Chapter VI

GRIEVANCE ADJUDICATION IN PUBLIC EMPLOYMENT

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Government today is the largest employer in our economy. In 1957, federal, state and local units of government together employed approximately 7.4 million civilian workers. About a third of this number were in the federal government, half were employees of local governments, and the remainder (seventeen percent) were state employees. To put it another way, today one of about every seven wage and salary workers in the United States is a government employee. Furthermore, the trend is upward. In 1929, there were about three million government employees, who constituted about ten percent of all wage and salary earners. Now government employees constitute fourteen percent of the total.[1] Whether or not this trend is desirable has been widely debated, but few people expect it to be reversed.

Public employment has its special industrial relations problems, which are numerous and intriguing, but which have received surprisingly little attention from academic students of the labor field.[2] During the past twenty years or so, scholars

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[1] *Economic Report of the President,* January 1958, p. 140; Irving Stern, "Government Employment Trends," *Monthly Labor Review,* July 1957, pp. 811-815.

[2] Although the literature is sparse, there are some articles, books, reports, and speeches which are excellent treatments of some aspects of the problem. This is not the place for a comprehensive bibliography, but the following examples may be cited: Floyd W. Reeves and Paul T. David, *Personnel Administration in the Federal Service,* No. 1, President's Committee on Administrative Man-

(Footnote continued on following page.)

have written thousands of words about industrial relations in every important industry in the United States, and they are now embarking on studies in foreign lands. The investigation of industrial relations problems of government agencies in the United States has been left chiefly to government administrators, who appear increasingly to believe that government can profit from an examination of practices, policies and procedures in private employment and from a consideration of the possibilities of adapting them to public employment. To cite some examples: The Labor Department of New York City has made recommendations to the Mayor, based on extensive studies, for a city labor relations policy that would incorporate many of the practices of private industry. The City of Philadelphia has employed Eli Rock as a labor relations consultant for several years, and it recently became the first large city in the United States to enter into a collective bargaining agreement providing for exclusive recognition of one union as the representative of all non-uniformed city employees.[3] At the request of the Michigan Civil Service Commission, the Labor and Industrial Relations Center at Michigan State University has undertaken an analysis of grievance and appeals procedures in the state service for the purpose of submitting recommendations for improvement.[4]

This paper is concerned with one strategic industrial relations problem in public employment: the final disposition of employee grievances which cannot be amicably adjusted. The

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agement, 1937; Sterling D. Spero, *Government as Employer,* 1948; National Civil Service League, *Employee Organizations in the Public Service* (undated); two reports (1952, 1955) by the Committee on Labor Relations of Governmental Employees of the American Bar Association; M. R. Godine, *The Labor Problem in the Public Service,* 1951; Eli Rock, "Practical Labor Relations in the Public Service," *Public Personnel Review,* April, 1957, pp. 71-80; Joseph P. Goldberg, "Constructive Employee Relations in Government," *Labor Law Journal,* August, 1957, pp. 551-556; and a series of monographs issued in 1955 by the New York City Department of Labor.

[3] The city has had contracts since 1944 with the same union (District Council No. 33 of the American Federation of State, County and Municipal Employees), and it has bargaining relations with representatives of firemen and policemen also.

[4] Associated with the author in this project are Melvin J. Segal, faculty research associate in the Center, and (during 1957) William Van DeVeer, graduate assistant.

employer-employee relationship, whether in public or private enterprises, inevitably involves frictions which produce grievances. In the sector of private employment covered by labor-management contracts, the solution to this problem that has been almost universally accepted is final and binding arbitration. It is estimated that more than 90 percent of all collective bargaining agreements today provide arbitration by a neutral as the termination device for unsettled grievances arising under the contract. Even in the absence of any other evidence, this widespread acceptance of arbitration as the final step in the grievance procedure would indicate that labor and management in private industry have found that this device meets an important need. Yet arbitration is all but unknown in public employment. The purposes of this paper are to explain why this is so, and to consider whether industrial relations in government might be improved by an adaptation of the principle of neutral adjudication of unresolved grievances.

We must begin with a consideration of the differences between public and private employment which are significant for our purposes. At the risk of carrying coals to Newcastle, let me state briefly the institutional foundation on which private grievance arbitration rests. An arbitration system in private industry is usually established by an agreement between an employer and a union. The union typically is the exclusive bargaining representative of the employees. This arrangement basically rests on a rather elaborate structure of law and practice protecting the right of employees to join unions of their own choice, providing for designation by public authority of the appropriate bargaining unit, and guaranteeing to the union chosen by the majority in that unit the right to serve as the exclusive representative of the employees. The essential elements of this institutional framework are almost wholly absent in public employment.

