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THE RIGHT TO STRIKE BY PUBLIC EMPLOYEES

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In the past, all strikes in the public service have been held to be against the public interest and, therefore, illegal per se. Recent years have seen an extension of the definition of public interest so as to include many groups of employees of private industry. With this extension of the term public interest to employees in private industry, there should be a concomitant withdrawal of the application of this term to employees of a governmental jurisdiction whose work no more affects the public interest than like groups in private industry.

Labor has been a potent factor in the national socio-economic picture for the past twenty-five years. Statutory law and judicial decisions have defined the rights and privileges of employees in private industry ensuring them of the right to organize, bargain collectively and strike. Labor relations in the public service have been neglected chiefly because the government has taken the position that it is sovereign and has specifically excluded public employees from the scope of legislative provisions. Public employees have become increasingly aware of the fact that individual action is ineffective in improving the economic and working conditions of the various levels of government, and this end can be achieved best through organized group effort.

ORGANIZATION IN THE PUBLIC SERVICE

Federal employees were successful in obtaining the right to organize through passage of the Lloyd-LaFollette Act in 1912 [1] which provides:

> That membership in any society, association, club or other form of organization of postal employees not affiliated with any outside organization imposing an obligation or duty upon them to engage in any strike, or proposing to assist them in any strike, against the United States, having for its objects, among other things, improvements in the condition of labor of its members, including hours of labor and compensation therefore and leave of absence, by any person or groups of persons in said postal service, or the presenting by any such person or group of persons of any grievance or grievances to the Congress or any member thereof shall not constitute or be cause for reduction in rank or compesation or removal of such person or groups of persons from said service. The right of persons employed in the civil service of the United States, either individually or collectively, to petition Congress, or any member thereof, or to furnish

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[1] 37 Stat. 555, 5 U. S. C. 652.

> information to either House of Congress, or to any committee or member thereof, shall not be denied or interfered with.

Although the Act relates specifically to postal works, it has been interpreted to give all federal workers the right to organize within limits without fear of executive reprisal. The first federal agency to enter into formal agreement with a union representing its staff was the Post Office Department.[2] The initial agreements dealt with seniority, promotions and hours of labor. Today other federal agencies engage in some degree of collective bargaining with their employees. The Securities and Exchange Commission, National Labor Relations Board, United States Housing Authority, Inland Waterways Corporation, Tennessee Valley Authority, Bonneville Power Administration and the Alaska Railroad all engage in some form of collective bargaining.

As a general rule, unless prohibited by statute, most states and their municipalities permit their employees to form employee organizations. Virginia permits its employees to organize but not with labor unions who have for a purpose the discussion of conditions of employment or who claim the right to strike. It is contrary to the public policy of Virginia to recognize or bargain collectively with a union.[3] New Jersey has also declared by statute that public employees may organize. By resolution of its board, the city of Lancing forbids its policemen to organize. Alabama law states that it is contrary to its public policy for employees to organize, because the right to organize carries with it the right to strike.[4] The city of Dallas passed an ordinance in December, 1942, which flatly forbids city employees to form any kind of labor organization. It declares:

> It shall be unlawful for any officer, agent or employee, or any group of them, of the city of Dallas, to organize a labor union, organization or club of city employees or to be or become a member thereof, whether such labor union, organization or club is affiliated or not with any local, state, national or international body or organization whose character, by-laws or rules govern or control its members in the matter of working time, working contions or compensation to be asked or demanded of the city of Dallas.[5]

The constitutionality of this ordinance as a reasonable and proper regulation was upheld in *Congress of Industrial Organization v. Dallas*.[6]

The city of Bridgeport, Connecticut passed an ordinance in 1946 which stated that it was the public policy of the city to permit

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[2] Spero, Sterling D., GOVERNMENT AS EMPLOYER, p. 361 passim.
[3] Virginia, Senate Joint Resolution, No. 12, February 8, 1946.
[4] Alabama, H. J. Resolution No. 142, July 10, 1940.
[5] Spero, Sterling D., GOVERNMENT AS EMPLOYER, pp. 30, 31.
[6] 198 S. W. (2d) 143 (Tex. App., 1946).

