negotiations are complicated by a problem that, while not quite unique, is more serious in Florida than in most states. Like most states, Florida has a "sunshine law" which opens most government meetings and files to interested citizens.[140] Most states, however, have exempted public sector collective bargaining from the scope of such laws, usually on the ground that meaningful collective bargaining cannot be carried on in public.[141] The leading Florida case prior to enactment of PERA took a similar view, holding that employees' constitutional bargaining rights might be harmed if negotiation sessions were open to the public, and that public employers could legally instruct their negotiators in private.[142] The Florida Legislature disagreed with the court on the first issue but not on the second. In PERA, it exempted discus-

137. *Id.*

138. FLA. STAT. ANN. §§ 447.309(2), (3) (Harrison 1977).

139. *Id.* §447.309(4).

140. FLA. STAT. ANN. § 286.011 (Harrison 1975) provides that:

(1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation or any political subdivision, except as otherwise provided in the constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, regulation or formal action shall be considered binding except as taken or made at such meeting.

(2) The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizens of this state.

(3) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation or any political subdivision who violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

FLA. STAT. ANN. § 119.01 (Harrison Cum. Supp. 1976) provides that: "It is the policy of this state that all state, county, and municipal records shall at all times be open for a personal inspection by any person."

141. Jascourt, *What Is the Effect of a "Sunshine Law" on Public Sector Collective Bargaining: An Introduction,* 5 J.L. & EDUC. 479 (1976).

142. Bassett v. Braddock, 262 So. 2d 425 (Fla. 1972).

sions between the chief executive officer or his representative and the legislative body of the employer from the scope of the sunshine law, but refused to exempt the bargaining sessions themselves.[143] "[W]ork products developed by the public employer in preparation for negotiations, and during negotiations," but no other documents, are exempted from the Public Records Law.[144]

The Florida courts and, more importantly, the state's attorney general have rigorously applied the sunshine law and the Public Records Law to the bargaining process. One circuit judge, for example, ordered that:

> (a) . . . when submitting orally or in writing a counter-proposal to the proposed contract or agreement (the party must) refer to the applicable article, page, paragraph, and line number of the proposed agreement, or future agreements.
>
> (b) . . . at the same time they (management negotiators) present any written counter-proposal prepared prior to the negotiating session to the Association, to also present copies of such proposals in reasonable numbers to the public and the representatives of the media present at the session.
>
> (c) . . . negotiations shall be carried on in such a manner that a person of reasonable experience and average intelligence and reading ability, listening to the negotiations can comprehend what is transpiring.[145]

Another court required a city to turn over its proposals for the budget of the city's fire department to the union because the proposals were developed in the normal course of business and not specifically in preparation for negotiations.[146] The attorney general has been similarly strict in interpreting the sunshine law's exemptions. While the law allows private discussions between the public employer and its negotiator "relative to collective bargaining," the attorney general held that the exemption does not allow closed meetings relating to a "stance" or "attitude" to be taken by the employer but, instead, is limited to "actual, ongoing

143. Public Employee Amendments, ch. 77-343, §§ 447.605(1), (2), 1977 Fla. Sess. Law Serv. 1297 (Harrison) (amending FLA. STAT. ANN. §§ 447.605(1), (2) (Harrison 1977)).

144. *Id.* (3).

145. State *ex rel.* Crago v. Hunter, No. 75-515 (Fla., Aug. 14, 1975), *quoted in* Slesnick, *What Is the Effect of a "Sunshine Law" on Public Sector Collective Bargaining: A Union Perspective*, 5 J.L. & EDUC. 487, 491 (1976).

146. City of Gainesville v. International Ass'n of Fire Fighters Local 2157, 298 So. 2d 478 (Fla. Dist. Ct. App. 1974) (interpreting the new law prior to its effective date but deciding the case under the old law).

collective bargaining negotiations."[147]

Opinions differ as to the wisdom and effect of negotiations open to public scrutiny,[148] but it is still too early for firm decisions. The Florida approach will probably be observed for some time before it is followed by other jurisdictions.

(c) Dispute resolution.—Strikes by public employees remain prohibited in Florida both by the state constitution and by PERA.[149] Indeed, PERA adds to the statute books a large number of new penalties for unions and individual employees who participate in strikes. The Commission or the public employer may obtain an injunction prohibiting the strike, which, if not complied with by the union, may be enforced by fines of up to $5000 against the union and $50 to $100 per day against its officers, agents, and representatives.[150] In addition, the union is liable for any damages suffered by the employer.[151] If the Commission finds that the union violated the strike ban, it may suspend or revoke the union's certification, revoke the privilege of dues deduction and collection, and fine the organization up to $20,000 per calendar day of such violation.[152] Individual strikers may be fired, and may be reinstated only upon strict conditions.[153]

147. *Compare* Public Employee Amendments, ch. 77-343, § 447.605(1), 1977 Fla. Sess. Law Serv. 1297 (Harrison) (amending FLA. STAT. ANN. § 447.605(1) (Harrison 1977)) *with* OP. FLA. ATT'Y GEN. 075-48 (Feb. 20, 1975). *See also id.* 076-102 (May 7, 1976).

148. *Compare* Casey, *What Is the Effect of a "Sunshine Law" on Public Sector Collective Bargaining: A Management Perspective,* 5 J.L. & EDUC. 481, 485 (1976) ("[T]he presence of the press at negotiations has been a serious problem.") *with* Slesnick, note 145 *supra,* at 489 ("Surprisingly, with some isolated exceptions, the interjection of 'sunshine' into collective bargaining has not had the disruptive consequences previously predicted."). *See also* Note, *Public Sector Collective Bargaining and Sunshine Laws—A Needless Conflict,* 18 WM. & MARY L. REV. 159 (1976).

149. FLA. CONST. art. 1, § 6 (1968); FLA. STAT. ANN. §§ 447.501(2)(e), .505 (Harrison 1977).

150. Public Employee Amendments, ch. 77-343, § 447.507(2), 1977 Fla. Sess. Law Serv. 1296 (Harrison) (amending FLA. STAT. ANN. § 447.507(2) (Harrison 1977)); FLA. STAT. ANN. § 447.507(3) (Harrison 1977); Broward County Classroom Teachers Ass'n v. PERC, 331 So. 2d 342 (Fla. 1976).

151. FLA. STAT. ANN. § 447.507(4) (Harrison 1977).

152. Public Employee Amendments, ch. 77-343, § 447.507(6)(a), 1977 Fla. Sess. Law Serv. 1296 (Harrison) (amending FLA. STAT. ANN. § 447.507(6)(a) (Harrison 1977)). An organization deemed to be in violation of the strike ban may not be certified until one year from the date of payment of all fines against it. FLA. STAT. ANN. § 447.507(6)(b) (Harrison 1977).

153. FLA. STAT. ANN. § 447.507(5) (Harrison 1977). Among the conditions are a six-month probationary period and denial of wage increases for a year following reappointment. Prior to PERA, the Florida courts were willing to improvise as to the various strike penalties. *See* National Educ. Ass'n v. Lee County Bd. of Educ., 260 So. 2d 206 (Fla. 1972)

PERA is rich in other methods of dispute resolution, however. First, unfair labor practices by employers or by employee organizations may be redressed following PERC proceedings by a Commission "cease and desist" order and by orders requiring the respondent "to take such positive action, including reinstatement of employees with or without back pay, as will effectuate the policies" of PERA.[154] Second, grievances arising under collective bargaining agreements are subject to mandatory arbitration, if they are not resolved administratively.[155] Finally, impasses during collective bargaining negotiations are subject to voluntary mediation[156] and to mandatory factfinding by a special master.[157] It should be noted that this last procedure provides no final answer. If the public employer or the employee organization does not accept the factfinder's recommendations, the matter is referred to the legislative body which "shall take such action as it deems to be in the public interest, including the interest of the public employees involved."[158]

(d) Conclusion.—Florida's PERA provides a comprehensive, consistent, and modern statutory framework for public sector labor relations. There is no guarantee that the other Southeastern States will adopt comprehensive legislation at all. As will be seen, many Southeastern States prefer the prohibition of all bargaining, and others are not apparently dissatisfied with ad hoc decisions made by local authorities. Those that do opt for comprehensive legislation, though, are likely to look to Florida for guidance. They could do much worse, for PERA is more than technically a good model: it is a moderate act which seeks to limit the possibilities of union abuse of power and seems in that regard

(permitting reinstatement of teachers only upon payment of $100 as "liquidated damages").

154. Public Employee Amendments, ch. 77-343, § 447.503(4)(a), 1977 Fla. Sess. Law Serv. 1295 (Harrison) (amending FLA. STAT. ANN. § 447.503(4)(a) (Harrison 1977)). Such orders are enforceable through the Florida courts. FLA. STAT. ANN. § 447.503(6)(a) (Harrison 1977).

155. *Id.* § 447.401. Career service employees may instead utilize the civil service grievance procedure. *Id.*

156. *Id.* § 447.403(1).

157. *Id.* (2)(a), (b). The factors to be considered by the special master are specified. *Id.* § 447.405.

158. *Id.* § 447.403(4)(d). Perhaps the legislature hoped that disputes would be resolved before the specified procedures were exhausted. If so, it seems to have been generally correct. The special master provision has been invoked only once since PERA was enacted, and no dispute has been referred to the legislature for resolution. [1977] GOV'T EMPL. REL. REP. (BNA) 704:21, 712:18.

to be better suited for southeastern attitudes than statutes enacted in more liberal states.

2. *Louisiana.*—Apart from Florida (which mandates collective bargaining) and North Carolina (which prohibits it), the Southeastern States have allowed public sector collective bargaining to drift into a state of legal limbo, tolerated or not, as random cases, attorney general opinions, or an amorphous public policy seem to dictate. The problem has not been simply a regional one; it has, rather, occurred in almost all jurisdictions prior to legislative action.[159] In the Southeast, courts in six out of the ten jurisdictions have refused to allow public sector bargaining without specific legislative action.[160] In only two Southeastern States, Louisiana and Mississippi, does full collective bargaining—that is, negotiation resulting in an enforceable contract—seem to be legal without statutory authorization, and only Louisiana provides such authorization for a substantial portion of its public employees.

In 1974, Louisiana adopted a new state constitution. Article X thereof established a civil service system applicable to employees of the state and of the City of New Orleans. Most of article X deals with standard merit system items, but, within a subsection addressing civil service commission rules governing layoffs, one surprisingly finds this language:

> No rule, regulation, or practice of the commission, of any agency or department, or of any official of the state or any political subdivision shall favor or discriminate against any applicant or employee because of his membership or nonmembership in any private organization; but this shall not prohibit any state agency, department, or political subdivision

159. A good, though somewhat dated, survey of this problem is provided by Dole, *State and Local Public Employee Collective Bargaining in the Absence of Explicit Legislative Authorization,* 54 IOWA L. REV. 539, 539-51 (1969). *See also* Alley & Facciolo, *Concerted Public Employee Activity in the Absence of State Statutory Authorization: I,* 2 J.L. & EDUC. 401 (1973); Green, *Concerted Public Employee Activity in the Absence of State Statutory Authorization: II,* 2 J.L. & EDUC. 419 (1973).

160. International Union of Operating Eng'rs Local 321 v. Water Works Bd., 276 Ala. 462, 163 So. 2d 619 (1962); Miami Water Works Local 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194 (1946); International Longshoremen's Ass'n v. Georgia Ports Auth., 217 Ga. 712, 124 S.E.2d 733 (1962); Medical College v. Drug and Hosp. Union Local 1199, No. 8117, (Charleston County Ct., July 9, 1969); City of Alcoa v. International Bhd. of Electrical Workers Local 760, 203 Tenn. 12, 308 S.W.2d 476 (1957); Virginia v. County Bd. of Arlington County, 217 Va. 558, 232 S.E.2d 30 (1977).

> from contracting with an employee organization with respect to wages, hours, grievances, working conditions, or other conditions of employment in a manner not inconsistent with this constitution, a civil service law, or a valid rule or regulation of a commission.[161]

The record of the 1973 constitutional convention sheds no light on the reasons for the adoption of this provision or its meaning,[162] but normal construction of the language would indicate that it was intended to have two significant effects: first, to establish right-to-work protection for public employees, and second, to authorize those public employers who so choose to bargain collectively. In both these respects, the provision is consistent with other Louisiana authority. This past year, for example, Louisiana adopted a broad right-to-work law protecting "all persons" in their rights to join or assist unions and to refrain from such activities,[163] while earlier court decisions and attorney general opinions had authorized public sector bargaining.[164]

(a) Unionization.—As noted, the new Louisiana constitution recognizes the right of employees of the state and of the City of New Orleans to join unions without fear of discrimination. A provision of the Louisiana statutes establishes a similar right for employees generally,[165] but it is not clear whether the statute also applies to public employees. Certainly it was not intended to apply to them. The very wording of the statute reflects a concern about corporate employers, not governmental,[166] and the section is included in the general labor code rather than the portion of the statutes dealing with government employees. However, one court has extended the policy favoring collective bargaining

161. LA. CONST. art. 10, § 10(3).

162. The collective bargaining provision was initially added to the civil service section without explanation by a 51 to 48 vote on December 13, 1973, 2 OFFICIAL J. OF PROC. AND CALENDAR OF CONST. CONVENTION OF 1973 OF LA. 957 (1974), and the civil service section was finally adopted on January 15, 1974 by a vote of 107 to 1, *id.* at 1280.

