

## CHAPTER V

# THE USE OF FACT-FINDING IN PUBLIC-EMPLOYEE DISPUTES SETTLEMENT

## I. THE UNION VIEW

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Public employees' unions have progressed in every way. I think it is interesting that the statistics of industrial growth show that the number of public employees has jumped by leaps and bounds, and the unions are moving into the public service area in the hope of increasing their membership. And I think it is significant that when a new Secretary of Labor was appointed, the only thing he said at the time he was introduced by President Nixon, the only thing he said troubled him, was the problem of strikes in the public service.

I must get invitations to at least one university seminar every month, generally to discuss the problems that are springing from this new field of employer-employee relations in the public service. The Brookings Institution got a \$400,000 grant, and I notice some of the people in this room are happily spending that grant investigating the dynamics in this new field. Articles and books galore are being printed, and I am pleased that this distinguished Academy has taken the time to include in its program a discussion of what we are doing. Perhaps we have really arrived, as witnessed by the fact that the National Right-to-Work Committee is spending most of its time trying to stop agency shops and union shops in the public service. This morning the Committee held a press conference to announce that it had managed to find a representative of a black extremist organization in one of the unions in the City of

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Detroit—this to show how the union bosses were using the agency shops across the country to enslave the workers.

### Some Problems and Some Progress

Not so many years ago most cities, all states with the exception of one, and most boards of education felt that it was an invasion of their status—an invasion of their sovereignty—if they even let a union organizer into the room.

Part of the problem we are facing is the great confusion in the field of public employee-employer relations. This confusion springs from the fact that certain things learned over the past 30 years in the private sector of labor-management relations are not necessarily applicable to the public sector. We have much to learn.

However, I should add that there has been some important progress in this area, and I will comment, for just a moment or two, on one advance—the right to organize. Recently the federal courts of appeals in Chicago and St. Louis took the position that public employees have the right to join unions. Interestingly enough, right-to-work laws in some of the most reactionary states, Texas and Arkansas, for example, have been used as a premise to guarantee our rights to organize.

There has been a change in the public point of view. For example, in a recent Gallup poll 60 percent of those polled felt that teachers were entitled to have a union, and the teachers' right to strike was also supported, although by less than a majority. In the less sensitive professions, the right to strike might even have achieved a plurality.

Here I want to say a little bit about background. It needs to be understood that this whole business of collective bargaining in the public service was considered impossible until relatively recently. Now I am not talking about the Calvin Coolidges and their position at the time of the police strike 50 years ago in Boston; I am talking about Franklin Delano Roosevelt.

I was on a television program the other night with a leader of the New York State Legislature who was quoting John Kennedy's Executive Order 10988 as evidence of the very conservative posi-

tion that some very liberal public officials have taken on the rights of public employees.

I saw Eli Rock here this morning. Fifteen years ago he helped to develop a contract in Philadelphia that granted exclusive recognition to our union—a tremendous step forward. That contract, I want to emphasize, was for public employees; but the idea seems to have died. It limited itself to Philadelphia, and little happened in other places in the country until action was taken, perhaps 10 years later, in New York City, followed by the Kennedy Executive Order on the federal level.

Despite all the talk, all the publicity, and all the excitement, and despite the fact that even newspaper editorials say, “We are for collective bargaining. We are opposed to the right to strike, but we are in favor of collective bargaining,” there are only about 10 states where there is any meaningful collective bargaining legislation, although 17 states have some legislation. Mr. Arvid Anderson will discuss the legislation in greater depth.

In the City of Philadelphia we have perhaps one of the most comprehensive public employee collective bargaining agreements in the United States. This has been accomplished without any legislative authority for that agreement. There is no collective bargaining legislation in the State of Pennsylvania. In other places we have negotiated contracts that have included such touchy provisions as union security, again without legislative authority. Our union and others have scores of contracts in the State of Ohio, in all major cities and many of the smaller ones in that state. There is no legislative authority for these contracts; and they exist despite the fact that the Attorney General would give you the opinion that such action is indecent and immoral.

Not too long ago the courts were ruling that these contracts were unenforceable. Today courts are reading them and helping to enforce them—a very encouraging development. But the uncertainty surrounding much of our bargaining makes it very difficult to develop mechanisms based on past procedures to attempt to deal with strikes and other difficult situations.