Generalizations about public employment are hazardous because of the tremendous diversity of government operations. There are exceptions to almost any generalization that might be formulated. However, there are some widely prevalent characteristics of public employment that should be noted here.

At least in theory, the people are sovereign in a democracy, and it is all of the people who are ultimately the employers of government workers. The sovereign people have delegated their functions, responsibilities, and prerogatives as employers; but the system of "checks and balances" in our form of government has resulted in diffusion of the delegated authority. The legislature generally determines basic conditions of employment, such as wage rates and fringe benefits. The courts provide some protection for job rights of public employees. Probably the executive branch has the greatest responsibility for industrial relations. However, even within the executive branch, we find a much greater diffusion of authority than is common in private industry. Line or operating officials have the major responsibility for day-to-day direction of employees and they have a great deal of control over working conditions. However, much independent authority is vested in a civil service commission or board.

Civil service is the creation of reformers of several generations ago who thought the public administration would be improved by eliminating the spoils system. Hence, civil service commissions are given considerable formal independence from political officials and are vested with many strategic management functions, such as determination of qualifications for employment and establishment and administration of job classification systems. Most commissions also review, sometimes before the event, discharges or other disciplinary actions against employees. The degree of actual independence from operating officials varies, of course. In some jurisdictions, the commission may give rubber-stamp approvals to most decisions of operating officials. But, on the other hand, the Michigan Civil Service Commission has the constitutional authority to order general wage and salary increases without reference to the legislature; and the commission's operating budget is constitutionally fixed at a percentage of total state payrolls. In general, the civil service commission in most jurisdictions has much greater independence from operating officials than does the personnel or industrial relations department in a private enterprise.

Another characteristic of public employment is the almost universal acceptance of the idea that public employees have no right to strike. A firm stand on this point helped to make Calvin Coolidge President of the United States. Another governor of another generation, but with the same aspiration, put the matter in this way in 1947: [5]

Realism requires recognition of the fact that public employees do use the strike weapon. New York City's subway riders can testify on this point; and a number of years ago, a book was published bearing the intriguing title, *One Thousand Strikes of Government Employees.*[6] Nevertheless, the strike is certainly not a generally effective or widely-used weapon in public employment.

Collective bargaining in private industry presupposes the freedom of the employees to withhold their labor, in the event of disagreement. The legal limitations on strikes by government employees, added to the other distinguishing characteristics of public employment, place their collective bargaining efforts on a different basis. There is rather widespread acceptance of the idea that genuine collective bargaining is impossible in the public service. Furthermore, law officers of governmental units have argued, and courts have sometimes held, that agreements between unions and government agencies are an illegal delegation of authority. These doctrines are not universally accepted, as is shown by the fact that one of the many public employee unions is party to 136 bilateral contracts in 22 different states.[7] But only a very small fraction of govern-

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[5] Statement by Governor Thomas E. Dewey of New York on signing the Condon-Wadlin Act; quoted in *New York Times,* March 28, 1947.

> "A public employee has as his employers all the people. The people cannot tolerate an attack upon themselves. . . . A strike against government would be successful only if it could produce paralysis of government. This no people can permit and survive."

[6] By David Ziskind; published 1940.

[7] Information supplied by Department of Research and Service, American Federation of State, County and Municipal Employees. This union also reports 76 "unilateral agreements" in the form of statements of policy or resolutions by employing authorities.

ment employees are covered by collective bargaining arrangements.

Generally speaking, there is no statutory protection of the right of public employees to join unions, there is no machinery for determining appropriate bargaining units or for holding representation elections, and there is no doctrine that the majority representative must be the exclusive representative of the unit. Such statutory provisions covering private employment assume the legitimacy or the desirability of collective bargaining, an institution that is still regarded with suspicion or hostility by most governmental units so far as their own employees are concerned.

Under these circumstances, it is not surprising that there is less union organization in government than in private industry. Roughly 18 percent of all government employees belong to unions, as compared with about 34 percent of all non-governmental wage and salary workers. The extent of organization is considerably greater on the federal level than on the state and local level. About 36 percent of the federal employees belong to unions; probably no more than 10 or 15 percent of the employees at the state and local level are union members. About one million of the 7.4 million government employees are so-called "blue-collar" workers, and it is among this group that unionism is numerically strongest. In the federal service, for example, nearly half of all the union members are in the Post Office.[8] Another common characteristic of public employee organization is multiple unionism. The Post Office employees are divided among eleven unions, many of them with overlapping jurisdictions, and this situation is by no means unusual.

