

PUBLIC SECTOR BARGAINING: A DIFFERENT ANIMAL

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Discussion of public employee bargaining must begin with recognition of the fundamental differences between public and private employment. The terms and conditions of employment in the private sector are determined by private decisions made by private parties shaped by market forces. In the public sector, the terms and conditions of employment are public decisions made through governmental officials and shaped by political processes as well as by market forces. In a democratic society, this means that decisions are confined by constitutional limitations and must ultimately reflect the will of the electorate.

I. PUBLIC EMPLOYMENT AND PRIVATE EMPLOYMENT

Public employment is constitutionally protected. In *Pickering v. Board of Education*,¹ the Supreme Court held that a teacher's public criticism of the school board was a constitutionally-protected exercise of free speech. In *Elrod v. Burns*,² the Court held that dismissal of a deputy sheriff because of his political affiliation was a denial of his constitutional right of freedom of assembly. In the private sector, there is no constitutional protection, and some state courts have held that the discharge of employees for similar conduct is not protected because it is contrary to public policy.³ Many public employees are protected by civil service systems that prohibit discharge or other adverse action without good cause

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1. 391 U.S. 563 (1968).

2. 427 U.S. 347 (1976). See also *Branti v. Finkel*, 445 U.S. 507 (1980) (holding that the First Amendment prohibits the discharge or employment denial of a public defender who lacks party endorsement).

3. *Korb v. Raytheon Corp.*, 574 N.E.2d 371 (Mass. 1991); *Schultz v. Indus. Coils, Inc.*, 373 N.W.2d 74 (Wis. Ct. App. 1985).

and proper procedure. Meanwhile, private employees can be summarily discharged for good cause, bad cause, or no cause at all. Public employment is not at will; it is considered a property right.

In public employment, many terms and conditions of employment such as pensions, health insurance, and length of the school year are prescribed by statute, not subject to either individual or collective bargaining. In the private sector, the same subjects are determined by free collective bargaining.

II. FUNDAMENTAL DIFFERENCE BETWEEN PUBLIC SECTOR AND PRIVATE SECTOR BARGAINING

The differences between public and private employee individual bargaining over the terms and conditions of employment are significant, but they pale in comparison to the fundamental difference between public and private sector collective bargaining. The focus of this article is on municipal employee bargaining because the differences in this area are more sharply drawn.

A public employee collective agreement is more than a contract; it is an instrument of government and a product of government decision making. It directly determines the terms and conditions that the governmental entity must provide, and it establishes the administrative structure and procedure to implement and enforce that government decision. But it does much more. A public employee collective agreement indirectly determines the level of taxes every person must pay and the level of government service every person will enjoy.⁴

Private sector collective bargaining is private decision making, concerned with the costs and benefits of the private parties to the agreement. The private parties have little or no concern for the interest or welfare of the public. They have little concern for the welfare of their customers beyond keeping them satisfied. Their focus is economic, each seeking to maximize their private interest.

Public employee bargaining is public decision making concerned primarily with the public interest, or more concretely, the desires of the electorate. The parties have little concern with the product market, for the public employer is largely immune from competition since the customers (residents) cannot readily move to another supplier. The focus is on the level of service the public wants and what taxes the public is willing to pay as expressed through the political process.

Private sector bargaining is primarily an economic process where

4. For a more complete development of this point of view, see Clyde Summers, *Public Employee Bargaining: A Political Perspective*, 84 *YALE L.J.* 1156 (1974).

market forces frame the outcomes mainly by determining what costs the product market will bear. Public sector bargaining is a political process where the outcome is framed by political forces, like the taxes voters are willing to bear and the curtailment of services they will tolerate. In local government, labor costs make up seventy percent of government expenditures, so the focus is inevitably on the budget, the city's most important political decision.

III. THE STRUCTURE OF BARGAINING

The most significant difference in the structure of bargaining is who sits at the table and who sits behind the bargainers with the authority to make the agreement binding. On the union side there is no significant difference between public sector and private sector bargaining. In both cases, negotiation is done by officers of the union or a negotiating committee. They may have the authority to make a binding agreement and can give a final answer at the bargaining table, though in many unions the agreement must be ratified by the members.