In addition to these complexities, we have this thing called Civil Service. Everybody of my age was in favor of Civil Service. It rep-

resented the only job security that existed at the time. There was also the theory that Civil Service represented a third-party mechanism devised to resolve disputes and problems between employer and employee. That is a myth of incalculable proportions. Let me give you some idea of this myth: The other night I heard someone say that it would seem almost impossible to find a leading black man in this country who was associated with the John Birch Society in a prominent position. But somehow or other, President Nixon found this man and appointed him to the United States Civil Service Commission. This man was prepared for his job. He had been an insurance agent, and Governor Reagan had appointed him to a high public position. Therefore, he was "qualified."

Some other federal and state Civil Service commissioners do have more distinguished credentials. Mr. Mason, for example, is a brilliant, able, decent man, a personnel administrator of top rank and certainly the kind of guy who, if he were white, would be head of the personnel department of General Motors or a similar industrial complex. But by no stretch of the imagination could he be an impartial third party; by no means would he be qualified to be a member of this Academy.

More often than not, moreover, we must deal with some tired old lawyer who has been running around the clubhouse. He is given a job as Civil Service Commissioner, or Public Works Administrator, or a similar appointment for which he is hardly qualified.

Even worse than working within the framework of a Civil Service system is attempting to bring order to the patronage system. Part of our continuing problem in many places in the United States, including Pennsylvania, Indiana, New Jersey, Ohio, and part of New York, is that the spoils system still exists. And it is only because we live in a society that provides many good jobs in private industry that the problem is not greater. Patronage hangs on because politicians would give up almost anything except the unilateral right to hand out jobs to people.

But, regardless of the system, the public employer simply has not put enough thought and consideration into dealing with employees and employee organizations. As evidence, I submit some sta-

tistics accumulated by the International City Managers' Association—an excellent organization, by the way:<sup>1</sup>

67 percent of the cities above 10,000 have no policy with respect to permitting employees to join nationally affiliated organizations.  
2 percent do not allow employees to join such organizations.  
29 percent do permit employees to join them.

66 percent have no policy with respect to authorizing management to punish employees for organizational activities.  
29 percent do not permit such punishment.  
3 percent admit to allowing such punishment.

66 percent have no policy with respect to allowing recognition of a majority unit.  
21 percent do not permit such recognition.  
11 percent (a very important figure) do permit such recognition.

72 percent have no policy with respect to authorizing signed negotiated agreements.  
15 percent do not permit signed negotiated agreements.  
10 percent do permit signed negotiated agreements.

68 percent have no policy with respect to authorizing arbitration of disputes.  
24 percent do not authorize arbitration.  
4 percent do authorize arbitration.

The figures can be misleading in that arbitration of some matters does exist in some very large cities, which typically do not have a city manager form of government. Also, the percentages do not refer to the number of employees but to the number of cities. Nevertheless, it is an incredible situation.

### Collective Bargaining Statutes

Let me say a word or two about the problems of legislation now on the statute books that deals with mechanisms for collective bargaining in the public sector. In many instances, the scope of bargaining is so narrow that bargaining on retirement systems is not permitted. Vacations frequently are not bargainable. Wages are often not bargainable, except through a civil dispute—which we

<sup>1</sup>Winston W. Crouch, *Employer-Employee Relations in Council-Manager Cities* (Washington: International City Managers' Association, 1968), Table 9, p. 39. The quoted statistics are based on responses to a questionnaire addressed to council-manager cities of 10,000 or more population. There are slightly fewer than 1,000 such cities in the United States; responses were received from 623, or 68 percent.

have managed to defend in our union. The Civil Service Commission, even where collective bargaining exists, fights very hard to maintain its so-called "management rights" in any discussion of arbitration of disciplinary grievances and, most importantly, in questions of job reclassification.