The foregoing summary makes it easy to understand why one authority has said that there is one word that best characterizes the practice of industrial relations in public employ-

[8] Statistical estimates based on the following: Goldberg, *op. cit.;* Roland Posey, "Employee Organization in the United States Public Service," *Public Personnel Review,* October, 1956; *Fortune,* May, 1955; plus examination of union membership figures reported by the U. S. Department of Labor and the National Industrial Conference Board. "Employee associations" which sometimes undertake some of the functions of unions are not included in these figures.

ment—and that word is "chaotic." [9] Clearly, the preconditions on which private grievance arbitration depends are all but nonexistent in government. It might at first appear futile to attempt to adapt private arbitration to such an inhospitable environment. Yet government jurisdictions have accepted the principle of impartial participation in grievance adjudication in sufficient numbers to suggest that this device can make a substantial contribution in government as it has in industry.

Most of the larger governmental jurisdictions have recognized the need for formal grievance and appeals procedures. This fact is shown by a questionnaire survey undertaken last fall by Michigan State University and the Michigan Civil Service Commission. Except where otherwise noted, the ensuing information is taken from the questionnaire returns, which covered eighteen jurisdictions, including the more populous states, the largest cities, the TVA, and the federal government. These jurisdictions account for about 38 percent of total government employment.

The approaches now used in the final adjudication of employee appeals can be roughly classified into four main categories. The first is final and binding arbitration by neutrals selected by mutual agreement of the agency and the employee representatives. This method is rare. Some examples are found in proprietary activities of government. The Tennessee Valley Authority has had a conventional arbitration clause in its contract with a council of unions for a number of years. Some other public power authorities and autonomous government corporations have followed this example.[10] The New York City Transit System finally adopted this type of procedure after a number of years of experimentation with other devices, including the use of an "impartial advisor." There are also examples of arbitration clauses covering more than merely proprietary activities. The American Federation of State, County and Municipal Employees has provided me with a list of more than 70 of its agreements containing such clauses.[11] Among the

[9] Eli Rock, *op. cit.*

[10] Spero, *op. cit.*

[11] Information supplied by Department of Research and Service.

cities included in this category are New Haven [12] and Norwalk, Connecticut; Niagara Falls and Troy, New York; Dayton, Ohio; and Racine, Wisconsin. A few other municipalities have similar clauses in contracts with unions like the Teamsters which are composed mainly of employees in private industry.

The second category is adjudication by a permanent appeal board established by law and independent of operating agencies and the civil service commission. This arrangement is found in two states, Connecticut and Massachusetts. In both of these states, the decisions of the appeal boards are final, but their jurisdiction excludes some important matters, particularly classifications and examinations. A hybrid arrangement is found in New York State, which has a statutory classification and compensation appeals board with one member representing the Civil Service Commission, one representing the Budget Director, and three State employees.

The third and most popular category is adjudication by, or under the control of, a civil service commission. This arrangement is found in New Jersey, Maryland, Minnesota and Wisconsin, where the commission itself (or some of its members) hears all appeals. In California, Illinois, Louisiana, the City of Los Angeles, and the United States Government, full-time employees of the commission hear appeals, with appeal to or review by the commission itself.

An important variation on the third type is found in Michigan and New York State, where proceedings remain under the control of the commission but with provisions made for participation by outside neutrals. The Michigan Commission has established a panel of hearing board members who are assigned in groups to hear particular appeals. None of the hearing board members is a State employee. Their decisions may be appealed to the Commission, but most are not. In New York State, the President of the Commission appoints a Grievance Board composed of one employee of the Commission and two representatives of the public. This board considers matters other than classification and compensation, and its "findings

[12] Recently an Academy member, Dean L. J. Ackerman, arbitrated a dispute between New Haven and the AFSCME under the auspices of the American Arbitration Association. *The Public Employee,* February, 1957, p. 13.

and recommendations" are not appealable, but in some situations they are only advisory in effect. The members of this board serve "at the pleasure" of the President of the Civil Service Commission.

The fourth category can only be called "miscellaneous." Pennsylvania provides for the appointment of a tripartite, advisory fact-finding panel at the request of any employees whose complaints or requests have not been satisfactorily resolved.[13] Philadelphia provides for an "advisory board" with a neutral chairman as the final step in a formal grievance procedure. In many jurisdictions, the final appeal is to the chief operating official—mayor, governor, township supervisor, or the equivalent. There are many other variations; but the foregoing examples indicate the diversity of techniques now in use in public employment for the final resolution of employee grievances.

No doubt this diversity reflects to some degree the widely varying circumstances of public employment. Other sources of diversity are statutes and judicial decisions which, in many jurisdictions, limit the freedom of action of the governmental agencies involved. But some of the diversity is clearly the result of confusion and uncertainty. Perhaps a critical examination of the main types of settlement techniques may help to clarify the nature of some of the problems and suggest some possible answers.