163. LA. REV. STAT. ANN. §§23:981-987 (West Cum. Supp. 1977).

164. *See* note 177, *infra.*

165. LA. REV. STAT. ANN. §23:822 (West 1964).

166. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers the unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore, it is necessary that the individual workman have full freedom of association . . . .

Id. Cf. Comment, *Public Employee Collective Bargaining in Louisiana,* 34 LA. L. REV. 56, 60-61 (1973) (statute presumes a corporate employer).

found in this section to public employers,[167] and the freedom of association incorporated therein would seem equally extendable. In any case, the federal constitutional right of public employees to join unions has been recognized by courts with jurisdiction in the state.[168] To date, however, the legislature has specifically recognized that right for only one group, the employees of the public transportation systems acquired by governmental authorities.[169]

The corollary of the right to join, *i.e.*, the right to refrain from union membership, is not so clearly recognized in Louisiana. The constitutional provision quoted above[170] certainly protects employees of the state and the City of New Orleans. Other public employees may or may not be protected by the state's right-to-work law. The language of the law deals with "all persons," but Louisiana recognizes the general rule of statutory interpretation that governments are "not included within the purview of a statute unless the legislative intent is clearly stated."[171] Still, it is unlikely that compulsory union membership agreements would be upheld in a state with both constitutional and statutory objections to them.[172] At the moment, the strongest union security device allowed in the public sector is the voluntary dues checkoff, which is specifically authorized by statute.[173]

(b) Collective bargaining.—Under the new constitution, the state and the City of New Orleans may bargain collectively with representatives of their employees,[174] and public transit au-

167. Louisiana Teachers' Ass'n v. Orleans Parish School Bd., 303 So. 2d 564 (La. Ct. App. 1974), *writ refused*, 305 So. 2d 541 (La. 1975). *But see* Town of New Roads v. Dukes, 312 So. 2d 890 (La. Ct. App. 1975) (state and its subdivisions are not "employers" within LA. REV. STAT. ANN. §§ 23:821-849 (West 1964)).

168. Beauboeuf v. Delgado College, 303 F. Supp. 861 (E.D. La. 1969), *aff'd per curiam*, 428 F.2d 470 (5th Cir. 1970); Orr v. Thorpe, 427 F.2d 1129 (5th Cir. 1970).

169. LA. REV. STAT. ANN. §23:890(D) (West Cum. Supp. 1977). The Louisiana Attorney General has, however, held that the legislature's authorization of the dues checkoff for public employees, LA. REV. STAT. ANN. § 42:457 (West Cum. Supp. 1977) is "a clear statutory recognition of the right of public employees to belong to labor unions," 74 OP. LA. ATT'Y GEN. 413 (1974).

170. Text accompanying note 161 *supra*.

171. Town of New Roads v. Dukes, 312 So. 2d 890, 892 (La. Ct. App. 1975).

172. *Cf.* OP. LA. ATT'Y GEN. Aug. 10, 1963 (Municipal Fire and Police Civil Service Board may not tell classified personnel whether they may or may not join a union).

173. 1966 La. Acts No. 419; LA. REV. STAT. ANN. § 42:457 (West Cum. Supp. 1977). As of 1973, only 16% of Louisiana's 51,000 civil service employees had union dues checked off from their pay, however. Statement of Louisiana Civil Service Director Harold Forbes, Sept. 25, 1973, *quoted in* LEAGUE OF WOMEN VOTERS OF LOUISIANA, *The Coming Dilemma? A Study of Collective Bargaining in the Public Sector*, at 9 (Aug. 1974).

174. LA. CONST. art. 10, § 10 (1974).

thorities that acquire private systems are given the same power by statute.[175] These authorizations leave open a number of significant questions: First, is such authority purely discretionary; second, with whom may the employer bargain; third, do public employers other than those previously mentioned have such power; and fourth, what is the legal status of contracts entered into pursuant to such bargaining.

As to the first question, it appears that, with the exception of public transit authorities, public employers may recognize and bargain with a union or not, at their option. Transit authorities acquiring private systems are obliged to bargain and to enter a written contract whenever a majority of the employees in an appropriate unit indicate a desire to be represented by a labor organization.[176] The constitutional provision authorizing bargaining for employees of the state and of New Orleans does no more than eliminate the argument that a prohibition on discrimination because of nonmembership implies a prohibition on bargaining with the representative of those who are members. Other public employers have for several years been allowed to negotiate,[177] but have been under no obligation to do so.[178] In the words of the special counsel to the state's attorney general, questions about bargaining between public employers and unions representing their employees "are not questions of law but rather policy determinations."[179]

As to the second question, public employers may talk to any union and may grant exclusive recognition to a majority union, provided that such recognition does not preclude individual presentation of grievances.[180] They are prohibited only from granting

175. LA. REV. STAT. ANN. § 23:890 (West Cum. Supp. 1977).

176. *Id.* (D). The cited statute uses the term "suit" where "unit" would be appropriate, but this appears to be a typographical error.

177. Louisiana Teachers' Ass'n v. Orleans Parish School Bd., 303 So. 2d 564 (La. Ct. App. 1974), *writ refused,* 305 So. 2d 541 (La. 1975); New Orleans Fire Fighters Ass'n Local 632 v. City of New Orleans, 204 So. 2d 690 (La. Ct. App. 1967); 74 OP. LA. ATT'Y GEN. 413 (1974).

178. Town of New Roads v. Dukes, 312 So. 2d 890 (La. Ct. App. 1975); Beauboeuf v. Delgado College, 303 F. Supp. 861 (E.D. La. 1969), *aff'd per curiam,* 428 F.2d 470 (5th Cir. 1970).

179. Letter from Louis A. Gerdes, special counsel to the Louisiana Attorney General, to William J. Oberhelman, Board of Administrators, Charity Hospital of Louisiana at New Orleans (Apr. 3, 1972).

180. Louisiana Teachers' Ass'n v. Orleans Parish School Bd., 303 So. 2d 564 (La. Ct. App. 1974), *writ refused,* 305 So. 2d 541 (La. 1975).

exclusive recognition to a minority union.[181] Third, because authority prior to the new constitutional provision allowed bargaining generally,[182] it is reasonable to assume that public employers other than the state and the City of New Orleans may continue to bargain. Fourth and finally, it would be in keeping with this line of authority to hold that the public employer may carry collective bargaining to its normal conclusion and enter a legally enforceable contract with a labor organization. Several cases imply as much,[183] and one has gone so far as to enforce such a contract by injunction against the public employer.[184]

(c) Dispute resolution.—Quite surprisingly, and in distinct contrast with other Southeastern States, it is not certain that strikes by public employees in Louisiana are illegal. Contrary to the assertion of one court, there is no statutory prohibition on public employee strikes.[185] In the one case directly on point, a struck public employer obtained an injunction against union members and violations of the injunction were held subject to punishment for contempt of court, but the report of the case does not indicate the authority by which the strike was held illegal.[186] Another court permitted a "near strike," namely the collective refusal to perform certain overtime work.[187]

Apart from strikes, however, Louisiana law recognizes several legitimate forms of dispute resolution in the public sector, ranging from peaceful picketing by aggrieved employees[188] to mandatory arbitration of "any labor dispute" in publicly acquired transportation authorities.[189] Moreover, the Commissioner

181. Zbozen v. Department of Highways, 293 So. 2d 901 (La. Ct. App. 1974).

182. *See* note 177 *supra.*

183. Louisiana Teachers' Ass'n v. Orleans Parish School Bd., 303 So. 2d 564, 568 (La. Ct. App. 1974), *writ refused,* 305 So. 2d 541 (La. 1975); Zbozen v. Department of Highways, 293 So. 2d 901 (La. Ct. App. 1974). *See also* 74 OP. LA. ATT'Y GEN. 413 (1974).

184. New Orleans Fire Fighters Ass'n Local 632 v. City of New Orleans, 204 So. 2d 690 (La. Ct. App. 1967).

185. One federal district court has bluntly asserted that "Louisiana prohibits public employees from striking," Beauboeuf v. Delgado College, 303 F. Supp. 861, 864 (E.D. La. 1969) (dictum), *aff'd per curiam,* 428 F.2d 470 (5th Cir. 1970), but none of the statutes cited in support of that statement says anything of the sort.

186. Town of New Roads v. Dukes, 312 So. 2d 890 (La. Ct. App. 1975).

187. New Orleans Fire Fighters Ass'n Local 632 v. City of New Orleans, 204 So. 2d 690 (La. Ct. App. 1967). The court was heavily influenced by the fact that an oral collective bargaining agreement gave the firemen power to refuse overtime in excess of 56 hours per week. *Id.* at 694.

188. Tassin v. Local 832, National Union of Police Officers, 311 So. 2d 591 (La. Ct. App. 1975).

189. LA. REV. STAT. ANN., §23:890(E) (West Cum. Supp. 1977).

of Labor is directed to do all in his power to promote voluntary conciliation of labor disputes,[190] and there is reason to believe that this provision is broad enough to include public sector disputes.[191] It is, therefore, somewhat anomolous that the state and its subdivisions were excluded by definition from the portion of the statutes dealing with mediation and arbitration of labor disputes.[192]

(d) Conclusion.—Although Louisiana has not addressed its public sector labor relations problems with a comprehensive statute, it seems to have gravitated toward the same position such a statute would have placed it. Unionization is legal and employers may recognize and bargain exclusively with majority unions, but union security agreements are prohibited and strikes enjoinable. These ad hoc arrangements do not resolve many of the finer points of labor relations, including methods of determining majority status and unit appropriateness, nor do they compel reluctant employers to deal with unions representing their employees. These uncertainties make frequent litigation unavoidable and guarantee that the Louisiana Legislature will be faced with substantial pressure to deal with the entire subject.

3. Mississippi.—It is only with some hesitation that Mississippi can be classified with the states permitting full collective bargaining in the public sector, for there is precious little authority on the question. Such authority as exists is somewhat dated and, therefore, subject to change. Still, with these caveats, the current state of Mississippi law is to permit but not require collective bargaining in the public sector.

(a) Unionization.—Thirty-odd years ago, in *City of Jackson v. McLeod*,[193] the Mississippi Supreme Court upheld the discharge of a police officer for joining a labor union, noting that other courts had perceived a conflict of loyalties between membership in a union and service to the public, and holding that this conflict provided cause for discharge.[194] Mississippi's constitutional and statutory right-to-work provisions[195] were enacted after

190. *Id.* 23:6.

191. *See* [1936-38] OP. LA. ATT'Y GEN. 1381 (1937).

192. "Employer," for the purpose of those provisions, was defined to exclude the state and its political subdivisions. LA. REV. STAT. ANN. tit. 23, § 862(3) (West 1964). Those provisions were repealed, and the labor board was abolished by 1972 La. Acts No. 406.

193. 199 Miss. 676, 24 So. 2d 319, *cert. denied*, 328 U.S. 863 (1946).

194. *Id.* at 687-90, 24 So. 2d at 321-22.

195. MISS. CONST. art. 7, § 198-A (1960); MISS. CODE ANN. § 6984.5 (Cum. Supp. 1970), currently codified at MISS. CODE ANN. § 71-1-47 (1972).

the *McLeod* decision. Although they do not by their terms apply to public employees, the Mississippi attorney general believes that they do.[196] In any case, federal constitutional rights supersede the *McLeod* case as well as several Mississippi statutes that tend to restrict freedom of association.[197] A number of states that oppose compulsory unionism nevertheless permit public employers to check off union dues for employees who file authorizations. Mississippi is an exception; it authorizes no checkoffs and in fact specifically prohibits union dues checkoffs for school teachers, principals, or superintendents.[198]

(b) Collective bargaining.—With one narrow exception,[199] Mississippi law does not explicitly authorize public sector collective bargaining. The general grant of powers to municipalities includes the broad phrase "to make all contracts and do all other acts in relation to the property and affairs of the municipality necessary to the exercise of . . . [their] powers,"[200] however, and similar language in a predecessor statute has been held sufficient to authorize collective bargaining by municipalities.[201]

That limited authority has been carried a long way. Claude

196. Letter from Attorney General Joe T. Patterson to Robert T. Mills (June 25, 1968): "[I]t is my opinion that the public policy of the State of Mississippi declared therein permeates the employer-employee relationship of the entire state, including municipal corporations." *Accord,* Letter to the author from J.B. Garretty, Special Assistant Miss. Attorney General (Mar. 2, 1977).

197. Three Mississippi statutes require certain classes of public employees to file affidavits listing memberships in any organization within the past five years. *See* MISS. CODE ANN. §§ 37-9-61 (1972) (elementary and secondary school teachers and administrators), 37-29-2111 (junior college faculty), and 37-101-187 (faculty in state institutions of higher education). A virtually identical Arkansas statute was declared unconstitutional in Shelton v. Tucker, 364 U.S. 479 (1960).

A resolution adopted by the City of Tupelo prohibiting certain fire department officers from joining unions having rank and file firefighter members recently withstood constitutional challenge. IAFF Local 2263 v. City of Tupelo, [1977] GOV'T EMPL. REL. REP. (BNA) 739:14.

198. MISS. CODE ANN. § 37-9-49 (1972).

199. *Id.* § 59-5-37 (Cum. Supp. 1976) allows the State Port Authority to execute contracts relating to employee benefits.

200. *Id.* § 21-17-1 (1972).