Most of the statutes do not mention unfair labor practices. Some of the more responsible state administrative boards have developed rules on unfair labor practices. However, one of the most dreadful strikes I have ever been associated with took place in New York recently. With great deliberateness, the Governor of New York voluntarily recognized an association in 1967 while the election petition of AFSCME was pending. In 1968, he attempted to play the same game—negotiate with the association while the same petition was pending before the state board. He forced outraged employees to strike—the only method available to them to stop the Governor from entering a cheap contract with the association. There was nothing in the statutes to stop him, although it would be considered a violation of the state labor relations law as well as the National Labor Relations Act for an employer to engage in negotiations with a union while another union's petition was pending. When we pleaded with the Governor to discontinue negotiations until elections had been held, he wouldn't listen. Instead, he proceeded to try to reach an agreement with the independent association. It was only by virtue of the strike that negotiations were stopped. What we desired was that the right of representation not be peremptorily handed to an association of the Governor's choosing under a very faulty statute.

I want to cite some basic facts regarding strikes. As David Cole wrote:

Considering the numerous cases in which disputes are not settled until after there has been resort to a strike, it may seem odd that confidence in the value of collective bargaining nevertheless persists. This is so for three reasons. The first is that we know that the strike or the threat of a strike is an essential part of negotiations; without it there could hardly be an approach to equality in bargaining power of the kind which our law seeks. The second is that the denial of the right to strike would be incompatible with tradition and would strip the element of voluntarism from the labor agreement, which is, after all, the objective of the process of collective bargaining as we understand it. . . . The third is that we have not been able

to devise a method of establishing wage rates and other conditions of employment that is more efficient and at the same time consistent with our basic political thinking. . . .

An anti-strike law should at best be addressed only to a case of genuine emergency, one in which we see as a fact that very acute harm is being done to the community; in other words a situation unlike any we have ever had, which approaches the proportions of a disaster. . . .<sup>2</sup>

And George Taylor waxed enthusiastic over the need to maintain the strike when he said:

Each substantial narrowing of latitude and every restriction upon the right to strike weakens the structure of collective bargaining. . . .

No one should have any doubt about the unlikelihood that collective bargaining can be maintained in the absence of the rights to strike and to lockout. . . .

[T]he strike . . . serves as a motive power to induce peaceful settlements. . . .<sup>3</sup>

Dr. Taylor, Mr. Cole, and Professors Dunlop, Harbison, and Bakke wrote a report for the Governor of New York which maintained that a repressive, unreasonable, and messy law is the only way to handle an impasse in the public sector—obviously in direct contradiction to their “private sector” beliefs. They continue to advocate that position.

Essentially what I am saying is this: A myth exists in this country, and I would like to say to this distinguished Academy that I am distressed by it. The myth is that there is a great emergency inherent in all strikes. In the public sector, there are very few strikes; yet it is argued very strongly that law enforcement officers, firemen, and even less essential employees have no right to strike. But we say this: The fuel oil strike and the Consolidated Edison strike in New York could have created a disaster in the city too terrible to contemplate if there had been a snow storm during those strikes.

I am saying—and for the very same reasons that Dave Cole cited to Governor Meyner—that if you are going to cope with the prob-

<sup>2</sup> David L. Cole, *The Quest for Industrial Peace* (New York: McGraw-Hill Book Co., 1963), pp. 111-12. The preceding two paragraphs are excerpts from *Report to Governor Robert B. Meyner by the Governor's Committee on Legislation Relating to Public Utility Labor Disputes in New Jersey*, Sept. 9, 1954, David L. Cole, Chairman.

<sup>3</sup> George W. Taylor, *Government Regulations of Industrial Relations* (New York: Prentice-Hall, Inc., 1948), pp. 2, 20, 21.

lem of strikes in utilities, you cannot effectively do so with restrictive legislation. Part of the problem that union officials have to deal with right now in one of our major cities is that the very existence of antistrike provisions incites the membership to force their leaders to prove their manhood by calling a strike and going to jail for 10 or 20 days. In this way the members can vent their anger. The very existence of this crazy law makes the strike necessary and assures that it will take place.

Let me point out—and I am sure Arvid Anderson will say this, too—that of the strikes in the public service that did take place in New York, all were outside the fact-finding mechanism of the Office of Collective Bargaining. For one reason or another, they were removed, at least partially, from the Office of Collective Bargaining and were placed under the oppressive Taylor law.

Another common occurrence in public-sector bargaining that drives us mad is to pick up the newspaper and learn that the governor or the mayor has appointed an “impartial” mediator or panel in an impasse situation—sometimes a critical one and sometimes one that will straighten itself out shortly. Anyone chosen in this manner, no matter how competent he may be, simply will not be effective. This concept of the boss choosing the neutral is ridiculous, but it goes on with grim regularity.