On the management side there is a crucial difference. In the private sector those at the table frequently have the authority to make a binding agreement; they can give a final answer at the bargaining table. The agreement need not be ratified by the stockholders, or, in most cases, by the corporate board. In public employment this is normally not the case, for those at the bargaining table often have no authority to commit the funds required by the contract. Expenditures can normally be authorized only by the legislative body, which makes up the budget and levies the taxes. Often, neither the mayor nor any member of the city council even sits on the bargaining committee. This may not cause problems because the negotiators may know what the mayor and city council will approve, or the negotiators may simultaneously negotiate with them behind the scenes to gain their approval. However, the gap between those who negotiate and those who provide the funds invites the intrusion of political differences that may go beyond the amount of funds requested and lead to an impasse.

In Philadelphia, collective bargaining for the schools is the responsibility of the board of education, but the board has no taxing authority and must go to the city council to get the necessary funds. This has, on occasion, led to political conflict and near crisis. When such an impasse occurs, the board of education may be forced to trim its budget, thereby reducing the educational quality of the schools. The alternative is to repudiate the contract. In *Philadelphia Federation of Teachers v. Thomas*,⁵ the board of education signed a two-year contract with increases

5. 436 A.2d 1228, 1229 (Pa. Commw. Ct. 1981). See Stephen Befort, *Public Sector*

in the second year. The city council refused to appropriate the amount necessary for the second year increase, so the board unilaterally rescinded the increase. The commonwealth court upheld the board's action on the reasoning that the promised increase was subject to an implied condition precedent that adequate funding would be forthcoming.⁶ This is a potential problem in each of the bargaining units of the city since the department heads sit at the bargaining table while the council controls the budget.

This problem is aggravated if the collective agreement is not concluded before the budget is adopted. The law specifies when the budget must be adopted and frequently specifies when the collective bargaining procedures are to be concluded so that the costs of the collective agreement are known before the budget is finalized. This is more often hoped for than realized. In practice, the budget deadline is more rigid than the bargaining deadline. As a result, the budget is often adopted before negotiations are concluded. This significantly limits the chances that negotiators will get a supplemental appropriation or will squeeze funds from other lines in the departmental budgets.

Another less-marked difference in the structure of bargaining is that most private employers have only one or two bargaining units, partly because many of their employees are not organized. When there are multiple units, they may engage in coalition bargaining or follow pattern bargaining with the negotiators in one unit setting the pace for the whole process. In public employee bargaining, multiple units are the rule, often with each department bargaining separately. If the board of education has independent taxing power, the board will have at least three bargaining units—teachers, principals, and non-teaching personnel—each of which is largely independent. New York City has 200 bargaining units, and smaller municipalities will have anywhere from six to sixteen units. Pattern bargaining is fragmented because there are normally at least four quite independent patterns: public security (police and firefighters), education (teachers and principals), professional employees, and all of the remaining employees. Patterns established in one group may not carry over to other groups, but gains by one group impact other groups because the money comes out of the same purse. Bargaining becomes similar to the process of herding cats.

IV. SUBJECTS OF BARGAINING

Public employee bargaining statutes originally followed the federally-developed law on mandatory subjects of bargaining, but it eventually

Bargaining: Fiscal Crisis and Unilateral Change, 69 MINN. L. REV. 1221, 1236 (1985).

6. *Id.* at 1232.

became widely recognized that the scope of bargaining in the public sector should be narrower, and a “balancing test” evolved. Exactly what was to be balanced was not illuminated. Typical language included whether the subject was a matter of “inherent management policy,” or “natural management prerogative” which “intimately and directly affects the work and welfare of the employee” or which “significantly interferes with the exercise of inherent prerogative,” or “an essential element of the right to manage affairs,” or whether the subject “falls closer to wages, hours and conditions of employment on the continuum or falls closer to the core of management discretion.”

This balancing test is stated with characteristic ambiguity in a Pennsylvania statute. First, section 701 of the Pennsylvania Public Employee Bargaining statute⁷ copies section 8(d) of the National Labor Relations Act. Then section 702 provides:

Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection, and direction of personnel.⁸

Such language provides no compass to the labor boards or the courts; it points to no helpful rationale for a different scope of bargaining in the public and private sector except that “the employer is the government,” with no explanation of why that should make a difference. The matter is left at sea with no guidance except for the boards’ or the courts’ intuition.

If we inquire more directly into why it should make a difference that the employee is the government, we may still be at sea, but in sight of land. In *Ridgefield Park Education Association v. Ridgefield Park Board of Education*,⁹ the New Jersey Supreme Court recognized that public employee bargaining was public decision making, and therefore pointed toward the consideration of keeping the political process open in making these governmental decisions. The court, in holding that the transfer and assignment of teachers was not bargainable, said:

There would be little room for community involvement if agreements concerning educational policy matters could be negotiated behind closed doors A private employer may bargain away as much or as little of its managerial control as it likes. However, the very foundation of representative democracy would be endangered if decisions on significant matters of governmental policy were left to the process of collective

7. 43 PA. CONST. STAT. ANN. § 1101.701 (West 1991).