201. At least it has been held to make collective bargaining "a matter of policy resting with the sound discretion of the governing authority" rather than a matter of law. Letter from Attorney General Joe T. Patterson to Robert T. Mills (June 25, 1968), interpreting MISS. CODE ANN. § 337-112 (1942). The reader is warned that the letter is a model of bureaucratic caution, vacillating widely before reaching that rather innocuous conclusion. Its authority should therefore be discounted somewhat. More recently, the attorney general's office has warned that the quoted opinion should be interpreted carefully because it did not define what was meant by the term "collective bargaining." Letter to the author from J.B. Garratty, Special Assistant Miss. Attorney General (March 2, 1977).

Ramsey, President of the Mississippi AFL-CIO, summed up the situation:

> As the opinion indicates, agents of City government can legally recognize and bargain with unions that represent their employees if they so desire. It comes down to something like this, we have no laws protecting the rights of these people to organize and bargain and we have laws that prohibits [*sic*] same. Recognition depends upon political influence and/or the sympathies of those people who hold office.[202]

To date at least four cities have signed agreements with unions representing their employees.[203]

(c) Dispute resolution.—A prudent observer would not claim that public sector strikes were legal in Mississippi, yet it is notable that there is no authority clearly stating that such strikes are illegal. The only statute even tangentially relevant is one that voids the employment contract of any school teacher or administrator who shall "arbitrarily or wilfully breach his or her contract and abandon his or her employment."[204] Legislation that would prohibit public sector strikes has been successfully opposed by organized labor,[205] thus leaving the legal question open to future resolution.

(d) Conclusion.—Public sector unionization in Mississippi is still at too early a stage to permit definitive description. At the moment it appears simply that public employees are free to join or refrain from joining unions and to bargain collectively if they have employers who are sympathetic or at least persuadable. There has been no clear test of the question, though, and on such a clean slate the Mississippi courts might well write a different answer.

B. States Permitting "Meet and Confer" Relationships

A number of Southeastern States, either by deliberate policy choice or by hesitation at the consequences of full collective bargaining, have settled into the "meet and confer" model of public

202. Letter from Claude Ramsey to the author (December 27, 1976).

203. These include Pascagoula, Moss Point, Meridian and Natchez. Firemen, policemen and sanitation employees are organized in Jackson, but their representatives have not yet been recognized by the city government. Letter from Claude Ramsey to the author (July 19, 1976).

204. MISS. CODE ANN. § 37-9-57 (1972).

205. Letter from Claude Ramsey to the author (July 19, 1976).

sector labor relations. The essence of this model is simple: public employers are authorized to discuss working conditions with unions and may in some cases even memorialize understandings reached in writing, but lack authority to enter into a binding collective bargaining agreement.[206] The meet and confer approach has been criticized as obsolete and sure to pass "from the lexicon of labor relations terminology."[207] Because it can provide a halfway position for states unwilling or unready to engage in full collective bargaining, however, it is likely to remain viable for several years.[208]

1. Alabama.—Alabama presents a clear example of a state reluctantly forced to deal with public sector unions. Bargaining short of a binding contract has now become a fact of life, haphazardly recognized in statutes of narrow application, in court decisions, in attorney general opinions, and, not least of all, in widespread practice.

(a) Unionization.—After many years of legal attempts to discourage[209] or prohibit[210] union membership by public employ-

206. Of course, there can be such a thing as mandatory "meet and confer"—that is, where the public employer is required to confer in good faith with the representatives of its employers, but where the resulting memorandum of understanding becomes effective only when unilaterally implemented by the pertinent executive and legislative officials. *See* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT (1970) in [1977] GOV'T EMPL. REL. REP. (BNA) RF 51:101, 108-12. Because only Alabama among the Southeastern States has such a system, the term as used herein includes two permissive meet and confer states, Georgia and Kentucky. At least one observer believes that there is little difference in actual practice between the meet and confer and traditional collective bargaining approaches. Edwards, *An Overview of the "Meet and Confer" States—Where Are We Going?*, 16 LAW QUANDRANGLE NOTES 10, 10-15, *reprinted in* R. SMITH, H. EDWARDS & R. CLARK, LABOR RELATIONS LAW IN THE PUBLIC SECTOR: CASES AND MATERIALS 345-51 (1974).

207. Edwards, note 206 *supra*, at 14-15, *reprinted in* R. SMITH, note 206 *supra*, at 350-51.

208. The meet and confer approach has been endorsed for just that reason. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, note 206 *supra*, at 41:111.

209. A 1939 resolution by the Alabama Legislature stated that an AFL effort "to organize State employees supported by the taxpayers' money—Jew, Catholic, and Protestant alike is viewed with grave concern and disfavor. . . ." H.J. Res. 142, 1939 Ala. Acts 1004.

210. Alabama prohibited union membership by public employees in the Solomon Act of 1953, ALA. CODE tit. 55, §§ 317(1)-(4) (1958). In 1951, the Alabama Supreme Court held that public employers could dismiss employees "who are members of labor organizations, which are not only national but international in scope and purpose and therefore their organization being opposed to and the direct antithesis of the basic purposes of local self government for which cities and towns in Alabama are established." Hickman v. City of Mobile, 256 Ala. 141, 147, 53 So. 2d 752, 757 (1951). Although strictly speaking the quoted language was not essential to the court's holding, the same sentiments were shared by

ees, Alabama has come to recognize that the freedom of association extends even to its employees. That recognition came slowly, however, beginning with separate exemptions from the prohibitive Solomon Act for several categories of workers[211] and later involving adverse court and attorney general opinions.[212] Finally in 1972, the Alabama Labor Council succeeded after nearly twenty years of litigation in having the Solomon Act declared unconstitutional.[213] Although the decision in that case was only by the Alabama Circuit Court, it was not appealed and has since been recognized as binding within the state.[214]

While the Alabama right-to-work law does not clearly include or exclude public employees,[215] the question is almost moot because no contract between a union and a public employer is enforceable at law.[216] A lesser form of union security, the volun-

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every member of the court. *Id.* at 760, 763 (concurring opinions). A long string of attorney general opinions held the same, *e.g.*, 44 OP. ALA. ATT'Y GEN. 36 (1946); 45 *id.* at 19 (1946); 45 *id.* at 43 (1946); 87 *id.* at 35 (1957).

211. Section 3 of the Solomon Act, ALA. CODE tit. 55, § 317(3) (Cum. Supp. 1973), exempted teachers and employees of the state docks board, of cities and counties, and of certain state institutions. In 1967, the legislature allowed firefighters to join non-striking unions, *id.* tit. 37, § 450(3)(1) (Cum. Supp. 1973), and in 1971 it authorized them to join any union, *id.* tit. 37, § 450(3)(2) (Cum. Supp. 1973).

212. Raines v. Feaster, 72 L.R.R.M. 2647 (Ala. Cir. Ct. 1969) (employees of the state docks department may join a union with bylaws prohibiting a strike against the department); letter from Gordon Madison, Assistant Ala. Attorney General to Jefferson County Sheriff Melvin Bailey (Aug. 2, 1972) (law enforcement personnel have a first amendment right to join unions).

213. Alabama Labor Council v. Frazier, 81 L.R.R.M. 2155 (Ala. Cir. Ct. 1972). Previous attempts to achieve that objective are discussed in Alabama Labor Council Pub. Employees Union Local 1279 v. Alabama, 453 F.2d 922, 923-24 n.1 (5th Cir. 1972).

214. Letter from Walter S. Turner, Chief Assistant Ala. Attorney General to Henry B. Gray III, Administrator, Ala. ABC Board (Aug. 3, 1973); letter from Walter S. Turner to Jim Boyd, Anniston City Councilman (Feb. 5, 1974); letter to the author from James L. Sumner, Jr., Assistant Ala. Attorney General (March 23, 1977). *See* AFT Local 2143 v. Jefferson County Bd. of Educ., 81 L.R.R.M. 2970 (N.D. Ala. 1972) (membership in one union shall not deprive individuals of benefits given to members of another union); *cf.* Melvin v. Water Works Board, 2 PUB. BARG. CAS. REP. (CCH) ¶ 20,419 (N.D. Ala. 1973) (public employees may freely express their views on union membership).

215. ALA. CODE tit. 26, §§375(1)-(7) (1958). The only official interpretation holds that the law does not cover public employees, 87 OP. ALA. ATT'Y GEN. 35 (1957).

216. *See* notes 229-34 and accompanying text *infra.* It is not entirely moot because contracts are authorized for employees of mass transit systems acquired by public agencies, ALA. CODE app. §§ 1059 (a17), (23), (26) (Supp. 1973), 1247(200)(a) (Supp. 1971). Arguably, union security agreements which were illegal while such systems were under private ownership could become legal when the system comes under public ownership if the right-to-work act does not apply to public employees, but such a strained interpretation of the act is unlikely to be accepted.

tary dues checkoff, is legal for most public employees.[217] Special legislation prohibits the checkoff only for one small group of employees, those employed by boards of education in counties with populations between 10,900 and 11,500.[218]

(b) Collective bargaining.

(1) Recognition.—The hodgepodge of Alabama authority on public sector unionization is epitomized in the state's rules on recognition of employee representatives. While there is substantial authority from the 1940's and 1950's to the effect that public employers may not even recognize such representatives in the absence of legislative authorization,[219] the current rule is that such recognition for the purpose of discussion about conditions of work is legally permissible, at least on a nonexclusive basis,[220] though it is not mandatory.[221] Where no statute authorizes recognition of an exclusive representative, all representatives must be treated alike by the employer.[222]

Recognition is statutorily authorized for several groups of public employees. School boards are directed to consult "with the professional organization representing the majority of the certi-

217. The checkoff is mandated for employees of transit authorities and school boards upon receipt of the employee's authorization, ALA. CODE app. § 1247(200)(c) (Supp. 1971) and permitted for other employees. 87 OP. ALA. ATT'Y GEN. 35 (1957); 92 *id.* 38 (1958); letter from Walter S. Turner, Chief Assistant Ala. Attorney General to Jim Boyd, Anniston City Councilman (Feb. 5, 1974); 157 OP. ALA. ATT'Y GEN. 33 (1974). *See* Erdreich v. Bailey, 333 So. 2d 810 (Ala. 1976); Raines v. Feaster, 72 L.R.R.M. 2647 (Ala. Cir. Ct. 1969). It is not, of course, constitutionally required, United Steelworkers v. University of Ala., Civil Action No. 75-H-1788S (N.D. Ala. Oct. 24, 1975), *quoted in* United Steelworkers v. University of Ala., 430 F. Supp. 996 (N.D. Ala. 1977).

218. ALA. CODE app. § .15(4) (Supp. 1971). The narrow numerical limitation "defies explanation except to say that some group in the county described wished to exclude that county from dues checkoff programs for employees. They then asked their local legislators to pass a local act . . . to accomplish that exclusion." Letter to the author from Assistant Ala. Attorney General James L. Sumner, Jr. (January 24, 1977).

219. 92 OP. ALA. ATT'Y GEN. 38 (1958); 87 *id.* 35 (1957); 45 *id.* 43 (1946); 44 *id.* 36 (1946); 23 *id.* 55 (1941).

220. Letter from Walter S. Turner, Chief Assistant Ala. Attorney General to Henry B. Gray III, Administrator, Ala. ABC Board (Aug. 3, 1973); letter from Walter S. Turner to Jim Boyd, Anniston City Councilman (Feb. 5, 1974). 157 OP. ALA. ATT'Y GEN. 33 (1974). In fact, this seems to be a fairly widespread practice and frequently involves exclusive recognition. The state's department of labor has even conducted elections and card checks to determine employee representatives. Letter to the author from Howard E. Hendrix, Alabama Commissioner of Labor (March 22, 1977).

221. United Steelworkers v. University of Ala., 430 F. Supp. 996 (N.D. Ala. 1977); United Steelworkers v. University of Ala., Civil Action No. 75-H-1788S (N.D. Ala., Oct. 24, 1975), *quoted in* United Steelworkers v. University of Ala., *supra,* at 1003-04; AFSCME v. Bailey, 2 PUB. BARG. CAS. REP. (CCH) ¶ 10,106 (N.D. Ala. 1973).

222. AFT Local 2143 v. Board of Educ., 81 L.R.R.M. 2970 (N.D. Ala. 1972).

fied employees" before adopting educational policies,[223] although no method is established for determining majority status. The State Docks Department is authorized to negotiate with employees engaged in the operation of terminal railroads. Although the statute does not state that such negotiations are to be with majority representatives of those employees, reference therein to the Railway Labor Act[224] implies as much and also implies that such representation is to be exclusive.[225] Similarly, public transit authorities are directed to deal with the representatives of employees of acquired systems, and reference to the protection of all previously held employee benefits implies the continuation of exclusive representation by majority unions.[226] Finally, firefighters who comply with the no-strike provisions of the law are authorized to "present proposals relative to salaries and other conditions of employment by representatives of their own choosing."[227] In light of the exclusivity principle applicable to the representation of teachers, railroad workers, and transit employees, one would expect the same with regard to firefighters. The statute does not address the question, however, and the one case to do so held just the opposite, that "[n]o representative may appear for any firefighter who has not authorized such appearance."[228]

(2) Bargaining.—Alabama public employers may not bargain with[229] or contract with[230] unions in the absence of statutory authorization. On the other hand, public employers may meet and confer with unions. In the words of the Alabama attorney general, the prohibition on collective bargaining

> does not mean that the Mayor and City Council cannot meet and confer with members of a public employee union. It does not mean that City officials cannot reach agreements with members of public employee unions. Certainly, it would be ridiculous for

223. ALA. CODE tit. 52, § 73 (Cum. Supp. 1973) (county boards of education); ALA. CODE tit. 52, § 166 (Cum. Supp. 1973) (city boards of education).