Final and binding arbitration of public employee grievances can be used in only a very limited number of situations. As already stated, the successful operation of this technique presupposes the kind of established collective bargaining relationship that is rare in public employment. Furthermore, there are legal barriers to arbitration in some jurisdictions. As already noted, there have been some rulings that even collective bargaining agreements are illegal. Some courts have specifically held that a public agency cannot enter into an agreement to arbitrate and to be bound by the result, because such an agreement is an illegal delegation of the authority entrusted to the

[13] Pa. Stat. Ann. tit. 43, Sec. 215.1, 1947, as amended.

public agency by the sovereign people.[14] However, no distinction has been made in these decisions between the arbitration of substantive terms of employment and the arbitration of grievances over the application of those terms of employment to particular cases. Such a distinction was made by the highest court of Connecticut in reaching the conclusion that grievance arbitration is permissible,[15] which perhaps helps to explain the fact that two Connecticut municipalities have arbitration clauses in contracts with the AFSCME. Even if the opposition of courts and legal officers could be overcome in other jurisdictions, it seems unlikely that conventional arbitration would be widely adopted in the absence of other basic changes in the structure of industrial relations in government.

The use of an independent, permanent appeal board in public employment is superficially similar to the permanent umpire system in private industry. An important difference is that its personnel is not chosen by the parties who are expected to abide by its decisions. One consequence of this difference is likely to be a relatively high ratio of decisions appealed to the courts. Further, it has been pointed out that in the past there has been some tendency to appoint "lame-duck politicians" to such boards.[16] However, assuming the necessary statutory authorization, and assuming the appointment of qualified personnel—crucial assumptions—the independent appeal board can provide some of the important benefits of third-party adjudication. There seems to be no persuasive reason for excluding classification and examination appeals from the jurisdiction of such boards, as is done in both Massachusetts and Connecticut. I will return to this point shortly.

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[14] Perhaps the leading case on this point is Mugford v. Mayor and City Council of Baltimore, Circuit Court of Baltimore, April 13, 1944, 8 C. C. H. Labor Cases 62137. See also Everett Fire Fighters v. Johnson, Washington Supreme Court, Jan. 7, 1955, 35 LRRM 2434; and Groehn v. Michigan Corporation and Securities Commission, Michigan Supreme Court, Nov. 26, 1957 (Court held that Civil Service Commission could provide for *assistance* in hearing cases, but "the final authority and responsibility remain its own . . .").

[15] Norwalk Teachers' Assn. v. Board of Education, Connecticut Supreme Court of Errors, July 30, 1951, 28 LRRM 2408. Rather surprisingly, the court held that the dismissal of a teacher did not constitute an appropriate subject for arbitration.

[16] Spero, *op. cit.*, p. 406.

Dependence on adjudication by a civil service commission or by its own employees involves several difficulties, some practical and some conceptual. In the larger jurisdictions, the commission is primarily a policy-making body, and it simply does not have the time necessary for lengthy hearings and careful consideration of individual grievances that are appealed. Delegation of grievance adjudication to subordinates only partly solves the problem if the commission takes seriously its obligation to review the performance of the subordinates.

A more fundamental difficulty grows out of the dual role assigned to the typical civil service commission: to represent the public interest in protecting civil servants from sinister political influences; but also to perform such clearly managerial functions as classification of jobs, and determination of qualifications for appointment and promotion. Hence, in one sense the civil service commission is distinct from management; but in another sense it is really a part of management.

The commission, and perhaps some of its staff members, can usually be regarded as "neutrals" in the review of personnel actions such as dismissals that originate in operating agencies. But in most jurisdictions it is the commission itself, or its staff, that has the primary responsibility for job classification and examinations. In practical terms, a grievance appeal involving job classification requires one civil service staff member to sit in judgment on the action of a fellow staff member, or it requires the commission to review the work of its own staff. In either case, there would appear to be considerable pressure for a presumption that the challenged determination is correct. It could be argued, for example, that if the commission does not have sufficient confidence in its staff to support it most if not all of the time, it should get a new staff. Under such circumstances, real impartiality may play havoc with human relations within the commission staff. And when appeals on these subjects are denied, however justifiably, the disappointed grievant will find reason in the close relationship between reviewer and reviewed to doubt the impartiality of the procedure.

A simple but drastic solution for this problem has gained wide acceptance. It is to bar any appeals of job classification or examination grievances. Ten of the 18 large jurisdictions

covered by our investigation bar examination appeals, and eight of them bar classification appeals. In defense of this solution, it is sometimes argued that both examinations and job classifications involve highly technical problems on which only the technician is qualified to pass judgment. This argument appears questionable, in view of the large volume of comparable cases regularly handled in private arbitration, presumably with reasonably satisfactory results. The seriousness of the exclusion is shown by the substantial number of appeals involving examinations and classifications that are processed in those states which do not bar them. In Michigan, for example, examination appeals regularly constitute from 12 to 30 percent of the total, and last year classification appeals were 6 percent of the total. To bar appeals on subjects of such great concern to employees is to ignore the problem rather than to solve it.