city employees to organize. A recent Connecticut case permitted a voluntary public school teachers' association not only to organize but also to bargain collectively for the pay and working conditions which it might be in the power of the Board of Education to grant.[7] Another recent court decision reaffirmed the right of public employees to form employee unions and to engage in activities therein even though they may be prohibited from striking.[8] One of the strongest statements made by a court with regard to the right to organize was in a Missouri case, *City of Springfield v. Clause*:[9]

> All citizens have the right, preserved by the First Amendment to the United States Constitution and Sections 8 and 9 of Article I of the 1945 Missouri Constitution, Sections 14 and 29, Art. 2, Constitution of 1875, to peaceably assemble and organize for any proper purpose, to speak freely and to present their views and desires to any public officer or legislative body . . . Organization by citizens is a method of the democratic way of life and most helpful to the proper functioning of our representative form of government. It should be safeguarded and encouraged as a means for citizens to discuss their problems together and to bring them to the attention of public officers and legislative bodies. Organizations are likewise helpful to bring public officers and employees together to survey their work and suggest improvements in the public service as well as in their own working conditions . . . Organizations of other state, county, and municipal officers are well known and have long been recognized as serving a useful purpose . . .

The above quotation is typical of the general attitude towards employee organizations. The denial of the right to organize has been limited almost entirely to organizations of policemen, firemen and teachers.[10]

Collective Bargaining in the Public Service

Any discussion of collective bargaining is usually prefaced with the statement made by President Roosevelt, a firm believer in the labor movement, to the effect that:

> The process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when

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[7] Norwalk Teacher's Ass'n v. Board of Education of City of Norwalk, 138 Conn. 269, 83 A. (2d) 482 (1953).

[8] Broadwater v. Otto, 370 Pa. 311, 88 A. (2d) 878 (1953).

[9] 356 Mo. 1239, 206 S. W. (2d) 539 (1947).

[10] Police: Fraternal Order of Police v. Harris, 306 Mich. 68, 10 N. W. (2d) 310 (1943); City of Jackson v. McLeod, 199 Miss. 508, 24 So. (2d) 319 (1946); Firemen: Carter v. Thompson, 164 Va. 312, 180 S. E. 410 (1935); McNatt v. Lawther, 223 S. W. 503 (1920); Teachers: Fursman v. Chicago, 278 Ill. 318, 116 N. E. 158 (1917); Seattle Chapter of A. F. of L. v. Sharpless, 159 Wash. 424, 293 P. 994 (1930).

> applied to public personnel management. The very nature and purposes of Government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organizations. The employer is the whole people who speak by means of laws enacted by their representative in Congress. Accordingly administrative officials and employees alike are governed and guided, and in many cases restricted, by laws which establish policies, procedures or rules in personnel matters. Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of Government employees.[11]

The collective bargaining agreements in the Federal agencies have never been challenged. The problem arises in municipalities which have limited jurisdiction depending on delegation of authority from state constitutions, statutes or city charters. Provisions of a city charter, so far as they deal with hours, wages, and working conditions of city employees, preclude collective bargaining with respect thereto.[12] Many public bodies, including the cities of Chicago, Illinois and Denver, Colorado have dealt with the problem in an effective manner by adopting the policy of paying the prevailing wage that similar work pays in the community in private employment. The respective city councils have approved such wage scales when evidence is presented to them that justifies the requested wage adjustments.

Other cities have a somewhat hybrid type of collective bargaining. Such collective bargaining agreements are incorporated in ordinances or resolutions. A Florida court recently upheld the action of a city which had refused to bargain with its employees in the water works on the theory that the city charter did not impose a duty on it to bargain.[13] After a similar decision by an Ohio court [14] holding that the city of Cleveland had no power either through the state contitution or its city charter to contract with a union representing motor coach employees, the legislature passed a law permitting collective bargaining agreements in public utilities taken over from private ownership where previous collective bargaining agreements were in force.[15] The closed or union shop contract has been rejected as being a denial of equality of opportunity of employment, improper discrimination between classes of people and to be restrictive of competition on public works.[16]

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[11] Letter to Mr. Luther Seward, President of the National Federation of Federal Employees, August 16, 1937.