224. Railway Labor Act, 45 U.S.C. §§ 151-88 (1970).

225. ALA. CODE tit. 38, § 17 (1958).

226. ALA. CODE app. § 1247(200) (Supp. 1971).

227. ALA. CODE tit. 37, § 450(3) (Cum. Supp. 1973).

228. Nichols v. Bolding, 291 Ala. 50, 58, 277 So.2d 868, 873 (1973).

229. IUOE Local 321 v. Water Works Bd., 276 Ala. 462, 463, 163 So.2d 619, 620 (1964).

230. *Id.*; Raines v. Feaster, 72 L.R.R.M. 2647, 2653 (Ala. Cir. Ct. 1969); 23 OP. ALA. ATT'Y GEN. 55 (1941); 44 *id.* 36 (1946); 45 *id.* 43 (1946); 87 *id.* 35 (1957); 92 *id.* 38 (1958); 157 *id.* 33 (1974); letter from Walter S. Turner, Chief Assistant Ala. Attorney General, to Henry B. Gray III, Administrator, Ala. ABC Board (Aug. 3, 1973); letter from Walter S. Turner to Jim Boyd, Anniston City Councilman (Feb. 5, 1974).

> this office or anyone else to say that a Mayor and City Council cannot sit down with its employees and discuss matters of mutual concern. . . .[This simply means that] bargaining agreements reached by the public agencies and public employee's [*sic*] unions are not enforceable in a court of law. In other words, the agreement would be terminable at will by the City or the union members.[231]

Legislative action does not seem to have changed the situation, with the exception of one of the two instances where Alabama has been forced to comply with federal law.[232] Firefighters are only given the right to "present proposals,"[233] and, while the Alabama Supreme Court held that this implied an obligation on employers to consider those proposals in good faith, it was equally insistent that they need not and could not do more than that.[234]

(c) Dispute resolution.—Alabama public employees are forbidden to strike,[235] but they may engage in peaceful picketing in support of union demands.[236] They may also petition public employers regarding conditions of employment.[237] Mandatory arbitration is provided for labor disputes in acquired transit systems,[238] and the State's Department of Labor has been active in

231. *Id. Accord,* Raines v. Feaster, 72 L.R.R.M. 2647, 2653 (Ala. Cir. Ct. 1969).

232. ALA. CODE tit. 38, § 17 (1958) (railway employees); ALA. CODE app. § 1247 (200)(a) (1971 Supp.) (employees of acquired transit systems). The state has had contracts with railway employees pursuant to tit. 38, § 17 since 1950. *See* Raines v. Feaster, 72 L.R.R.M. 2647, 2649 (Ala. Cir. Ct. 1969). Despite the holding of that court that non-railway employees of the docks department are not covered by the Railway Labor Act, 72 L.R.R.M. at 2651, the state has, apparently without formal authority, contracted with the International Longshoremen's Association on behalf of those employees. Letter to the author from Lionel L. Layden, counsel for the complainants in the *Raines* case (Feb. 11, 1977). Apparently no contracts have resulted from the transit workers' act. Letter to the author from Assistant Ala. Attorney General James L. Sumner, Jr. (Jan. 24, 1977).

233. ALA. CODE tit. 37, § 450(3) (Cum. Supp. 1973).

234. Nichols v. Bolding, 291 Ala. 50, 53, 277 So. 2d 868, 870 (1973).

235. United Steelworkers v. University of Ala., 430 F. Supp. 996 (N.D. Ala. 1977); Nichols v. Bolding, 291 Ala. 50, 277 So. 2d 868 (1973). ALA. CODE tit. 37, § 450(3) (Cum. Supp. 1973) (firefighters); 92 OP. ALA. ATT'Y GEN. 38 (1958); 87 *id.* 35 (1957); letter from Walter S. Turner, Chief Assistant Ala. Attorney General to Henry B. Gray III, Administrator, Ala. ABC Board (Aug. 3, 1973). Notwithstanding these prohibitions, there have been strikes by public employees. *See, e.g., 1972 Hearings,* note 6 *supra,* at 450 and *1973-74 Hearings,* note 78 *supra* at 210-11.

236. Letter from Walter S. Turner to Henry B. Gray III, Administrator, Ala. ABC Board (Aug. 3, 1973).

237. Hudson v. Gray, 285 Ala. 546, 234 So.2d 564 (1970).

238. ALA. CODE app. § 1247(200)(b) (Supp. 1971).

providing mediation and, in a few cases, arbitration in the public sector.[239]

(d) Conclusion.—The status of public sector unionization in Alabama is clear, but likely to prove untenable. Employees may organize, and employers may confer with the representatives of their employees, but employers may not enter a binding agreement. So long as some employees but not others are guaranteed meet and confer rights, and so long as some employers but not others may refuse to talk to employee organizations, there will be many unnecessary disputes. To give just one example, the City of Decatur must give good faith consideration to proposals of the Decatur Firefighters Association[240] but may ignore the representatives of its police officers; the local school board must consult with the professional organization representing a majority of its teachers before adopting policies affecting the schools,[241] but may slam the door on the representatives of its custodial staff. Eventually, these inconsistencies will force the state to provide some semblance of uniformity.

2. Georgia.—Georgia, too, has come to the meet and confer position almost accidently. There is no comprehensive statute on the subject, but a number of court decisions and attorney general opinions have firmly established that public employers may talk to, but not contract with, employee organizations.

(a) Unionization.—The one legislative attempt in Georgia to ban public sector unionization, a prohibition on union membership for police officers, was declared unconstitutional in 1971.[242] Prior to that, opinions of the state's attorney general had held that public employees were entitled under the first amendment to join labor organizations.[243] The legislature has formally recognized this right in only one instance, that of employees covered by the Fire Fighter's Mediation Act, which applies only to a few governmental units.[244]

239. The Department is allowed by ALA. CODE tit. 26, § 380 (1958) to become involved in any labor dispute. Letter to the author from Howard E. Hendrix, Alabama Commissioner of Labor (March 22, 1977).

240. Nichols v. Bolding, 291 Ala. 50, 277 So. 2d 868 (1973).

241. ALA. CODE tit. 52, §§ 73, 166 (Cum. Supp. 1973).

242. GA. CODE ANN. §§ 54-909, -9923 (1974), declared unconstitutional in Melton v. City of Atlanta, 324 F. Supp. 315 (N.D. Ga. 1971).

243. 69 OP. GA. ATT'Y GEN. 262 (1969); *id.* at 379; *accord* 73 *id.* 56 (1973); Johnson v. City of Albany, 413 F. Supp. 782 (M.D. Ga. 1976).

244. GA. CODE ANN. §§ 54-1301 to -1315 (1974). The act applies only to cities of 20,000

Although the Georgia right-to-work law excludes employees of the state and its subdivisions,[245] compulsory union membership agreements would be unenforceable, just as other provisions of labor contracts are in Georgia.[246] Unions clearly have no constitutional right to have dues checked off,[247] and employers may lack the legal authority to do so even if they are willing.[248] Whatever the legal status of the checkoff, it has been widely used in at least one major city.[249]

(b) Collective bargaining.—While exclusive recognition of a majority union is not required in the absence of a statute, it may be permitted,[250] and in any case it has been accepted in practice.[251] Exclusive recognition has been statutorily authorized only for firefighters who elect a majority representative that does not advocate the right to strike.[252] Similar legislation for Chatham County was declared unconstitutional in 1969.[253]

There is no obligation for a public employer to bargain in the absence of a statute,[254] and it seems that there is no legal authority to do so, either.[255] Employers may confer with employee repre-

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population or more whose governing authorities agree to coverage. *Id.* at § 54-1314.

245. GA. CODE ANN. § 54-901(a) (1974).

246. A. Bolton & A. Evans, Jr., Legal Status of Public Employee Labor Organizations in Georgia 16-17, 20 (July 23, 1974) (paper prepared by Georgia Attorney General's office). *See* notes 258-64 and accompanying text *infra.*

247. Strojny v. Rousakis, 88 L.R.R.M. 2458 (S.D. Ga. 1974).

248. The attorney general suggests that such a checkoff would be a "donation or gratuity" to the union, which is prohibited by GA. CONST. art. 7, § 1, para. 2 (1945) and GA. CODE ANN. § 2-5402 (1973), and notes that several bills to allow checkoffs have failed in the legislature. Bolton & Evans, note 246 *supra*, at 17-19.

249. As of 1976, some 52% of eligible city of Atlanta employees had union dues checked off, as did 68% of Atlanta public school employees. RESEARCH ATLANTA, GOVERNMENTAL LABOR RELATIONS IN ATLANTA 51 (1976).

250. Bolton & Evans, note 246 *supra*, at 8-9.

251. Again, in Atlanta, *see* Jedel & Rutherford, note 3 *supra*, at 490-91, and also in Chatham County, *see* Chatham Ass'n of Educators, Teachers Unit v. Board of Pub. Educ., 231 Ga. 806, 204 S.E.2d 138 (1974).

252. GA. CODE ANN. § 54-1305 (1974). This law, the Fire Fighters Mediation Act of 1971, authorizes local governments to bargain with fire fighters if they desire. As of 1976, however, no local government had elected coverage under the Act. RESEARCH ATLANTA, note 249 *supra*, at iv.

253. The Chatham County Employee-Management Cooperation Act, 1968 Ga. Laws 2953 (declared unconstitutional in Local 574, Int'l Ass'n of Firefighters v. Floyd, 225 Ga. 625, 170 S.E.2d 394 (1969)).

254. Chatham Ass'n of Educators, Teacher Unit v. Board of Pub. Educ., 231 Ga. 806, 807-08, 204 S.E.2d 138, 139-40 (1974); 69 OP. GA. ATT'Y GEN. 262 (1969) (unofficial) *quoted in* Bolton & Evans, note 246 *supra*, at 11-12; 73 OP. GA. ATT'Y GEN. 56 (1973); 64 *id.* 524 (1964).

255. Chatham Ass'n of Educators, Teacher Unit v. Board of Pub. Educ., 231 Ga. at

sentatives about matters of mutual concern,[256] and it may even be legal for them to record agreements reached in a "memorandum of understanding,"[257] but such agreements are clearly unenforceable.[258] As a result parties may avoid concluding formal agreements relying instead on the good faith of the other party.[259]

The needed statutory bargaining authority has not been eagerly granted by the Georgia Legislature. Only firefighters are explicitly given the right to bargain collectively.[260] One other group is given the same right indirectly, namely employees of publicly acquired transit systems.[261] Georgia law gives the state's department of transportation power "to do all things necessary, proper, or expedient to achieve compliance with the provisions and requirements of all applicable federal aid acts and programs,"[262] and, as noted above, section 13(c) of the Urban Mass Transportation Act protects the bargaining rights of such employees.[263] The department of transportation has not yet engaged in any bargaining under this provision, however.[264]

(c) Dispute resolution.—Employees of the State of Georgia are statutorily prohibited from striking, and those who violate the prohibition risk the loss of their jobs and disqualification from reemployment with the state except upon strict conditions.[265] Firefighters are also prohibited from striking,[266] but other employees

807-08, 204 S.E.2d at 139-40 (1974); International Longshoremen's Ass'n v. Georgia Ports Auth., 217 Ga. 712, 718, 124 S.E.2d 733, 737, *cert. denied*, 370 U.S. 922 (1962); Bolton & Evans, note 246 *supra*, at 12-14.

256. State employees are allowed to express complaints or opinions relating to the conditions of employment pursuant to GA. CODE ANN. § 89-1302 (1971), and the attorney general has indicated that other public employees have a similar right which may be exercised through representatives. 73 OP. GA. ATT'Y GEN. 56 (1973). *See also* 69 *id.* 62 (1969), *quoted in* Bolton & Evans, note 246 *supra*, at 11-12.

257. Such memoranda have been entered into by the City of Atlanta and AFSCME for several years. Jedel & Rutherford, note 3 *supra*, at 490.

258. Chatham Ass'n of Educators, Teacher Unit v. Board of Pub. Educ., 231 Ga. at 808, 204 S.E.2d at 140 (1974).

259. *Cf.* Beaird, *Labor Relations Policy for Public Employees: A Legal Perspective*, 4 GA. L. REV. 110, 128 (1969) (settlement of Savannah sanitary workers' strike of 1967).

260. GA. CODE ANN. § 54-1304 (1974). *See* note 252 *supra*.

261. GA. CODE ANN. § 95A-302(g) (1976). *See* text accompanying notes 72-90 *supra*; City of Macon v. Marshall, 96 L.R.R.M. 2797 (M.D. Ga. 1977).

262. GA. CODE ANN. § 95A-302(g) (1976).

263. Note 79 and accompanying text *supra*.

264. Letter to the author from Thomas D. Moreland, Commissioner of the Georgia Department of Transportation (Dec. 29, 1976).