This examination of adjudication procedures in public employment would be incomplete without a judgment concerning the quality of decisions. Let me preface this judgment with the observation that in private grievance arbitration, the most experienced practitioners seem to be in substantial agreement on some elementary principles, especially on the subject of discipline. For example, most of them would rule that under most circumstances an employee should be informed that a certain act is a punishable offense before he is penalized for committing it. Most of them would hold that the basic purpose of discipline is correction of undesirable conduct rather than retribution. I do not suggest that there is universal agreement on all of the questions that commonly arise in private arbitration; neither do I suggest that arbitrators ignore the unique circumstances of the particular case. I do suggest that the application of many minds to basically similar industrial problems has gradually developed a kind of "common law" concerning some of those problems. This development has been criticized by some; but I believe that most of the criticisms are specious, and that both labor and management in private industry find most aspects of this "common law" acceptable.

I have read a great many opinions from a number of governmental jurisdictions, and I have examined the awards of some

of those agencies that do not prepare opinions. Some of the opinions and awards appear to be impeccable. In many of the cases, however, it is quite apparent that the adjudicators are dealing with unfamiliar problems, and the results are sometimes highly questionable. Many of these government adjudicators labor in ignorance of the highly pertinent body of thought and experience developed in handling fundamentally similar problems in private arbitration. This is but another manifestation of the isolation of governmental industrial relations from the main body of industrial relations practice and principle.

One solution for some of the many problems of grievance adjudication in government that have been discussed here would be for government agencies, especially civil service commissions, to devise ways of making use of experienced industrial arbitrators in such adjudications. While conventional arbitration is not possible in most governmental jurisdictions, there seems to be no reason why experienced arbitrators could not be appointed on an ad hoc basis to render advisory opinions on almost all types of unresolved public employee grievances. They could be substituted for the full-time staff members now performing this function in some jurisdictions; they could be added to hearing boards, such as the one now used in Michigan; and they could serve on the permanent appeal boards, such as those now in existence in Connecticut, Massachusetts, New York State, and elsewhere. Parenthetically, I assume that many arbitrators would be willing to devote a reasonable amount of time to such assignments as a public service, despite the sacrifices that would be involved.

The arbitrators would not usually be the mutual choice of the parties to particular disputes, but the impartiality of men and women who are repeatedly chosen by companies and unions in private employment should be above question. This demonstrated impartiality would be particularly advantageous in the handling of classification and examination appeals. While decisions would be subject to review by the civil service commission or other governmental authority in most jurisdictions, the decisions could be of great value in sharpening the issues for consideration. Where the transcript as well as the

decision must be reviewed (as in Michigan), the experience of most private arbitrators in conducting informal but orderly and expeditious hearings could help to develop a useable record. Most important, such substantive wisdom as has been developed in private arbitration could be adapted, on a case-by-case basis, to the circumstances of public employment.

It must be realized that most of these benefits would accrue only if the reviewing authorities were willing to give considerable weight to the advisory decisions. Some systems of "advisory arbitration" have broken down because of the rejection of most of the recommendations submitted to the reviewing authority.[17] On the other hand, arbitrators could not expect automatic acceptance of all of their recommendations. What I propose might not work in some situations, but it seems to be worth at least a trial. Experiments of this kind might help to stimulate the overdue reexamination of industrial relations concepts, policies and practices in public employment.

Since the early days of enthusiasm for civil service reform, many people have argued that the government should be a "model employer," or should at least be abreast of the best practices in private employment. On some matters, particularly fringe benefits, and in some jurisdictions, this policy has been followed. But in the handling of employee grievances, especially in their adjudication, government generally has fallen far behind private industry. There is abundant evidence that the provision of well-defined channels for handling employee grievances and the provision for impartial adjudication of unresolved grievances is an important morale factor in almost any kind of employment. Neutral participation in the final stage of the grievance process helps to induce reasonableness in the earlier stages, and it also helps to insure fair treatment of both employers and employees. It would be a mistake—and in many respects an impossibility—to attempt to transfer to all kinds of public employment all of the procedures

[17] For example, an "Impartial Grievance Committee" was established in the 1940's in the New York City transit system. "So little interest did the Board [of Transportation] show in the . . . Committee's recommendations that routine reports asking that employees who had died or left the service be taken off the rolls came back stamped 'denied'." Spero, *op. cit.*, p. 418.

and policies of grievance arbitration in private employment; but a great deal of adaptation to the requirements of public employment seems to be both possible and desirable.