[12] Mugford v. Mayor of Baltimore, 185 Md. 266, 44 A. (2d) 745 (1945).

[13] Miami Local No. 654 v. Miami, 157 Fla. 445, 26 So. (2d) 194 (1946).

[14] City of Cleveland v. Division 268 Amalgamated Association of Street, Electric and Motor Coach Employees, 30 Ohio Op. 395 (1945).

[15] Ohio Laws, 1945, Sec. 258, July 18, 1945.

[16] Fiske v. The People, 188 Ill. 206, 58 N. E. 985; Adams v. Brenan, 177 Ill. 194, 52 N. E. 314.

The author of a recent book on labor problems in government[17] criticizes the present method of negotiation because decisions must be made by administrative officials making it necessary for courts to set and define the area of negotiation. Without statutory law to guide them, the courts must look to other statutory law and to case law of dubious relevance in deciding such matters as legality of union recognition and affiliation, the closed shop, majority representation, the check off, and other issues relating to collective bargaining in public employment. Godine suggests as a solution to the collective bargaining problem explicit statutory prescription of the permissible area of group consultation and of the criteria to be observed in the making of vital decisions affecting conditions of employment. There should be expressed or implied legislative approval of important administrative revisions in the terms of public employment. Maintenance of the open shop and unrestricted eligibility to union membership should be maintained unless a denial were clearly warranted on such grounds as dishonesty or a betrayal of associational confidences.[18]

RIGHT TO STRIKE IN THE PUBLIC SERVICE

A thorough study of all strikes against the government was made in 1940. Of the 1,116 strikes studied, the author comments that "the calling of a strike, regardless of its duration means the existence of a labor problem, the exhaustion of pleas and patience, and the accumulation of resentment to the breaking point . . . government strikes are normal results of existing maladjustments in public employment."[19] Ziskind analyzed that the failure of wages to rise with the cost of living was the major reason for strikes coupled with the fact that the usual budget set wages one year in advance. Those governmental jurisdictions that set wages equal with the prevailing wages in the community did not have to cope with the strike problem. Another major cause was the refusal of officials to permit organization of government workers. A third important cause was conflict regarding collective bargaining. The unit of government would feel that to bargain was incompatible with the authoritarian role of government. Other minor causes involving working hours, affiliation with the general labor movement, discrimination and fringe benefits.

Government workers have been slow to organize and reluctant to strike. Most of the strikes have been promulgated by those workers in the craft and industrial field who are more closely aligned with the national trade unions. It is actually remarkable

[17] Godine, Morton Robert, THE LABOR PROBLEM IN THE PUBLIC SERVICE, p. 92.
[18] *Ibid*, p. 283.
[19] Ziskind, David, ONE THOUSAND STRIKES OF GOVERNMENT EMPLOYEES, Breakdown of strikes; Public legislation and administration 3, public protection 66, public education 23, public health and sanitation 94, public road construction 72, public parks and recreation 18, public property maintenance 62, publicly owned utilities 114, public employment projects 664. Many of these strikes lasted for less than one day and the average was six days.

that there have been so few strikes considering the lack of recognized procedures for settling labor controversies. Most government unions, affiliated or not, have as a matter of policy adopted a no strike provision. The public is inclined to take its civil servants for granted until there is an interruption of the usual services, and then the concern is the restoration of the services rather than attempting to correct the working conditions of the public employees.

It was not until the close of World War II with its consequent labor unrest resulting in a number of strikes that anti-strike legislation was passed. The Taft-Hartley Act, passed in 1947,[20] specifically prohibits public employee strikes:

> It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government Corporations to participate in any strike. Any individual, employed by the United States or by any such agency, who strikes, shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for reemployment for 3 years by the United States or any such agency.