265. GA. CODE ANN. §§ 89-1301 to -1304, -9917 (1971). 69 OP. GA. ATT'Y GEN. 262, 379 (1969).

266. The Fire Fighter's Mediation Act states that Georgia's policy is to extend to fire

of local governments are not mentioned, and attempts to expand the anti-strike statute to employees of political subdivisions have failed.[267] Nevertheless, the policy against such strikes would almost certainly be applied to other government employees.[268] Picketing without striking would be illegal if it blocked entrance to or egress from the place of employment,[269] or if it was for an unlawful objective.[270] Otherwise, picketing appears to be legal.[271]

Nonbinding mediation is provided for labor disputes falling within the Fire Fighter's Mediation Act.[272] The Commissioner of Labor is generally instructed "[t]o do all in his power to promote the voluntary arbitration, mediation and conciliation of disputes between employers and employees," including the establishment of temporary boards of arbitration. Although the current commissioner believes that this law does extend to public employees, there have been no requests for arbitration.[273]

(d) Conclusion.—Georgia fits the meet and confer mold much more consistently than Alabama. When recognized authority to meet with employee representatives is used intelligently by public employers, it can provide a viable substitute for collective bargaining. Common law authority does not answer the difficult problems of conflicting or minority demands for recognition[274] and of unit determination, though, nor can it prevent or correct abuses by obstinate employers. Because of these difficulties, Georgia's meet and confer approach would be improved by detailed legislation.

3. Kentucky.

(a) Unionization.—Kentucky has a very general statutory

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fighters certain privileges "other than the right to strike or to engage in any work stoppage or slowdown." GA. CODE ANN. § 54-1302 (1974). It more clearly prohibits strikes in § 54-1312.

267. Beaird, note 259 *supra*, at 132.

268. Bolton & Evans, note 259 *supra*, at 14-15; Beaird, note 259 *supra*, at 131; Johnson v. City of Albany, 413 F. Supp. 782 (M.D. Ga. 1976); 64 OP. GA. ATT'Y GEN. 524 (strike by a teacher would be regarded as a breach of contract).

269. GA. CODE ANN. § 54-803 (1974).

270. International Longshoremen's Ass'n v. Georgia Ports Auth., 217 Ga. 712, 124 S.E.2d 733, *cert. denied*, 370 U.S. 922 (1962).

271. GA. CODE ANN. § 89-1302 (1971) (prohibition on public employee strikes not intended to limit employee freedom of expression). *Cf.* Bolton & Evans, note 246 *supra*, at 20.

272. GA. CODE ANN. §§ 54-1307 to -1311 (1974). *See* note 252 *supra*.

273. GA. CODE ANN. § 54-122(3) (1974); Letter to the author from Sam Caldwell, Georgia Commissioner of Labor (March 22, 1977).

274. *See, e.g.*, Davis v. Howard, 404 F. Supp. 678 (N.D. Ga. 1975).

provision protecting the rights of employees to organize unions free from employer restraint,[275] but it has been clear for many years that the statute was not applicable to public employees.[276] Still, the constitutional right of public employees to join unions was recognized in Kentucky by the state's attorney general well before the first federal cases on the subject.[277] In addition, the legislature has formally established the same right for firefighters, county police, and employees of acquired transit systems, although those statutes are applicable to only a very few jurisdictions.[278]

There is no Kentucky authority on union security agreements for public employees other than firefighters. In contrast with most of the other Southeastern States, Kentucky has no right-to-work law and might be considered more receptive to compulsory unionism. Indeed, the firefighters law mandates dues checkoff upon employee request, authorizes the union shop, and does not include a "right to refrain" from union membership among the enumerated rights of covered employees.[279] The other statutes authorizing bargaining are silent on the issue. This silence could be interpreted either as allowing any normal terms in the contracts negotiated thereunder or as implying that expression of such authority in one statute excludes it from others where not expressed. For employees other than those covered by the three statutes, union security clauses would be as unenforceable as any others.[280] There is, however, some reason to believe that a public employer can on its own require membership in an employee organization.[281]

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275. KY. REV. STAT. § 336.130 (1972).

276. Jefferson County Teachers Ass'n v. Board of Educ., 463 S.W.2d 627, 629-30 (Ky. Ct. App. 1970), *cert. denied*, 404 U.S. 865 (1971). *Accord*, 67 OP. KY. ATT'Y GEN. 7 (1967); 72 *id.* 279 (1972); 75 *id.* 126 (1975).

277. 64 OP. KY. ATT'Y GEN. 361, 591 (1964); 65 *id.* 84 (1965); 67 *id.* 7 (1967).

278. KY. REV. STAT. § 345.030 (Cum. Supp. 1976) (fire fighters); KY. REV. STAT. § 78.470 (Cum. Supp. 1976) (county police); KY. REV. STAT. § 96A.200 (1971) (transit employees). The fire fighter's act is applicable only to cities with 300,000 or more population and to others that opt for inclusion. To date, only Louisville and Ashland are covered. The police statute applies only to counties of 300,000 or more population and only Jefferson County (Louisville) meets that standard. Only Louisville has utilized the bargaining provisions of the transit system act, letter to the author from Martin Glazer, Assistant Ky. Attorney General (Jan. 5, 1977), although a reported arbitration case indicates that at least one other jurisdiction does bargain. Transit Auth. of River City ATU Division 1447 (Nov. 24, 1976) (Volz, Arb.) reported in [1977] GOV'T EMPL. REL. REP. (BNA) 700:24.

279. KY. REV. STAT. §§ 345.110, 050(1)(c), 030(1) (Cum. Supp. 1976), respectively.

280. Note 289 *infra.*

281. 64 OP. KY. ATT'Y GEN. 361 (1964) (Board of Education may require membership

(b) Collective bargaining.

(1) Recognition.—Public employers in Kentucky are not required, in the absence of a statute, to recognize bargaining representatives of their employees.[282] They may do so voluntarily, though apparently not to the exclusion of individual presentation of grievances,[283] and may even hold elections to select representatives.[284] Exclusive representation by a majority union is statutorily authorized only for firefighters,[285] and representation without reference to exclusivity is allowed for county police.[286]

(2) Bargaining.—Public employers are not obliged to bargain with public employee unions.[287] They can meet and confer with unions if they choose to do so,[288] but, with the exception of governmental agencies subject to the bargaining laws mentioned above, they have no authority to sign a contract with a union.[289]

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in teacher professional organization).

282. International Bhd. of Firemen and Oilers Local 320 v. Board of Educ., 393 S.W.2d 793 (Ky. Ct. App. 1965); 65 OP. KY. ATT'Y GEN. 84 (1965); 67 *id.* 7 (1967); Lexington-Fayette Urban County Gov't v. IAFF Local 526, 90 L.R.R.M. 2308 (Ky. Cir. Ct. 1975), *aff'd*, 95 L.R.R.M. 2923 (Ky. 1977).

283. Lexington-Fayette Urban County Gov't v. IAFF Local 526, 90 L.R.R.M. 2308, 2309 (Ky. Cir. Ct. 1975), *aff'd*, 95 L.R.R.M. 2923 (Ky. 1977); 64 OP. KY. ATT'Y GEN. 591 (1964); 72 *id.* 279 (1972). The latter opinion contains some questionable dicta to the effect that employees "may not be represented" and "cannot be represented" by unions but it should not be given much weight in view of the authority to the contrary. *See, e.g.*, Louisville Fire Fighters Local 345 v. Burke, 75 L.R.R.M. 2001 (Ky. Cir. Ct. 1970). The Fire Fighters Collective Bargaining Act contains an unusual provision that "[n]othing in this *or any other law* shall be construed to prohibit recognition of a labor organization as the exclusive representative by a public agency by mutual consent." KY. REV. STAT. § 345.060(4) (Cum. Supp. 1976) (emphasis added). Arguably this allows all public agencies, not merely the employers of fire fighters, to recognize exclusive agents. The interpretation strains belief, however, both because it is unlikely that such a policy decision would be made in an act of such narrow application, and because the definition of labor organization as used therein is limited to those "in which fire fighters participate." *Id.* at § 345.010(3).

284. 65 OP. KY. ATT'Y GEN. 84 (1965).

285. KY. REV. STAT. § 345.030(2) (Cum. Supp. 1976).

286. *Id.* at § 78.470.

287. Lexington-Fayette Urban County Gov't v. IAFF Local 526, 90 L.R.R.M. 2308 (Ky. Cir. Ct. 1975), *aff'd*, 95 L.R.R.M. 2923 (Ky. 1977); 75 OP. KY. ATT'Y GEN. 126 (1975); 67 *id.* 7 (1967); 65 *id.* 84 (1965).

288. Lexington-Fayette Urban County Gov't v. IAFF Local 526, 90 L.R.R.M. 2308 (Ky. Cir. Ct. 1975), *aff'd*, 95 L.R.R.M. 2329 (Ky. 1977); FOP Blue Grass Lodge No. 4 v. Lexington-Fayette Urban County Gov't, 89 L.R.R.M. 2709 (Ky. Cir. Ct. 1974); Louisville Fire Fighters v. Burke, 75 L.R.R.M. 2001 (Ky. Cir. Ct. 1970); 67 OP. KY. ATT'Y GEN. 7 (1967); 65 *id.* 84 (1965); 64 *id.* 591 (1964). A recent demand by teachers in Fayette County for bargaining with the board of education has been stalled by an injunction issued by Fayette Circuit Judge Armand Angelucci until he has time to consider the legality of such bargaining: [1977] GOV'T EMPL. REL. REP. (BNA) 705:22.

289. 72 OP. KY. ATT'Y GEN. 279 (1972); 75 *id.* 126 (1975). *Contra*, FOP Blue Grass

Cities covered by the Fire Fighters Collective Bargaining Act are obliged to bargain with the exclusive representative of their employees,[290] and counties covered by section 78.470 of the Kentucky Statutes may bargain with representatives of police employed by them. Public owners of acquired transit systems seem to have similar permissive authority, although the language of the statute is not so clear.[291]

(3) Contracts.—With the exception of agreements entered into pursuant to the bargaining authorizations for firefighters, county police, and transit workers discussed above, contracts reached in bargaining are void and unenforceable.[292] The attorney general opinions stating this rule are not entirely convincing, however. The most recent one asserts without qualification or support that the public employer's "discretion cannot be surrendered or impaired."[293] Another relies solely on *International Brotherhood of Firemen and Oilers Local 320 v. Board of Education*,[294] which simply held that a public employer could not be forced to deal with a union, for the unqualified assertion that it could not even voluntarily bargain: "[a] fortiori any contract which might be made between [the public employer] and a union would be ultra vires."[295] A third is ambiguous, allowing teachers to "organize and bargain collectively," but prohibiting a contract which "involves the surrender of the [employer's] legal discretion, is contrary to law, or is otherwise ultra vires."[296] The last is extremely dated and relies on even more dated sources.[297]

Lodge No. 4 v. Lexington-Fayette Urban County Gov't, 89 L.R.R.M. 2709, 2710 (Ky. Cir. Ct. 1974) (dictum).

290. KY. REV. STAT. §§ 345.040, .050(1)(e) (Cum. Supp. 1976). The City of Louisville has already done so and has signed a contract with the Fraternal Order of Police. [1977] GOV'T EMPL. REL. REP. (BNA) 690:17.

291. KY. REV. STAT. § 96A.200 (1971).

292. 64 OP. KY. ATT'Y GEN. 591 (1964); 65 *id.* 84 (1965); 72 *id.* 279 (1972); 75 *id.* 126 (1975). *But see* Wheatley v. City of Covington, 2 PUB. BARG. CAS. REP. (CCH) ¶ 20,283 (Ky. Cir. Ct. 1972) (contract held enforceable but decision is unclear as to whether it involved one of the groups of employees authorized to bargain); OP. KY. ATT'Y GEN. No. 75-607 (Sept. 17, 1975), *cited in* [1977] PUB. EMPL. BARG. (CCH) ¶ 2505.05 (contract with a police union held enforceable against a county not subject to policemen's collective bargaining law).

293. 75 *id.* 126 (1975).

294. 393 S.W.2d 793 (Ky. 1965).

295. 72 OP. KY. ATT'Y GEN. 279 (1972).

296. 65 *id.* 84 (1965).

297. 64 *id.* 591 (1964).

It is therefore possible that a court faced with the question might reach a different conclusion. Still, the most recent southeastern court to face the question found such agreements void,[298] and absent some legislative action to the contrary, the Kentucky courts would most likely take the same position.

(c) Dispute resolution.—The statutes authorizing bargaining for firefighters and police explicitly ban strikes.[299] This seems to reflect the general recognition of the illegality of public sector strikes and even strike threats.[300] Kentucky law provides no substitute for the strike, however, except for firefighters who are provided with a procedure for redressing unfair labor practices and with advisory factfinding for disputes.[301] Several government agencies do submit grievances to arbitration pursuant to collective bargaining agreements, regardless of the doubtful legal status of such proceedings.[302]

C. *States Prohibiting All Forms of Collective Bargaining*

Four of the Southeastern States, the Carolinas, Tennessee, and Virginia, have chosen by statute, decision, or policy to prohibit public sector collective bargaining altogether. This statement deserves several qualifications, however. First, as in the other Southeastern States, there is a big gap between theory and practice, and some bargaining does in fact occur in each of the four. Second, although the language used in the governing authority in each of these states seems to prohibit formal recognition and a bargaining relationship, it is impossible to prohibit informal relationships leading to the same end. The line between these four and the three meet and confer states, then, is very thin indeed—one might say the distinction is a mere matter of form rather than substance.