Discussion—

ELI ROCK *

Professor Killingsworth, in the first part of his remarks describing the existing state of public service labor relations in the United States, has referred to such things as the confusion of concept, the obvious need for adaptation and adoption of larger areas of private industry labor relations experience, and the simple lack of information as to what is actually happening. All three of these characteristics can be further sharply illustrated, I believe, by an experience of one of our fellow Academy members:

Father Leo Brown once told me, quite accidentally, of a case some years ago where he had been called in as an arbitrator in a small, midwestern, highly union-conscious town. It seems that the local government and the union of its employees had negotiated the terms of what would normally be a contract, but which were instead embodied in the form of an ordinance by the local legislative body. (Not an unusual occurrence at all, incidentally, at the level of state or local government.) A question having arisen as to the meaning and interpretation of the terms agreed upon, it seemed entirely normal to both sides that Father Brown should be called in to arbitrate the question. Apparently to no one except Father Brown, who of course proceeded to arbitrate the case, did it appear at all unusual that an outside arbitrator should be called in to arbitrate the meaning and interpretation *of a law!*

Professor Killingsworth has attempted, as he has pointed out, to analyze and make recommendations on a specific aspect of labor relations where the broad canvas must be described as one that is little less than hopelessly confused. The inherent difficulties that must confront him, or anyone else who at-

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tempts such an approach in public service labor relations, are obvious.

Until such fundamental questions as the role and function of public service unions, their rights to written contracts or to exclusive bargaining recognition or to grievance procedure ending in arbitration, the difficult obstacles posed by the division of authority in government—until these, and other basic institutional and conceptual difficulties are clarified or even partially resolved, clearly the task of approaching a specific problem such as Professor Killingsworth has here attempted must be regarded as infinitely complicated.

This is not to say that the attempt is not a justified one, or even that it may not bear worthwhile fruit. Clearly, the broad and basic questions to which I have alluded, will not be answered today or tomorrow, and in the meantime, the growing dissatisfaction over such immediate problems as those posed by existing forms of grievance procedure call for steps that will be designed to lend immediate improvement at least. And while the latter may unavoidably constitute a cart-before-the-horse approach, it is entirely possible that out of the exposure and understanding that must accompany a study like the present one, progress will also be pointed toward the solutions to the ultimate problems which have been mentioned.

Insofar as Dr. Killingsworth's immediate analysis is concerned, let me start out by inserting one or two questions or qualifications regarding his preliminary evaluation of the existing situation, an evaluation which, in addition to being extremely provocative, I have found remarkably accurate, considering the lack of research and informational facilities that have generally characterized this field up to the present time.

His description of the division of authority within government, which has so complicated the labor relations in that field, however, omits to refer to the division of authority also between the state government and local government, in many places, on matters of local concern. And within the executive branch, it should be mentioned that the division of authority between an elected head of government and a civil service commission is often further complicated by the existence of virtually autonomous department heads, and in places like New

York City, by the existence of a board of estimate, which is in turn, theoretically and partially at least, independent of the autonomous departments, the mayor *and* the civil service commission.

I believe also his paper may understate somewhat the extent of unionism in the public service. The fact is that accurate figures are simply not available, and most existing statistics, in my opinion, fail particularly to give sufficient weight to the widely prevalent independent employee associations in the public service—some of which follow a behavior pattern which, despite their oddly and sadly revealing protestations to the contrary, I believe most of us would regard as justifying, at least at a minimal level, a label of unionism. Even assuming some lag in extent of organization, however, the important lag in the public service is rather in the nature and degree of the collective bargaining which is practiced.

With reference to the survey conducted for the Michigan Civil Service Commission, I believe that while the sampling of 38 percent of public employees must certainly be regarded as a formidable one, the remaining 62 percent, considering the uniquely diverse practices in this field, cannot automatically be regarded as following the same pattern. Moreover, in this field more than in most, my experience has shown me that there is often a considerable variation between what may be stated in a questionnaire, or between what a court might have regarded or might be anticipated to regard as proper or improper standards of conduct, and what is actually practiced.

A truly accurate body of information as to what is being done in public service labor relations must, I am afraid, await the considerably more expensive procedure of some on-the-spot, nationwide surveys.

Turning now to Dr. Killingsworth's analysis of the existing hearing and adjudication procedures, as revealed by the Michigan survey, I have no basic quarrel either with his evaluation or his recommendations. I do believe it is important, however, to lend some added emphasis to a common disability which must be regarded as applying, with the exception of the relatively rare, outright arbitration arrangements, to all of the

various types of "hearing arrangements" described and discussed by Dr. Killingsworth.