There have been no strikes since the passage of this Act and the validity of this legislation has not been questioned.

About one fourth of the states have passed similar legislation.[21] The Michigan statute is typical and pertinent portions read as follows:

> An Act to prohibit strikes by certain public employees; to provide certain disciplinary action with respect thereto; to provide for the mediation of grievances and to prescribe penalties for the violations of the provisions of this Act . . . No person holding a position by appointment or employment in the government of any one or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a 'public employee', shall strike.

The Act further provides for loss of position, rights and pension unless reappointed. Reappointment, employment, or re-employ-

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[20] Labor-Management Relations Act, 29 U. S. C. A., P. L. 101—80th Cong., Sec. 305.

[21] Indiana Acts 1947, c. 341 (public utilities only); Michigan, Public Acts 1947, No. 336, p. 524; Minnesota, Laws 1947, c. 335 (charitable hospitals); Missouri, Revised Statutes Annotated, 1947, Sec. 10178.207; Nebraska, Laws 1947, c. 178; New Jersey, Acts 1947, Senate 323 (public utilities only); New York, Gen. Laws 1947, c. 391; Ohio, Code Supp. 1947, Sec. 17-7; Pennsylvania, Laws 1947, p. 1161; Texas, Laws 1947, c. 135; Virginia, Laws 1946, c. 333; Washington, Laws 1947, c. 287.

ment are conditioned on not receiving any more salary than was received at the time of the violation. No salary increase can be granted for one year and the employee is on probation for two years. The constitutionality of the Act was tested in *Detroit v. Division 26 of Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America.* The court held that the right of public employees to collectively refuse to render the services for which they are employed differs in legal point of view from the right of private employees to strike and that the classification of public employees for purpose of applicable legislation was valid. The court recognized that the operation of a transit system was a proprietary activity of government but held that this constituted engaging in a public enterprise for a public purpose.[22]

Experts advocate differing opinions on the right of public employees to strike.[23] Some adopt the view that government is different and that no one has the right to strike against the government at anytime under any circumstances even though this is not the view they express with regard to employees in private industry. A number of reasons have been advanced in support of their conclusions: the state is sovereign and cannot tolerate defiance on the part of its employees; the state represents all of the people and all groups and cannot yield to the pressure of one group; conditions of employment in the public service are fixed by law, unilaterally, and cannot be made the subject of bargaining and bilateral agreements as in a treaty between sovereign powers; the principal employment decisions are made by legislative bodies, not by executives, and consequently a strike is directed against the ultimate representative assemblies, which by definition cannot and in the general interest ought not to have their free decision foreclosed by force. These sentiments were echoed by a New York court in the following language:[24]

> To tolerate or recognize any combination of Civil Service employees of the Government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our Government is founded. Nothing is more dangerous to public welfare than to admit that hired servants of the state can dictate to the Government the hours, the wages and conditions under which they will carry on essential services vital to the welfare, safety and security of the citizen. To admit as true that Government employees have power to halt or check the functions of Government, unless their demands are satisfied, is to transfer to them all legislative, executive and judicial power. Nothing would be more ridiculous.
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> The reasons are obvious which forbid acceptance of

[22] 332 Mich. 237, 51 N. W. (2d) 228 (1952).
[23] *Strikes in the Public Service*, 10 PERSONNEL REVIEW (January, 1949).
[24] Railway Mail Ass'n v. Murphy, 180 Misc. 868, 44 N. Y. S. (2d) 601 (1943).

> any such doctrine. Government is formed for the benefit of all persons, and the duty of all to support it is equally clear. Nothing is more certain than the indispensable necessity of Government, and it is equally true, that unless the people surrender some of their natural rights to the Government, it cannot operate. Much as we all recognize the value and the necessity of collective bargaining in industrial and social life, nonetheless, such bargaining is impossible between the Government and its employees, by reason of the very nature of Government itself. The formidable and familiar weapon in industrial strife and warfare—the strike—is without justification when used against the Government. When so used, it is rebellion against constituted authority.