1. North Carolina.—Without question North Carolina is of all the Southeastern States the most adamant in its opposition to public sector unionism. This opposition should not be said to

298. Virginia v. County Bd. of Arlington County, 217 Va. 558, 232 S.E.2d 30 (1977).

299. KY. REV. STAT. §§ 345.130, 78.470 (Cum. Supp. 1976).

300. IAFF Local 526 v. Lexington-Fayette Urban County Gov't, 95 L.R.R.M. 2923 (Ky. 1977); City of Winchester v. Abney, 94 L.R.R.M. 2729 (Ky. Cir. Ct. 1976); Jefferson County Teachers Ass'n v. Board of Educ., 463 S.W.2d 627 (Ky.), *cert. denied*, 404 U.S. 865 (1971); 75 OP. KY. ATT'Y GEN. 126 (1975) (strikes and strike threats); 65 *id.* 84 (1965).

301. KY. REV. STAT. § 345.070 (Cum. Supp. 1976) (unfair labor practices); *id.* § 345.080 (fact-finding).

302. *E.g.*, [1977] GOV'T EMPL. REL. REP. (BNA) 700:24.

reflect an opposition to public employees per se. It flows rather out of an old, almost paternalistic approach to employer-employee relationships in general. Some flavor of this approach can be seen in a 1961 letter from a North Carolina assistant attorney general:

> You see here in this ignorant Southland we are not too well indoctrinated in sociological theories of togetherness and we have the quaint, old-fashioned and archaic notion that public employees are paid from appropriations made by the sovereign, and when the appropriation is enacted the process of bargaining has no place. We always thought that public employees owed allegiance and loyalty to the units of government who paid them and for whom they worked. We never thought that it was necessary for an outside organization to look after public employees. We simply do not have strikes among public employees because the employees know that this would not be tolerated. We think that most of the public employees would say that they are getting along fairly well.[303]

Much has changed since 1961 of course. Even in North Carolina, there have been several public employee strikes,[304] and at least some observers do not think that public employees "are getting along fairly well" under the present system.[305]

(a) Unionization.—Unlike the other Southeastern States opposed to public sector bargaining, North Carolina attempted in 1959 to address the problem legislatively through broad prohibitions. One portion of this attempt was a ban on union membership by law enforcement and fire prevention employees,[306] struck down as unconstitutional ten years later in *Atkins v. City of*

303. Letter from an unnamed North Carolina Assistant Attorney General to the Harvard Law Review, *quoted in* 75 HARV. L. REV. 391, 391 n.2 (1961).

304. Haemmel, *Impasse in North Carolina: The Need for a Viable Public Employees Labor Relations Act,* 5 N.C. CENT. L.J. 190, 206-08 (1973) provides a list of public sector work stoppages in North Carolina from 1953 to 1973.

305. Haemmel, note 304 *supra*, at 212; Pfefferkorn, *Professional Negotiations in North Carolina: An Alternative to Formal Collective Bargaining for Public Employees,* 7 WAKE FOREST L. REV. 189, 209-10 (1971); *Public Union OK Sought By Workers,* The Charlotte Observer, March 9, 1977, §B, at 1, cols. 5-6.

306. N.C. GEN. STAT. §§ 95-97, 95-99 (1975). By its terms, the ban extended only to unions which were affiliated with national or international organizations and which had collective bargaining with a government as a purpose. *Cf.* 35 N.C. ATT'Y GEN. BIENNIAL REP. 80 (1958-60) (public employees not prohibited from joining a union which does not have a collective bargaining objective). Section 95-99 made a violation of § 95-97 a misdemeanor.

Charlotte.[307] The *Atkins* opinion is instructive, for it indicates the effect which such prohibition can have. Prior to the passage of the prohibition, the International Association of Fire Fighters maintained an active local in Charlotte, which engaged in collective bargaining and even had a checkoff arrangement with the city. Following the adoption of the law, the city terminated the checkoff and bargaining activities and established an individual grievance procedure that did not make provision for union representation.[308] Accordingly, the union suffered significant losses of memberships and dues.

The federal court decisions discussed in Part II. A., above, have now clearly established the legality of union membership by public employees, but such membership can be pointless in North Carolina. Although the state's right-to-work law carefully excludes public employees,[309] presumably to avoid conflict between its provisions protecting union membership as well as nonmembership and other state and local prohibitions on union membership by public employees,[310] this hardly means that union security agreements involving them would be valid. To the contrary, all such agreements, including even the dues checkoff, would be void under the general prohibition on collective bargaining agreements.[311]

One union raised an imaginative argument that it was entitled to a dues checkoff as a matter of constitutional law because the employer withheld funds from employees' paychecks for a number of other purposes. The union had some success in the lower courts, but in *City of Charlotte v. IAFF Local 660,* the Supreme Court rejected this argument, accepting as sufficient the city's explanation that it allowed withholding only when it was for purposes of benefit to all city or departmental employees.[312]

(b) Collective bargaining.—One portion of North Carolina's prohibitions on public sector union activity withstood con-

307. 296 F. Supp. 1068 (W.D.N.C. 1969) (three-judge court).

308. *Id.* at 1072.

309. N.C. GEN. STAT. § 95-100 (1975).

310. *Compare id.* §§ 95-78, -81 *with id.* § 95-97. *Cf.* OP. N.C. ATT'Y GEN. (Jan. 8, 1959) (municipality may prohibit employees from joining unions).

311. N.C. GEN. STAT. § 95-98 (1975); 40 OP. N.C. ATT'Y GEN. 591 (1969); 40 *Id.* 591 (1969).

312. Local 660, Int'l Ass'n of Firefighters v. City of Charlotte, 381 F. Supp. 500 (W.D.N.C. 1974), *aff'd,* 518 F.2d 83 (4th Cir. 1975), *rev'd,* 426 U.S. 283 (1976).

stitutional attack in *Atkins*. That provision, section 95-98 of the North Carolina General Statutes, states in the broadest terms imaginable:

> Any agreement, or contract, between the governing authority of any city, town, county, or other municipality, or between any agency, unit, or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina, and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or agency or instrumentality of government, is hereby declared to be against the public policy of the State, illegal, unlawful, void and of no effect.[313]

In upholding this provision, the *Atkins* court said simply, "There is nothing in the United States Constitution which entitles one to have a contract with another who does not want it. It is but a step further to hold that the state may lawfully forbid such contracts with its instrumentalities."[314]

Section 95-98 alone almost sums up the status of public sector bargaining in North Carolina. Because of it, public employers may not recognize any group as bargaining agent for public employees.[315] Because of it, public employers not only have no obligation to bargain with a union, they have no authority to do so.[316] A fortiori, public employers have no authority to sign a contract with a union and must not do so.[317] Should such a contract be signed, it is, pursuant to the statutory language, void and of no effect.

Small comfort though it may be to supporters of public sector bargaining, the law does permit teacher union representatives to meet and talk with school boards about matters related to teachers "just as anyone could talk with such boards about educational matters," so long as such conversation is not "with a view to establishing a group or collective contract for public school teachers."[318]

313. N.C. GEN. STAT. §95-98 (1975).

314. 296 F. Supp. at 1077. *Accord*, Winston-Salem/Forsyth County Unit, N.C. Ass'n of Educators v. Phillips, 381 F. Supp. 644 (M.D.N.C. 1974).

315. 40 OP. N.C. ATT'Y GEN. 274, 276 (1969).

316. 40 *id.* 274 (1969).

317. 40 *id.* 315 (1969); *id.* at 591 (1969); *id.* at 592 (1969); letter from North Carolina Attorney General Robert Morgan to N.C. State Representative Arthur H. Jones (April 17, 1969).

318. 40 OP. N.C. ATT'Y GEN. 274, 275-76 (1969).

The only clear exception to this rule is the case of the North Carolina Ports Authority. Because it is a carrier subject to the Federal Railway Labor Act,[319] it is obliged to bargain with majority unions[320] and has in fact executed contracts with the International Longshoremen's Association in 1975 and 1976.[321] Arguably the provision of the North Carolina statutes authorizing the state's board of transportation "to do all things required under applicable federal legislation to administer properly the federal mass transportation programs" within the state would include collective bargaining pursuant to section 13(c) of the Urban Mass Transportation Act,[322] but the question will probably not be tested in court because the state has chosen as a policy matter not to participate in programs requiring section 13(c) agreements.[323] Local governments have applied for such grants but have avoided conflicts with section 95-98 by contracting out the management of transit systems to private companies not protected from bargaining obligations under the NLRA by the exemption provided for government agencies.

(c) Dispute resolution.—Against this background of determined opposition to public sector union activity, it is surprising that there is no authority declaring that public sector strikes in North Carolina are illegal. Presumably, the North Carolina courts will apply the common law rule against such strikes when the question arises. Other forms of dispute resolution in the state are extremely limited. The attorney general held in 1969 that school boards do not have authority

> to assist in establishing meditation [*sic*] boards nor do they have any authority to submit disputes to the American Arbitration Association for final binding arbitration nor do such boards have the authority to pay the cost of any outside personnel utilized for meditation [*sic*], fact finding or arbitration.[324]

A mediation and conciliation division has been established in the

319. N.C. GEN. STAT. § 95-98 (1975).

320. International Longshoremen's Ass'n v. North Carolina Ports Auth., 511 F.2d 1007 (4th Cir. 1975).

321. Letter to the author from Edwin M. Speas, Jr., Special Deputy N.C. Attorney General (Jan. 13, 1977).

322. Urban Mass Transportation Act of 1964, 49 U.S.C. § 1609(c) (1970); *see* part II B 2 *infra.*

323. Letter to the author from W. F. Caddell, Jr., Assistant N.C. Secretary of Transportation (Jan. 7, 1977).

324. 40 OP. N.C. ATT'Y GEN. 274, 276 (1969).

state department of labor, and, though no mention is made of the public sector, the law is made applicable to "all labor disputes in North Carolina," and the division does function in that area.[325]

2. South Carolina.—Much of the South Carolina authority on public sector unionization arose out of the Charleston Hospital strike of 1969. That event, the first significant public sector labor dispute in the state's history, was a long and bitter affair marked by mass picketing, violence, threats, and intimidation and aggravated by racial tension.[326] Understandably, there was a highly negative reaction from government officials to public employee unionism in general.

(a) Unionization.—For several years before the Charleston strike, local authorities attempted to prohibit their employees from joining unions, and the state's attorney general upheld the legality of such actions as late as 1965.[327] During 1969, however, two local courts recognized the right of public employees to join unions,[328] and that right has since been consistently acknowledged in the state.[329] Union security agreements are prohibited in South Carolina as are all other public sector collective bargaining agreements.[330] Although a number of governmental agencies check off union dues as a service to employees, there is no statutory authorization for the practice. The law allowing such deductions generally is part of the state's right-to-work act, which does not apply to public employees.[331]

(b) Collective bargaining.—Exclusive recognition of a bar-

325. N.C. GEN. STAT. §§ 95-32 to -36 (1975).

326. The strike is discussed in a clearly partisan manner by the counsel to the striking union in Eisner & Sipser, *The Charleston Hospital Dispute: Organizing Public Employees and the Right to Strike,* 45 ST. JOHN'S L. REV. 254, 254-58 (1970), and, in a less biased manner, in Medical College v. Drug and Hosp. Union Local 1199, No. 8117, slip op. at 1-8 (Charleston County, S.C., Court of Common Pleas, Charleston County, July 9, 1969).

327. [1958-59] OP. S.C. ATT'Y GEN. 142 (No. 641, 1958); [1964-67] *id.* 298 (No. 1778, 1964); [1964-67] *id.* 88 (No. 1834, 1965) (dictum).

328. Medical College v. Drug and Hosp. Union Local 1199, note 326 *supra*, at 17; Bateman v. South Carolina State Ports Auth., 298 F. Supp. 999 (D.S.C. 1969).

329. Holder v. City of Columbia, 71 Lab. Cas. ¶ 53,128 (D.S.C. 1972); REPORT OF THE COMMITTEE CREATED PURSUANT TO S-592 OF 1970 TO STUDY THE RESPECTIVE RIGHTS OF THE STATE, COUNTIES, MUNICIPALITIES AND POLITICAL SUBDIVISIONS REGARDING ITS RIGHTS, DUTIES AND OBLIGATIONS TO ITS EMPLOYEES AND THE RIGHTS, DUTIES, AND OBLIGATIONS OF THE EMPLOYEES TO THE EMPLOYERS, *reprinted in* 1971 S.C. SEN. JOUR. 180, 182 (Jan. 28, 1971) [hereinafter cited as *S.C. Study Committee Report*].

330. Notes 332-40 and accompanying text *infra.*

331. S.C. CODE ANN. § 41-7-40 (1976); *accord,* Medical College v. Drug and Hosp. Union Local 1199, note 326 *supra*, at 11; [1963-64] OP. S.C. ATT'Y GEN. 298 (No. 1778, 1964).

gaining representative was declared to be beyond the powers of a public employer by the attorney general in 1965.[332] In 1971, a study committee on public sector labor relations created in the aftermath of the Charleston strike reiterated this policy, but recommended exceptions for government agencies that had already recognized unions.[333]

Recognition would in any event appear to be of little worth in view of the state's complete prohibition on collective bargaining with public employee unions. As early as 1965, the attorney general had held that public employers could not bargain with unions.[334] The Charleston strike brought about a double affirmation of this rule. First, in April of 1969, the South Carolina Legislature adopted a concurrent resolution, known as the McNair Resolution, which stated a public policy opposed to collective bargaining.[335] Then, in July of the same year, the Charleston County Court of Common Pleas adopted the same position.[336] A legislative subcommittee report two years later listed the rule among the basic principles governing public sector labor relations in the state.[337]

There are two possible exceptions to this rule, only one of which has ever been used. The only affirmative statutory grant of bargaining power is found in section 54-3-210 of the South Carolina Code, which authorizes the State Ports Authority to enter into contracts with railroad workers at the terminal railroad pursuant to the Railway Labor Act.[338] The authority and its successor, the South Carolina Public Railways Commission, have for many years been under contract with the United Transport Union.[339] The general powers granted to public transportation authorities seem broad enough to include section 13(c) agreements pursuant to the Urban Mass Transportation Act of 1964 but the question is not a clear one, and no contracts have been executed under those powers.[340]

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332. [1964-67] OP. S.C. ATT'Y GEN. 88 (No. 1834, 1965).