The members of these boards, or hearing officers operating under them, it must be emphasized, will be appointed by the elected executive, or by some other officials—that is to say, by government, which is to say, *management*. The unions, as such, have no role in the basic machinery. This is, of course, not arbitration and should not be mistakenly regarded as even approaching that, lacking union participation both in the selection and, most important of course, *termination* of those who carry the decisive vote. Moreover, a government procedure of this general character, I believe, must inevitably attract to itself through the eyes of the employees, the coloration that experience has already shown to be present in the case of civil service commissions. That is to say, to the employee, a government-appointed appeal board is a matter of law and right, something in the nature of a court, something to which he as an individual employee, quite apart from any union, has the right of access, and before which he may choose to be represented as he pleases—in some cases by a lawyer, in some cases by a union which, it must be emphasized, may represent only a tiny minority of a possible bargaining unit.

It is not my purpose at this point to render judgment on the latter. Obviously, real arbitration is not in the cards on any extensive scale for the immediate future. Clearly, given the existing state of facts, Dr. Killingsworth's approach is a completely salutary one and offers, without question, tangible possibilities of improvement *under the existing pattern*. Nevertheless, I believe it is important to re-emphasize that such an approach cannot, except by indirection and generally pointing up the further problem areas remaining, assist substantially in the resolution of the fundamental difficulties which plague public service labor relations today. Until the role and the status of the union in the public service are clarified and established, such resolution will be impossible.

Insofar as Dr. Killingsworth's call for greater assistance and participation by the members of an organization like this is concerned, I agree wholeheartedly, and would even enlarge on the suggestion. Individuals like those here present, whose qual-

ifications must be regarded as including at least a partial talent for engendering attitudes of realistic understanding and reasonableness in others, can perhaps lend important support and impetus—not alone in the immediate task of improving existing grievance machinery, but in the longer-range task which will be involved in the resolution of the basic problems in this field. Perhaps, I can inject a sense of immediacy by adding to my previous description of the basic problems a description also of a few of the practical problems which plague day-to-day relationships.

In general, the ranks of public personnel administrators are devoid of either training or interest in the rudiments of collective bargaining. The numerically tremendous importance of public employees in this country, as described by Dr. Killingsworth, and the virtual certainty that this vast pool of employees will not long be able to continue in its present state of isolation from the mainstream of labor relations in this country (pointed up by the experience of almost every other democracy in the world—or, closer to home, by the recent New York subway strike), have gone virtually unrecognized among typical public administrators. And yet where the pressure of immediate problems can no longer be resisted, the solutions agreed upon by these administrators may often be of a character which, from a technical point of view, would make the hair of a private industry labor relation's man stand on end.

In most cases, since the unions usually lack the strike weapon or any meaningful alternative, they are either reduced to coming to these officials hat-in-hand, or more often, confronting the officials with every kind of public and political pressure imaginable. The result, too, is that the unions, and through them perhaps the members they represent, may become rather closely involved with politicians and political parties.

By a strange anomaly, these latter techniques and results are relatively acceptable to many of the same public administrators whose major training and dedication have been to the preservation and furtherance of the merit system form of government. The role of a union as part of the larger and general lobbying-pressure group pattern in government, which is a pattern that is familiar and understood, seems much prefer-

able to the strange and foreboding function known as "collective bargaining." Despite the virtual absence of work stoppages in those few jurisdictions where real collective bargaining is practiced and despite the almost universal legal ban on strikes by public employees, the term "collective bargaining," in the minds of most public administrators is still one which is synonymous with "strike." That strikes may be more likely to occur as the frustrative result of long bargaining denial, or that they can in any event occur with at least equal likelihood under the lobbying-pressure pattern are facts that have apparently been ignored.

The problem is, of course, not all on one side. To many public service unions, unversed in the techniques and the restraints as well as strengths of private industry bargaining, the lobbying-pressure technique also seems the only possible path; certainly, it is the only one known. Rather than attempting, really attempting, to concentrate and pinpoint the collective bargaining effort in, let us say, the executive branch of government (and thereafter appearing jointly before the legislative branch with an agreed-upon, collectively-bargained program), the unions insist on their freedom to lobby and pressure both branches, hoping always that the legislative branch will add to whatever has been obtained from the executive, or sometimes vice versa. There is usually insistence on representation of supervisors as well as those supervised, resistance to exclusive bargaining rights in any one union and utterly no disposition to begin to evolve new patterns that will at once fit the special conditions and limitations of government and at the same time hold promise for an enduring and constructive level of labor relations.

Under the existing state of affairs, both sides, of course, lose in the long run. To those in government who believe in "good government" and a career service based on dignity, there can be no small satisfaction either in the political "pressure-cooker" process itself, or in the kind of technical results which frequently emerge from the process. Clearly, today's labor relations problems are far too complex and specialized for such handling. Moreover, in a jurisdiction where the merit system may be on somewhat less than solid footing, the loss of potentially power-

ful union support, which might otherwise be obtainable were the unions to feel a stake in the "system," should be a matter of more than passing sadness.