Another view that is often expressed is that strikes in the public service are to be avoided, but circumstances may exist and occasionally do in which a strike is defensible in the public interest itself and unavoidable in the interest of employees. The belief is that the right to strike as a means of securing improvement in conditions of employment is one of the fundamental elements of liberty in the American sense of the term and has been an incentive in private industry for better management. Government employees abhor violence and would resort to the strike as a last resort. Strikes are tolerated in private industry, and yet when the government is engaged in the same type of activity, the strike becomes illegal. Justice Buford in a vigorous dissent put it this way:[25]

> in the operation of its waterworks system, the city acts in its proprietary or corporate capacity and not in its sovereign governmental capacity; that in the performance of such activity the city is bound by the same laws and burdened with the same duties toward its employees in that activity as may be applicable to any persons or corporation engaged in like activity.

Strikes in the public service are not necessarily more serious than those in which private employees are engaged. Certainly a strike on the nation's railroads, coal mines, or milk industry is more serious than a strike of file clerks, street sweepers, welfare employees or golf course employees.

The true test should depend on the nature and gravity of the consequences involved in a strike, whether by the government, a government corporation, mixed enterprise or a private enterprise affected with the public interest. A rule that "a strike that would bring direct, immediate, certain, and serious danger to a primary interest of the community should be prohibited by law, with adequate sanctions, but also with adequate means to secure full public consideration and solution of the issues involved" would be a

[25] Miami Local No. 654 v. Miami, 157 Fla. 445, 26 So. (2d) 194 (1946).

good rule. Certainly the past decisions of some courts would still be good law under this rule. This is illustrated by the enjoining of strikes in two hospitals on the grounds that such strikes were contrary to the best interests of the general public.[26]

Both statutory law and judicial decisions discriminate arbitrarily against a large group of Americans by excluding them from labor legislation and enacting statutes limiting their rights and privileges. It is clear that there should be an extension of the definition of public interest to include employees of private industry where cessation of work results in great harm to the public interest. Strikes should be banned when the public interest is harmed whether the strike be by private or public employees. It is important that public employees have the right to strike when the public interest is not harmed and when the government is engaged in proprietary and not sovereign activities.

NOTES AND COMMENTS

TORTS — INTERPRETATION AND OPERATION OF COLORADO'S GUEST STATUTE CLARIFIED IN SEVERAL RECENT CASES—The latest, and perhaps the most important, of the recent guest statute cases is *Pettingell v. Moede.*[1] In this case the plaintiff's injury resulted from an automobile accident which occurred when the defendant driver, who was inexperienced in mountain driving, applied his brakes and slid off of an icy highway on a mountain pass. He had been warned to put on chains, but had not done so as there were "winter" tires on the jeep that he was driving. The plaintiff, who was a guest and the only passenger, had made no protest on the defendant's driving. There were only minor variations in the testimony, and the case was submitted to a jury which returned a verdict for the plaintiff. The defendant appealed from the judgment entered on this verdict, and the Supreme Court reversed with directions to dismiss the action.

The Court states that recent presentations made to it have revealed that there is still a good deal of uncertainty and confusion as to the provisions of our guest statute.[2] The statute specifies three instances where the driver of a vehicle may be liable to his guest. Neither intentional accident nor intoxication are here involved, so if there is a liability, it has to be on "negligence consisting of a wilful and wanton disregard of the rights of others." Admitting that it has previously been said that this phrase is self-evident,[3] the Court undertakes to clarify the interpretation of it.

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[26] Society of N. Y. Hospital v. Hanson, 59 N. Y. S. (2d) 91 (1945); Jewish Hospital of Brooklyn v. Doe, 252 App. Div. 581.

[1] — Colo. —, 1953-54 C. B. A. Adv. Sh. No. 15, p. 358.

[2] '35 C. S. A., c. 16, §371.

[3] Foster v. Redding, 97 Colo. 4, 45 P. (2d) 940 (1935).