333. *S.C. Study Committee Report*, note 329 *supra*, at 183.

334. [1964-67] OP. S.C. ATT'Y GEN. 88 (No. 1834, 1965).

335. H. 1636, 1969 S. C. SEN. JOUR. 826 (April 8, 1969) and 1969 S.C. HOUSE JOUR. 942 (April 30, 1969).

336. Medical College v. Drug and Hosp. Union Local 1199, note 326 *supra*, at 12-14.

337. *S.C. Study Committee Report*, note 329 *supra*, at 182-83.

338. Railway Labor Act, 45 U.S.C. §§ 151-88 (1970).

339. Telephone conversation with William J. Betz, General Manager of the South Carolina Public Railways Commission (July 6, 1977).

340. The powers include the rights to "make contracts of every name and nature"

It is unlikely that South Carolina's opposition to public sector bargaining will change in the near future. The difficulties faced by South Carolina unions favoring public sector bargaining are illustrated by the fact that such legislation must be approved by a South Carolina House of Representatives subcommittee currently chaired by a supervisor for the vehemently anti-union J. P. Stevens Co. Not surprisingly, the subcommittee has refused to act on proposed public sector bargaining legislation.[341]

(c) Dispute resolution.—If there previously had been any doubt, the Charleston strike firmly established that public sector strikes and even peaceful picketing for prohibited objectives are illegal and enjoinable.[342] As an alternative, South Carolina has established detailed grievance systems for state, county, and municipal employees.[343] Moreover, the state's department of labor says that it stands ready to assist in the resolution of labor disputes in the public sector.[344]

3. Tennessee.—Like Mississippi, Tennessee is a difficult state to categorize with regard to this subject, but for a different reason. In the case of Mississippi, there was too little authority to permit firm conclusions; in the case of Tennessee, there is more authority but little agreement on what it means. Moreover, there is in Tennessee an enormous gap between what the authority seems to hold, and what is done in practice.

(a) Unionization.—The only firm authority on the subject of union membership by Tennessee public employees is a very dated 1958 decision of the Tennessee Supreme Court, *Keeble v. City of Alcoa.*[345] Keeble was a former employee of the city's elec-

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and to "do all acts necessary for the conduct of its business," S.C. CODE ANN. §§ 58-25-50(j), (n) (1976); letter to the author from H. Brent Fortson, Assistant S.C. Attorney General (Jan. 5, 1977).

341. *Legislator Sees No Conflict in Stance on Bargaining Bill,* The State (Columbia, S.C.) March 17, 1977, § C at 1, cols. 1-3. The chairman's employment caused a supporter of the legislation to remark, "It's just like a hen going to the wolf's house to ask for justice, like putting a rabbit in charge of the lettuce patch." *Id.* at col. 2.

342. Medical College v. Drug and Hosp. Union Local 1199, note 326 *supra*, at 9-12, 15-16. *Accord,* [1964-67] OP. S.C. ATT'Y GEN. 298 (No. 1778, 1964); [1970-73] *id.* 238 (No. 2969, 1970); H. 1636, 1969 S.C. SEN. JOUR. 826 (April 30, 1969); *S.C. Study Committee Report,* note 329 *supra*, at 182.

343. *E.g.*, S.C. CODE ANN. §§ 8-17-10 to -40 (state employees), §§ 8-17-110 to 160 (county and municipal employees), §§ 59-25-110 to -270 (teacher certification), §§ 59-25-410 to -530 (teacher employment and dismissal) (1976).

344. Letter to the author from Arthur A. Fusco, Assistant S.C. Commissioner of Labor (April 18, 1977).

345. 204 Tenn. 286, 319 S.W.2d 249 (1958).

tric department who alleged that she had been dismissed because of her membership in a labor organization. She brought suit for damages rather than reinstatement and relied on the state's right-to-work law[346] rather than on the Constitution. The case reached the Tennessee Supreme Court on demurrer by the city, which argued that the right-to-work law did not apply to municipal employers. The court sustained the demurrer on the ground that a state or subdivision thereof is not subject to a statute of general application unless specifically mentioned therein[347] and, therefore, implicitly upheld the right of a municipality to discharge union members. That decision is generally ignored in Tennessee because of federal authority to the contrary,[348] and recently the state's attorney general finally recognized the right of "any individual, including public employees" to join a labor organization.[349]

Notwithstanding the *Keeble* decision, union security agreements in the public sector would be void because of the state's prohibition of all public sector bargaining.[350] Voluntary payroll deductions for union dues appear to be legal, however, in the discretion of the employing agency.[351]

(b) Collective bargaining.—It is with the more difficult question of the legality of public sector bargaining that the uncertainties regarding the applicable legal authorities become apparent. The only rulings which might be considered binding hold almost without exception that public employers may not recognize, bargain with, or contract with a union. More recent commentators disagree, but they lack authority.

Some thirty years ago, for example, the attorney general held that county officials are not authorized to recognize a bargaining agent for their employees and may not by contract limit their authority over terms and conditions of employment.[352] A decade later, two Tennessee courts held that public employers could not

346. TENN. CODE ANN. §§ 50-208, -209 (1977).

347. 204 Tenn. at 289, 319 S.W.2d at 250.

348. Tennessee Legislative Council, *Study on Public Employer-Employee Relations*, 8-9 (1970) [hereinafter cited as *Tennessee Study*]; letter to the author from T. Edward Sisk, Legal Counsel to Tennessee Governor Ray Blanton (July 22, 1976) (stating governor's position supporting the right of state employees to organize).

349. [1976] OP. TENN. ATT'Y GEN. No. 72.

350. *See* notes 352-62 and accompanying text *infra.*

351. [1976] OP. TENN. ATT'Y GEN. No. 72.

352. OP. TENN. ATT'Y GEN. (March 3, 1947), *cited in* National Governors' Conference Executive Committee Report on Task Force on Labor 1967.

be compelled to bargain collectively[353] and that in the absence of a statute they lacked the power to do so.[354] In 1958, the Tennessee Supreme Court affirmed these rules, albeit in dictum:

> The public policy of Tennessee is reflected by the case of City of Alcoa v. International Broth. of Elec. Wkrs. Local 760, supra, and Weakley County Municipal Electric System v. Vic, Tenn. App., 309 S.W.2d 792, in the first of which it was held that a union could not compel a public employer, such as the City of Alcoa, by force of strike to enter into a collective bargaining agreement and in the second case it was held that a county operating a utility was without authority to enter into a collective bargaining agreement with a labor union . . . .[355]

These decisions were reasonable, for the only legally approved bargaining in Tennessee prior to that time had been pursuant to statute.[356]

On the basis of these decisions, it would seem that a permissive statute is required before a Tennessee public employer can engage in collective bargaining. This puts a severe crimp in union efforts to organize public employees in Tennessee,[357] for the only such statute on the books today is limited to government owned public transit systems.[358]

This interpretation has been challenged twice in recent years. First, a report of the Tennessee Legislative Council in 1970 summarized the current law as holding that "[p]ublic employees may contact, negotiate, and bargain with public employers."[359] Its conclusion is doubtful, however, for it was apparently

353. City of Alcoa v. IBEW Local 760, 203 Tenn. 12, 19-23, 308 S.W.2d 476, 479-80 (1957). The court opinion did not overrule a portion of the lower court's order that allowed the union to "contract, talk to, negotiate, and bargain with" the city, *id.* at 15, 308 S.W.2d at 477, but its silence in this regard seems of no significance in light of its later statement that public employers lacked the power to bargain collectively. *See* note 355 *infra*. Still, there is room for the contrary implication as the state's attorney general indicates, [1976] OP. TENN. ATT'Y GEN. No. 72.

354. Weakley County Mun. Elec. Sys. v. Vick, 43 Tenn. App. 524, 550, 309 S.W.2d 792, 804 (1957), *cert. denied*, 41 L.R.R.M. 2639 (Tenn. 1958).

355. Keeble v. City of Alcoa, 204 Tenn. 286, 292, 319 S.W.2d 249, 251-52 (1958).

356. Memphis Power & Light Co. v. City of Memphis, 172 Tenn. 346, 362-63, 112 S.W.2d 817, 823 (1937) (applying TENN. PRIVATE ACTS ch. 108 § 2 (Extra Session 1935), which was passed to enable the state to obtain federal grants).

357. Letter to the author from Ralph A. Franklin, Staff-Assistant to the Tennessee State Labor Council (July 9, 1976).

358. TENN. CODE ANN. § 6-3802 (Cum. Supp. 1976) allows government owners of transportation systems to bargain collectively pursuant to § 13(c) of the Urban Mass Transportation Act.

359. *Tennessee Study*, note 348 *supra*, at 9.

made without considering the language in *Keeble* quoted above and gave little weight to the *Weakley County* holding.

A more powerful challenge comes from former University of Tennessee Law Professor Robert B. Moberly, who argues that these cases ought to be distinguished and that public sector labor agreements should be upheld by the Tennessee Supreme Court. Moberly bases his argument on three premises:[360] first, that the language in those cases declaring such agreements invalid is "mere dicta"; second, that public attitudes have changed enough so that more recent court decisions conclude that governmental units do not need specific legislative authority to enter into such agreements; and finally, that the judges deciding the Tennessee cases prohibiting bargaining "were merely supplying their own views of governmental policy" rather than applying the law in the public interest.

Professor Moberly's argument is a strong one, but, at least with regard to what the law of Tennessee is today, it is not convincing. In the first place, the relevant language in *Weakley County* and *City of Alcoa* cannot accurately be described as dicta. In both cases, the court had to decide whether peaceful picketing could be enjoined. Because peaceful picketing is constitutionally protected absent an unlawful objective, it was essential to the court's opinions to decide whether the objective of the picketing, *i.e.*, collective bargaining, was legal.[361] In the second place, courts in the Southeastern States do not seem to have perceived the shift in public attitudes discussed by Moberly, or if they have, they have not felt obliged to respond to that shift by allowing collective bargaining without statutory authorization.[362] Finally, there is no evidence either in Moberly's article or in the decisions themselves to indicate that the judges' opinions in the Tennessee cases reflected their own views more than the public interest—or at least that they were in that respect less objective than judges in other states who reached opposite conclusions.

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360. Moberly, *Public Sector Labor Relations Law in Tennessee: The Current Inadequacies and the Available Alternatives*, 42 TENN. L. REV. 235, 238-41 (1975).

361. City of Alcoa v. IBEW Local 760, 203 Tenn. 12, 19-25, 308 S.W.2d 476, 479-82 (1957); Weakley County Mun. Elec. Sys. v. Vick, 43 Tenn. App. 524, 541-53, 309 S.W.2d 792, 800-05 (1957), *cert. denied*, 41 L.R.R.M. 2639 (Tenn. 1958).

362. *E.g.*, IUOE Local 321 v. Water Works Bd., 276 Ala. 462, 136 So. 2d 619 (1964); Commonwealth v. County Bd., 217 Va. 558, 232 S.E.2d 30 (1977); Medical College v. Drug and Hosp. Union Local 1199, No. 8117, (S.C. Court of Common Pleas, Charleston County, July 9, 1969).

Whatever may happen in the future, the current law appears to be that public employers may not engage in collective bargaining. In few other states does practice vary so widely from the rule, however. The available evidence indicates that most of the larger Tennessee cities and a number of state agencies engage in bargaining, regardless of the law, and several have even signed contracts with unions. The earliest breakthrough for public employee unions came in the Memphis sanitation workers strike of 1968, during which Martin Luther King was assassinated. The city finally adopted the negotiated "memorandum of understanding" in April of that year[363] and currently bargains with some fifteen different units.[364] Nashville and Chattanooga also engage in bargaining,[365] as does the state department of mental health.[366]

(c) Dispute resolution.—All authorities are in agreement that public sector strikes in Tennessee are unlawful and may be enjoined, as may picketing in support of demands for collective bargaining.[367] As in other states, the legal prohibitions have not prevented all strikes.[368] With the exception of voluntary arbitration provisions for transit workers,[369] however, Tennessee has not formally authorized alternative methods of dispute resolution. Several political subdivisions are experimenting on their own. A recent report indicates that the City of Nashville has adopted a system of "last best offer" arbitration for use in certain disputes,[370] for example, and grievance arbitration is well established in Chattanooga and Memphis.[371]

4. Virginia.

(a) Unionization.—Until the current decade, Virginia gov-

363. *See generally* Marshall & Van Adams, *The Memphis Public Employees Strike*, in RACIAL CONFLICT AND NEGOTIATIONS: PERSPECTIVES AND FIRST CASE STUDIES 75-107, 161-216 (W. Chalmers & G. Cormick eds. 1971).