8. 43 PA. CONST. STAT. ANN. § 1101.702 (West 1991).

9. 393 A.2d 278, 285 (N.J. 1978).

negotiation, where citizen participation is precluded.¹⁰

In a later case, the New Jersey court was more explicit: "Matters of public policy are properly decided, not by negotiation and arbitration, but by the political process. This involves the panoply of democratic institutions and practices, including public debate, lobbying, voting, legislation and administration."¹¹

If we start with the proposition that public employee bargaining is a process of governmental decision making, we can compare the political process when certain decisions affecting terms and conditions of employment are made without collective bargaining and how that political process is changed by collective bargaining. This will then give us some guidance as to the proper subjects for bargaining.

Consider, for example, the political process when the question is whether the salaries of the teachers should be raised. In the absence of collective bargaining, individual teachers or teacher organizations will try to persuade the board of education by petition, discussion, or attendance at school board meetings to provide for an increase in the next year's school budget. When the budget is presented at a public hearing, the teachers, perhaps reinforced by parents or the PTA, will argue for the fairness and the need for an increase. Taxpayers, individual and organized, will argue against the increase and protest the level of taxes the increase will require. The board will retire to an executive session to decide, and if it is an elected board that has taxing power, the board will be held accountable at the next election.

Consider other questions that affect terms and conditions of employment such as class size. The process will be much the same, with perhaps more vigorous advocacy by the parents and PTA, but with less vigorous advocacy, or none, by the taxpayers who may not recognize the impact this decision will have on their tax rate. Consider also the question of school discipline such as expulsion, suspension, or corporal punishment. Both the teachers and the parents will have divided views and the taxpayers will be largely unconcerned. The board's decisions in all of these cases will be shaped by weighing the articulated views of these, and perhaps other, interest groups.

Now consider the political process if any of these subjects are matters for collective bargaining. The union, selected by the majority of teachers, will determine what demands to make by weighing the interests of the teachers. The board will weigh its interests against what it believes the parents and taxpayers want. The two parties will then go into a room from

10. *Id.* at 287.

11. *Local 195, IFPTE, AFL-CIO v. State of New Jersey*, 443 A.2d 187, 191 (N.J. 1982).

which all other interested parties are excluded. The board will be confronted directly by the union's demands with no equivalent articulate counter-pressure from other interested groups. Once the agreement has been made at the bargaining table, it is difficult to block it at the ratification stage unless it has substantial impact on the budget. This gives the union, as the representative of the teachers, a larger and more effective voice in the decision than if there was no collective bargaining. It largely precludes the voters from having an effective voice. The effect of collective bargaining is to significantly change the political process, removing subjects of bargaining from effective public discussion.

This alteration of the political processes is not necessarily bad; it depends on the particular subject for decision. For some decisions, the normal political processes may create an imbalance between competing political forces. When decisions are made concerning economic terms and conditions of employment such as salaries, medical benefits, or pensions which have a direct impact on the budget and taxes, public employees are at a distinct political disadvantage in the normal political processes. The voters, like all employers and customers, want the maximum level of services at the lowest cost. Their economic interests are in direct conflict with the union's economic demands. Taxes are the most sensitive issue, and the taxpayers have far more votes. Although public employees may have political weight beyond their numbers, they are politically overwhelmed when the issue is the budget and taxes. They need the advantages they gain through collective bargaining to offset the voters' effective voice in determining the budget and taxes.

The same justification for collective bargaining may not apply to other subjects of bargaining. Collective bargaining concerning discipline, seniority, or job assignments in the public works department may have quite a different rationalization. The taxpayer has little interest because these problems will have no visible budget impact. But employees and management have very strong and adversary interests. Joint decision making by the two parties in interest would seem an appropriate manner of managing.

Compare the process when the issue is discipline of students through suspension, expulsion, or corporal punishment as decided by the collective bargaining process. These are not matters of importance to taxpayers, but they are of vital concern to the teachers and to parents. Settling these issues behind closed doors, with no participation by the parents, blocks out a major interested group.

This process, however, raises a more serious question because under the rule of exclusive representation, the union speaks for all employees whether they agree or not. When economic terms such as salaries, health insurance, and pensions are bargained for, the teachers will be unanimous

in wanting more benefits, though they may have different views as to how the money should be allocated. These differences among the teachers are of little concern to the taxpayers and might be resolved by the democratic process within the union.