From the union's point of view, the lobby-pressure process may at times result in immediate advantage; but the disadvantages that are inherent in dependency on pre-election promises, in backing a political horse that may later prove to be a losing one or in the obvious opportunity that government itself has of passing the responsibility for a particular request back and forth between legislative and executive until forgotten, should be obvious. The best answer of all, perhaps, is the now almost-universal recognition, in and out of union circles, of the low estate of public service labor relations generally, in this country.

From the public point of view, too, the present state of affairs can only be regarded as unsatisfactory in the extreme.

It is not my purpose here to suggest solutions, but rather to point up the problem. Nevertheless, procedures-leading-to-solutions may, at this stage, be almost as important as the problems themselves, and deserve an additional word. This whole field, it seems to me, will some day have particular need for the individual who is trained as the middleman. If we are to assume that the ultimate answer will not be the strike weapon or some form of compulsory arbitration, there must obviously be considerably greater emphasis on an expanded and more realistic and fruitful concept of *voluntarism* in this field. (The success of that concept in the bargaining experience of Philadelphia and a number of other jurisdictions certainly makes it more than a theoretician's dream.) The fact that we are dealing here with an area of the public domain should make possible strong public demand upon both sides that voluntarism at least be given a more "honest try" than it has heretofore been afforded, and failing this, that some other new set of patterns be evolved and attempted. In pressing such a demand, the public can inquire pointedly of unions and government alike as to why, for example, public service labor relations in England have been handled so much more soundly and sensibly than here. Against such a backdrop, in addition to the need for a more enlightened corps of public administrator and union

representative, there must surely be a new and heightened role for the so-called "third-man," a role perhaps somewhat akin to that of the privately-selected grievance mediator in industry but obviously encompassing much more.

As Dr. Killingsworth has pointed out, appointments to grievance-type boards or civil service commissions in this field have heretofore ignored the men who virtually exclusively are regarded by private managements and unions in this country as the recognized middle-men. Why this has been so, I am unable fully to understand. Certainly, Dr. Killingsworth's reference to the "political" nature of some of these appointments is an important explanation in some cases, but not in all. In the case of civil service commissions, for example, it should not be overlooked that a major portion of their responsibilities, up to now at least, has included such matters as examination programs and policing of the merit system, which would normally not be regarded as part of an arbitrator's skill. Also, the average arbitrator will, at this stage, know relatively little of the special characteristics of government as an "industry."

Nevertheless, a great many commissions today do, increasingly, occupy themselves with hearings on grievances which, in their nature, resemble almost precisely some of the issues in a typical arbitration hearing; and this must be almost completely true of the appeal or hearing board type of proceeding. My own feeling is that a large share of the explanation may lie in the fact that government appointments, even without pay, are regarded and sought after by other potential appointees, as a form of prestige recognition, and that men seem frequently to be chosen in this field on the basis of their general standing in the community. I believe it is also possible that those who make the appointments may not always be sufficiently aware of the technical and professional nature of the problems, particularly in the grievance area, which may be increasingly confronting such boards or commissions.

It seems to me that there is every reason in the world why Academy members, either individually or as a group, should make themselves heard on all of this. If the attraction of technically-qualified people means that the compensation must be at least minimally adequate, this too should be made known;

certainly, government pays the minimally adequate rate for many types of services that it receives.

Most important of all, from the public's point of view, it is essential that men with skill and background such as is possessed by members of this Academy should be brought in soon to a situation that cannot long continue to drift or go by forfeiture. From their role, suggested by Dr. Killingsworth, as the members of impartial boards or commissions which hear grievances, such men may very well find themselves, before long, drawn logically into the next and major, unfolding task of assisting in the resolution of the truly basic problems in this field. Should that happen, it could not fail to be a public service of the first order.

Perhaps, in closing, I can illustrate much of what has characterized the attitude of public officials and courts in the past towards unions of public employees, and which must account in large measure for the present unsatisfactory state of affairs, by a case we had in Pennsylvania a few years ago: Under a state act passed in the late 1940's, public employees were prohibited from striking. The same act also provided, however, that public "employees" who had "grievances" could request a tri-partite, fact-finding procedure. Two discharged employees of the Philadelphia County Prison, which at that time had refused to recognize the City union, claimed that their discharge was because of union activity and sought to invoke the fact-finding procedure of the act. The County Prison, claiming that discharged persons were no longer "employees" within the meaning of the act, refused to participate in the latter procedure. The state attorney-general issued an interpretation upholding the position of the board. The matter was fought through the courts and eventually reached the Supreme Court of the state, where, by a vote of four to one, the position of the County Prison was upheld and the right of the two grievants to the fact-finding procedure was denied. (*Broadwater v. Otto,* 88 A.2d878, 370 Pa. 611, 1952).