Second, we are provoked by the unwillingness—the absolute hostility—of public officials to the use of mediators from outside their own camps. What do I mean by that? Bob Wagner, who considered himself father of the little Wagner Act, never let a state or federal mediator within a hundred miles of an impasse in New York City. He preferred a strike rather than to allow someone not directly appointed by him to come in as a mediator. This was the kind of problem we had over and over again in the city, and, believe it or not, it is the same complaint that is now made by the president of the New York Teachers' Union in his unhappy relationship with the Board of Education. I would point out that it is extremely rare that public officials let federal mediators enter a dispute. The so-called willingness of public employers to have third-party impartial mediation is also part of the myth.

Let me extend the myth one step further. Can I honestly be expected to believe that the members of a labor board appointed by

the mayor or the governor will be immune to pressures from their appointing officer when they negotiate with us? Government may be the neutral party in private-sector labor-management relations, but how can government be the neutral when it is also the boss? Yet governors continue to think of themselves as third parties, even when negotiating with their own employees. Once in the capital city of Michigan, the mayor kept saying, "I am the third party here. I represent the people of this city." He may have been a good mayor, but he had no understanding of what his employees thought, and he couldn't have cared less.

### Mechanisms for Dispute Settlement

The mechanism in New York City is the only one I know of which is tripartite; labor, management, and the public are all represented. It is also the only mechanism that I know of which public employees trust, and even here we sometimes have problems. Nevertheless, we trust it because we think it is decent and moral, and for these reasons it is working. I would also admit that the tripartite mechanism could be turned against us in a different environment. The last guy I want to arbitrate a problem in which my union is involved is another labor organizer. They kill you. The point is not that the panel consists of labor, management, and the public, but rather that there is no question that the appointing authority is both labor and management and not management alone. This, then, provides for true neutrality.

There is much discussion about arbitration as a mechanism to resolve disputes. Let me tell you that I share all the fears that trade unionists have of arbitration as a means for dealing with impasses in the negotiation of contracts. While I am in complete accord with the use of arbitration as the final step in the grievance procedure, I am scared to death of it in contract negotiation for obvious reasons. We are afraid there will be no real bargaining, that the whole argument will consist of finding the golden mean or average instead of dealing with the real economic dynamics. Further, in winning collective bargaining rights we are determined to close the unjustified wage gap between public and private employment—the gap between the hospital worker and the factory worker, for example. Arbitrators sometimes are unwilling to tam-

per with "historical differentials." We are determined that these differentials shall be changed because they have no basis in fact, except that they exist.

I was talking to a lawyer who represents the Amalgamated Transit Union, Isidore Gromfein. He believes that compulsory arbitration is working in the relationship between the traction companies and the street railway workers in various cities in the United States, and that it has not stifled collective bargaining.

In some isolated instances, in the private sector, compulsory arbitration may have scored impressive results. However, I don't think you will see it introduced into the public service unless laws get so oppressive that unions are forced to look to the legislative and political arena and press for such measures. In such an eventuality, I believe that the workers, the government, and, most important, the public will lose.

When debating with a public official I occasionally amuse myself by baiting him with the suggestion that he should surrender his "sovereignty" to a member of this Academy, who would decide such issues as the tax rate, what services would be performed by the city, how these services would be performed, and similar "easy" issues.

Something new is being kicked around—well, not really new, but with a new sheen to it—and that is voluntary arbitration over the terms of a new contract. I distinguish this from compulsory arbitration. The other night somebody suggested that the New York State Legislature act as a court of last resort in impasse situations in the public service. What an incredible mechanism that would be! I don't know if this will happen or, if so, in what state, but legislatures are not terribly efficient now, and they will be even less efficient if their responsibilities are increased. More important, legislatures should not be in the business of negotiating union contracts. This entire situation would be an unimaginable mess.