However, when disciplinary rules are bargained for, the teachers may have different and conflicting views, yet the union as exclusive representative purports to speak with a single voice for all teachers. With bargaining behind closed doors, the teachers who disagree will have no opportunity to be heard. Indeed, in Madison, Wisconsin, a non-union teacher claiming to represent an informal committee spoke at a board of education meeting urging the board to table a mandatory dues proposal until there had been further study and discussion. The Wisconsin court held that the board, by allowing anyone other than the exclusive representative to appear and speak on issues under negotiation, had committed an unfair labor practice.¹²

More important, because the bargaining is behind closed doors, the negotiators for the board are the sole spokespeople for the parents and the students who will have widely varying and conflicting views. When the parties emerge from the bargaining room with the completed agreement, discipline will be just one among many issues that will not be fully discussed. The result is that a governmental decision is made on a significant public policy with many of those most interested having no effective voice. Unlike economic issues, there is no direct conflict between the teachers' and the taxpayers' interests. Instead, it is a question of educational policy which should be subject to open discussion.

The problem of collective bargaining silencing those who have a vital interest in the subject is dramatically illustrated by examining whether the decision to establish a public review board to inquire into cases of police abuse should be made by collective bargaining. The general public's interest is central; to leave it to bargaining between the police commissioner and the police officers' union would largely ignore the wider public's interest.

Designating a subject as bargainable means that the decision making process has moved from the open public forum of normal political processes to a closed forum where the union speaks for all employees. It is a form of delegation of public decision making. Whether a subject is considered bargainable depends on whether it is appropriate to move the particular decision from the open political process to the closed negotiation process. As the examples suggest, this question cannot be sensibly answered with concepts or formulae of words, but only by examining the

12. *City of Madison Joint Sch. Dist. v. W.E.R.C.*, 231 N.W.2d 206 (Wis. 1995), *aff'd*, 429 U.S. 167 (1976).

practical functioning of the political process. If there is any broad principal it is that those who have a significant interest in the decision should have a proportionate effective voice.

One might venture some general rules to be used as rough guidance. Where the two opposing political interests—taxpayer/residents and employees—are grossly unbalanced, collective bargaining serves to adjust the imbalance. Where public management and the employees have opposing interests, but taxpayers or other groups have no substantial interests, the two interest groups can be allowed to work out their differences collectively. However, if bargaining by the two parties shuts out other groups that have substantial interests, depriving them of effective voice in the decision, then collective bargaining is inappropriate. Finally, if the employees have strongly opposing interests among themselves, then the union ought not be able to shut out from public discussion those who have different views.

This is an attempt to spell out a crude theoretical framework that would guide the courts, a framework that has not been articulated by the courts beyond the language quoted from the New Jersey Supreme Court. However, if one is not distracted by the broad generalities typified by the Pennsylvania statute and similar language in court opinions, one may see, or imagine, that the courts are going in this direction. In determining whether the transfer and assignment of teachers was bargainable in *Ridgefield*, the New Jersey Supreme Court stated that negotiable terms were “those matters which intimately and directly affect the work and welfare of the public employment which would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy.”¹³

In holding that transfers and assignments were not bargainable, the court gave some substance to this rather slippery test:

The selection of the school in which a teacher works or the grade and subjects which he teaches undoubtedly have an appreciable effect on his welfare. However . . . this aspect of the transfer decision is insignificant in comparison to its relationship to the Board’s managerial duty to deploy personnel in the manner which it considered most likely to promote the overall goal of providing all students with a thorough and efficient education.¹⁴

The test, as stated here, is less than clear, but it should be read in conjunction with the court’s expressed concern for preserving community involvement.¹⁵ This can come only through the board’s open political

13. See *Ridgefield*, 393 A.2d at 284.

14. *Id.*

15. *Id.*

process and not through the closed collective bargaining process. What is clear is that the limits on appropriate subjects for collective bargaining in the public sector are governed by totally different considerations than those in the private sector.

V. STRIKES

In private sector bargaining, the right to strike is considered fundamental. While it may be limited in time, place, manner, and purpose, a broad prohibition of the right to strike would be politically rejected, if not considered unconstitutional. Even in cases of national emergency, the Taft-Hartley Act only postpones the strike for eighty days. In the public sector, the starting assumption is quite the opposite: that public employees have no right to strike. A strike is sometimes characterized as a challenge to the state's sovereignty, bordering on insurrection. Even though most states provide by statute for public employee collective bargaining, most states still prohibit employees from striking when their demands are rejected. Employee recourse is solely through the political process where their demands for higher pay are pitted against the voters' resistance to increased taxes.