364. Jedel & Rutherford, note 3 *supra*, at 492. *See, e.g.*, Memphis AFT Local 2032 v. Board of Educ., 534 F.2d 699 (6th Cir. 1976).

365. *Id.*; [1977] GOV'T EMPL. REL. REP. (BNA) 692:17-18.

366. *Tennessee Study*, note 348 *supra*, at 28-29.

367. City of Alcoa v. IBEW Local 760, 203 Tenn. 12, 308 S.W.2d 476 (1957); Weakley County Mun. Elec. Sys. v. Vick, 43 Tenn. App. 524, 309 S.W.2d 792 (1957), *cert. denied*, 41 L.R.R.M. 2639 (Tenn. 1958); *Tennessee Study*, note 348 *supra*, at 7-9; Moberly, note 360 *supra*, at 236-38; Comment, *Public Employees: No Right to Strike*, 38 TENN. L. REV. 403, 410-12 (1971).

368. A partial list of public sector strikes from 1968-70 appears in *Tennessee Study*, note 348 *supra*, at 33-34.

369. TENN. CODE ANN. § 6-3802 (Cum. Supp. 1976).

370. [1977] GOV'T EMPL. REL. REP. (BNA) 692:17-18.

371. *Id.* at 700:27.

ernments assiduously banned union membership by public employees, holding that such membership was against public policy,[372] that it could be prohibited by public employers,[373] and that public employees were not protected by the state's right-to-work law.[374] Following the 1968 and 1969 federal cases, which recognized the constitutional right of public employees to join unions,[375] the Virginia policy changed dramatically. In 1970, the Virginia attorney general twice affirmed the right,[376] in 1971 and 1972 federal courts in Virginia held the same,[377] and finally in 1973 the legislature amended the right-to-work law to protect public as well as private employees.[378]

Because the right-to-work law now applies, union security agreements are illegal, even in those few cases where other portions of public sector contracts would be enforceable.[379] No statute prohibits dues checkoffs made as a convenience to employees and not pursuant to collective bargaining, but in this state as elsewhere it is clear that employees have no constitutional right to such a checkoff.[380]

(b) Collective bargaining.—Prior to this year, Virginia authority on the topic of public sector bargaining rights had become quite confused. Clear policy statements opposing any bargaining were in direct conflict with detailed instructions from the attorney general on the content of negotiated agreements,[381] and several governmental authorities, particularly in the Washington, D.C., suburbs, openly ignored the legal authority opposing bar-

372. S.J. Res. 12, 1946 Va. Acts ch. 1006 (by implication).

373. Carter v. Thompson, 164 Va. 312, 180 S.E. 410 (1935).

374. VA. CODE §§ 40-68 to -74 (1950); Verhaagen v. Reeder, No. 6009 (Va. Ct. of Law & Chancery, Norfolk, Nov. 28, 1955), *appeal refused*, 198 Va. lxxix, *cert. denied*, 353 U.S. 974 (1956); [1962-63] OP. VA. ATT'Y GEN. 117.

375. Notes 14-17 and accompanying text *supra.*

376. [1969-70] OP. VA. ATT'Y GEN. 158, 231.

377. Carroll v. City of Norfolk, No. 524-70-N (E.D. Va. April 20, 1971) (striking down local ordinance forbidding fire fighters organization from affiliating with a labor union); Newport News Fire Fighters Ass'n Local 794 v. City of Newport News, 339 F. Supp. 13 (E.D. Va. 1972); *accord,* Teamsters Local 822 v. City of Portsmouth, 90 L.R.R.M. 2145, 2147 (E.D. Va. 1975) (dictum), *aff'd per curiam*, 534 F.2d 328 (4th Cir. 1976).

378. 1973 Va. Acts ch. 79, VA. CODE § 40.1-58.1 (1973).

379. *See* notes 393 & 394 *infra.*

380. International Ass'n of Firefighters Local 995 v. City of Richmond, 415 F. Supp. 325 (E.D. Va. 1976).

381. *Compare* S.J. Res. 12, 1946 Va. Acts 1006 *with* Teamsters Local 822 v. City of Portsmouth; 90 L.R.R.M. 2145, 2147 (E.D. Va. 1975), *aff'd per curiam*, 534 F.2d 328 (4th Cir. 1976) *with* [1969-70] OP. VA. ATT'Y GEN. 231, [1974-75] *id.* 22 *and* [1974-75] *id.* 78.

gaining.[382] To clarify the situation, Virginia Governor Mills Godwin instructed the state's attorney general to bring suit testing the legality of such contracts,[383] and the result of that action has finally established Virginia's place among the states prohibiting public sector bargaining.

The suit was brought against the County Board and the County School Board of Arlington County, challenging the legality of the procedures adopted by the defendants for granting exclusive recognition to unions and allowing negotiation of collective bargaining agreements.[384] The trial court upheld the labor relations policies of the respective boards and the contracts negotiated pursuant to them, finding that governmental bodies in Virginia had implied authority to engage in such acts.[385] On appeal, the Virginia Supreme Court reversed,[386] and its opinion in *Virginia v. County Board of Arlington County,* stands as an authoritative, if not completely definitive, statement of the current law on the subject.

The court stated the question in the case as follows:

> [W]hether, absent express statutory authority, a local governing body or school board can recognize a labor organization as the exclusive representative of a group of public employees and can negotiate and enter into binding contracts with the organization concerning the terms and conditions of employment of the employees.[387]

This statement posed three issues for resolution, namely (1) exclusive recognition, (2) negotiation, and (3) binding contracts. Due in part to a confusion of terms—the court seemed unable or unwilling to separate "negotiation" from "binding contracts"—the court's opinion actually resolved only the last of the three issues, holding that the collective bargaining agreements were void, and the policies permitting them invalid.[388] It may have answered the second as well by holding that policies permitting

382. *Virginia To Test Public-Employee Labor Pacts,* The Washington Star, May 1, 1976, § A at 3, col. 2.

383. Statement of Governor Mills E. Godwin, Jr. (April 30, 1976), *quoted in* The Washington Star, note 382 *supra.*

384. Brief for Appellants on Petition for Writ of Error at 2, Virginia v. County Bd., 217 Va. 558, 232 S.E.2d 30 (1977).

385. Virginia v. Board of Supervisors, 93 L.R.R.M. 2390 (Va. Cir. Ct. 1976).

386. Virginia v. County Bd., 217 Va. 558, 232 S.E.2d 30 (1977).

387. *Id.* at 559, 232 S.E.2d at 32.

388. *Id.* at 581, 232 S.E.2d at 44-45.

"collective bargaining" are also invalid,[389] but because the court did not define the term, we cannot know for sure whether it condemned the negotiation process per se or only that process when linked to its normal outcome, the contract. Earlier authority also fails to resolve the issue and hedges on the issue of the legality of talks between unions and employees. Several opinions of the attorney general tacitly accepted the legitimacy of such meetings, for example, while questioning the enforceability of resulting agreements,[390] and at least one court has done the same.[391]

Neither the opinion nor earlier authority resolves the first issue, that of exclusive union recognition. On the one hand, the authority mentioned above, supporting the legality of negotiations not involving a contract, implies that employers may in this sense recognize employee representatives. On the other hand, employers have no authority to deny the right of individual employees to be heard.[392]

Perhaps the most sensible conclusion to be drawn from this is the one adopted in the other states prohibiting collective bargaining; that is, that public employers may at any time meet with employees and their representatives on matters of mutual interest, but not to the exclusion of other employees or employee representatives and not with an eye to entering any sort of collective bargaining agreement. It is clear that none of this affects public employers who have been granted statutory authority to bargain. In Virginia, only two types of governmental agencies have been given such authority, the Washington Metropolitan Area Transit Authority[393] and commissions assuming operation of private transit facilities.[394] The first of these involves only a single, unique agency, however, and the second is seldom used because most local transit authorities contract with private companies for man-

389. *Id.*

390. [1969-70] OP. VA. ATT'Y GEN. 231; [1974-75] *id.* 22; [1974-75] *id.* 78.

391. Newport News Fire Fighters Ass'n Local 794 v. City of Newport News, 339 F. Supp. 13, 17 (E.D. Va. 1972). One court went further and found a constitutional right to engage in collective bargaining, Richmond Educ. Ass'n v. Crockford, 80 L.R.R.M. 3116 (E.D. Va. 1972), but this decision is of dubious importance. *See* note 24 *supra.*

392. [1974-75] OP. VA. ATT'Y GEN. 78; [1974-75] *id.* 22; [1969-70] *id.* 231.

393. 1972 Va. Acts ch. 571.

394. 1974 Va. Acts ch. 53, VA. CODE § 15.1-1357.2 (Cum. Supp. 1977); *cf.* letter from Andrew P. Miller, Virginia Attorney General, to Howard H. Carwile, Virginia House of Delegates (Oct. 7, 1974) ("[L]ocal units of government may not enter into collective bargaining agreements absent express statutory authority . . . ").

agement services, and those companies are subject to the National Labor Relations Act.[395]

(c) Dispute resolution.—Virginia clearly prohibits strikes by public employees, under penalty of termination and ineligibility for public employment for the next twelve months.[396] Unlike many other Southeastern States, it also supplies comprehensive alternatives to the strike.

The most important of these alternatives are grievance systems covering almost all categories of state and local government employees. Both systems provide binding arbitration for grievances arising out of the interpretation or application of policies, rules, and regulations, but exclude "wages, salaries or fringe benefits" from the definition of the term "grievance."[397] In addition, arbitration is provided for disputes involving those narrow categories of public employees authorized to engage in bargaining.[398] Previously the attorney general had approved the use of advisory arbitration in public employment pursuant to agreement with a union,[399] but that hardly seems possible in light of the *Arlington County* decision.

Far more interesting is a requirement, perhaps unique to Virginia, that every public employer adopt rules or policies to provide its employees with "an opportunity to contribute to the development of policies which directly or indirectly affect the working conditions of the employees."[400] Quite possibly this requirement was intended to obviate the need for unionization;[401] if adequately implemented it could at least have that effect.

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395. Letters to the author from D. Patrick Lacy, Jr., Deputy Va. Attorney General (Jan. 6, 1977) and J. Westwood Smithers, Jr., Assistant Va. Attorney General (Jan. 19, 1977).

396. VA. CODE § 40.1-55 (1970).

397. VA. CODE §§ 2.1 to 114.5 (Cum. Supp. 1977) (state employees) and § 15.1-7.1 (Cum. Supp. 1977) (local employees); *accord,* address by Virginia Attorney General Andrew P. Miller at the Fifth Annual Labor Law Conference of the Virginia Bar Association (Oct. 6, 1975) at 16-17.

398. *See* notes 393 & 394 and accompanying text *supra.*

399. [1969-70] OP. VA. ATT'Y GEN. 231; address of Andrew P. Miller, note 397 *supra,* at 15.

400. H.J. Res. 208, Va. Gen. Assembly (1973).

401. *Cf.* Brown, *Public Sector Collective Bargaining: An Emerging Reality,* 2 VA. B.J. 7, 9 n.8 (1976) (grievance procedures adopted by the state board of education in part to forestall collective bargaining legislation).

IV. SUMMARY AND CONCLUSIONS

Allowing for some doubt about states with sketchy or contradictory authority on public sector unionism, it is not difficult to summarize the current status of the law in the Southeast. In a sentence, there is simply no uniformity of treatment. While all of the states have been required by the Constitution to tolerate union membership by public employees, some have voluntarily gone far beyond that point, while others have refused to move another inch. Even this dichotomy fails to reveal the complexity of the situation. Of the three states allowing full collective bargaining, Florida, Louisiana, and Mississippi, only the first has done so as a careful, deliberate matter of public choice; the others have done so almost accidentally. Of the four states prohibiting bargaining, the Carolinas, Tennessee, and Virginia, only North Carolina has spoken with a firm legislative voice. The three "meet and confer" states, Alabama, Georgia, and Kentucky, have been no more decisive than their neighbors—none of the three has a comprehensive statute on point.

It may, therefore, be more enlightening to summarize the law in the Southeast according to a procedural criterion rather than a substantive one: only two of the ten Southeastern States, Florida and North Carolina, have taken the trouble to deal legislatively with what could prove to be the most important issue of public administration in our time. Each of the other eight is, to one degree or another, in a state of confusion and contradiction about governmental labor relations.

The reflective observer needs no crystal ball to draw conclusions about this situation. First, it is safe to predict that, in the absence of legislative action, public sector unionization and de facto bargaining arrangements will increase substantially in the next few years. Second, the lack of definitive methods of resolving disputes over such matters as representation rights, scope of bargaining, and enforceability of contracts will cause a large number of disputes, many of which will result in strikes—disputes that could have been avoided by legislative foresight. Third, the relative experience and organization of the initiating party—the public employee union—make it likely that the early years of public sector bargaining in the Southeast will be marked by major union successes, perhaps at the expense of the taxpayers but certainly at the expense of more objective methods of resource allocation. These problems will not be eliminated until the state and local governments learn by experience how to

negotiate labor disputes, and until they develop a corps of management professionals skilled in labor relations. Finally, these developments will almost certainly force the Southeastern States to do that which most have so far avoided, *i.e.*, to adopt clear and comprehensive legislation addressing public sector collective bargaining. The delay in doing so will exact a painful price: the unplanned development of ad hoc bargaining relationships, each with its own procedural and substantive traditions, will rob lawmakers of the flexibility essential to good legislation; and union strength will have grown to the point where unions, rather than government employers or the public generally, will have the decisive voices on the shape such legislation will take.