This lack of meaningful recourse frequently leads to strikes, despite the legal prohibition against them and despite their limited effectiveness. Putting the strike leaders in jail has sometimes meant that the public officials have to go to the jail to negotiate a settlement. Putting striking teachers in jail does not reopen the schools, a problem which has led to releasing the jailed teachers during the day so that they can teach their classes before returning to jail for the night.

Only a few states allow a limited right to strike. Pennsylvania allows strikes, but they may be enjoined if the strike creates a "clear and present danger or threat to the health, safety or welfare of the state."¹⁶ All states prohibit strikes by public safety employees—police, firefighters, prison guards—but many provide for recourse to arbitration where the parties are not able to agree, which frequently occurs.

A strike of public employees is not unlike a strike of private employees if we recognize that the employers are the residents and taxpayers who receive the benefit of the employees' work and pay the employees' wages. Like all employers, they want maximum production for minimum cost; they want more public service and lower taxes. They want more police protection, better schools, improved streets, more rubbish collection, and cleaner parks, while seeking a reduction in taxes at the same time.

16. 43 PA CONST. STAT. ANN. § 1101.1003 (West 1991).

Public sector strikes commonly have a directness of confrontation which private sector strikes do not have. When public sector employees strike, they confront their employers—taxpayers and users of their services—directly with the declaration, “No services until you meet our demands.” The taxpayers and users through their elected officials respond, “No work until you agree to our terms.” The contest of wills and staying power is direct. More important, the costs of settlement are direct. The decision is controlled by those who use the services and pay for the settlement.

Contrast this with many private sector strikes. If steelworkers strike, workers in industries using steel are put out of work, but they have no voice in whether the strike continues. The settlement affects the price of all products using steel, but those buying these products have no voice in the settlement. If the airlines strike, passengers must stay home, and when the strike is settled, the passengers must pay the fare increase. But they have no direct voice in how long the strike goes on, or in the terms of the settlement. But if the street maintenance workers or the garbage collectors strike, the ones jarred by the potholes or who smell the garbage have a voice through the political process in the length of the strike and the terms of its settlement.

There is often an unarticulated assumption that public employee strikes are much more effective than private employee strikes, and that government will be paralyzed and chaos will result when public employees strike. This may be true of strikes by police, firefighters, and some other special categories of employees, but for most public employee strikes, the fear of paralysis or chaos is much greater than the pain of the reality. If the public works department strikes, car drivers will just continue to be jarred by the potholes, picnickers will go to cluttered parks, and citizens will see public buildings deteriorate for some extra weeks. If teachers strike in September, parents will suffer and children will enjoy an extension of summer vacation, with the time to be made up by reducing vacations during the year and extending school into the next summer, or substitutes will be hired to maintain the fiction of holding classes to fulfill the required 180 days of school. If the city hall employees strike, few people will even notice. Indeed, it is said by some public employees that they do not want to strike because it might reveal how little they are needed.

Strikes by public employees do, of course, cause some inconvenience and generate various degrees of economic and political pressure. However, unlike private sector strikes, they do not cut off the income of the employer. The city continues to collect taxes, even though it is not providing services or paying wages and salaries. Indeed, there are instances when a school board or a city welcomed a strike or its continuation because it helped them to balance their budget.

Public employee strikes function quite differently from private sector strikes. They bring pressure directly on those who use and those who pay for their services. These people, in turn, exert political pressure on the ones negotiating on their behalf. At the same time, the union, perhaps with the aid of other unions, will continue to exert political pressure on the employers' negotiators. Unlike a strike in the private sector, a strike in the public sector is not an economic instrument operating through the market. It is primarily a political instrument working through the political process.

VI. CONCLUSION

These comments obviously do not canvass all of the differences between public sector and private sector bargaining. They seek only to point out the most fundamental difference, and how that difference affects two important areas: the subjects of bargaining, and the use of strikes.

The law and practice of public sector collective bargaining have been slow to recognize and react to this fundamental difference and its impact. In part, this is because most of the lawyers who represent the parties in public sector bargaining are the same lawyers who represent parties in private sector bargaining. They have a tendency to carry over their ways of thinking from the private to the public sector. The legislatures also bear a large measure of responsibility, for they carried over the language of the public sector statutes from the private sector. The similarity of wording has induced a similarity of thinking.