We are opposed to legislation providing compulsory arbitration of disputes over contract terms. We would seriously consider, however, experimenting with a variety of other possibilities that have been put forward on occasion, which contain the essential in-

redient of "voluntarism." For example, we would certainly examine carefully the potentialities of voluntary binding arbitration—preferably over a small number of well-defined issues and preferably on an ad hoc basis. The important item here is "voluntarism." Before negotiations commenced the parties could agree to arbitrate disputes that arose during negotiations. This would, in a sense, be an agreement to arbitrate future unknown disputes. Or, they could agree to arbitrate only after having reached an impasse. Nor do we reject advisory arbitration out of hand, although we tend to believe that if a decision is advisory, fact-finding with public disclosure of the "facts" and recommendations will be more effective. In short, we are willing to examine and discuss virtually any serious alternative to compulsory arbitration.

As you know, former President Johnson never did release the Federal Review Committee's Report on the experience under Executive Order 10988. As released by Secretary Wirtz, it recommended a board of arbitration consisting of the Chairman of the Civil Service Commission, the Secretary of Labor, and the Chairman of the National Labor Relations Board. This is hardly an impartial board. In any event, I think that some forms of voluntary advisory arbitration really approach a form of fact-finding.

### Conclusion

This leads me to the obvious conclusion that we are dealing with a whole series of messy, cluttered mechanisms that either don't work well or don't work at all. Essentially, our union has learned, as the civil rights movement and the labor movement had to learn, that the only way it can get its job done is by civil disobedience. We know that civil disobedience may lead to the excesses and apparent unreasonableness that have occasionally characterized some of the difficulties in public service. As a trade unionist, whether an angry one or not, I say to you, we don't want to strike. We don't want to engage in civil disobedience, but we'll be damned if we'll quietly permit employers to do to us what they have done time and time again—to say, "This is our last offer. Take it or leave it. But remember, if you hit us with a strike, we'll kill you with the law tomorrow. We'll destroy your union. We'll fire your members, and we'll put you in jail."

Some of you may recall the welfare strike in New York City four or five years ago. The underlying cause of this strike was that the Mayor of New York thought it was good politics to take a welfare strike. His labor advisors said, in effect, "You can't do anything about it," so, instead of negotiating, he read us excerpts from the common-law syndrome and Condon-Wadlin, the Taylor Act of the time, which provided penalties against workers rather than against unions.

These are some of the common situations we deal with. We don't want compulsory arbitration, and we don't want strikes, and we want to keep the tax rate down. You want your kids to be able to go to school, and you want the garbage picked up, and you want the water to run when you turn on the tap. How do we achieve this?

When all is said and done, there are no panaceas or guarantees. We do know that people must have faith in the kind of mechanisms that are used, so the first prerequisite is confidence. And there is a sad lack of confidence on the union side, as well as on public management's side. The second thing we need is a mechanism that we believe to be fair and decent. The only mechanism that has worked so far has been fact-finding, and then *only* when the confidence issue was very carefully considered and when the mechanism was carefully used by professionals.

Some of the unhappiness in Michigan—that whole series of recent strikes—occurred when the mechanism was put into operation too rapidly, with fact-finders who didn't have the competence to deal with issues.

Our union would also go along with a built-in cooling-off period, even if there were no "emergency" involved. We'll go beyond that and say that we think the Taft-Hartley cooling-off period works very well, except for the longshore industry, and I'll bet you have never heard a labor leader admit more.

In essence, however, the whole machinery will have to work or you will get total and complete oppression of some 15 million people. You can't say to 15 million people in a free society, "You're lacking in freedom." You can't convince 15 million people that all

the public officials in the United States are altruists and men of courage.

Public employees are prescient enough to think that some public officials are not altruistic. They don't like oppression and they are fighting it. That is the reason for the whole series of strikes that now take place. Fundamental responsibility lies in decency and fair play, not in oppression.

## II. THE USE OF FACT-FINDING IN DISPUTE SETTLEMENT

ARVID ANDERSON \*

Many years ago a distinguished mediator and arbitrator, William H. Davis, observed that it was foolish to argue about a fact because ". . . we can only be ignorant about it." Mr. Davis's sage advice has not been followed, for there is a great deal of argument and ignorance about the facts or, at least, the role of fact-finding in dispute settlement. Some have suggested that the term "fault-finding" would be more accurate. Others prefer the term "impasse panels"; others feel the term "advisory arbitration" would more fittingly describe fact-finding because the process is more than fact-finding and involves judgment with recommendations.

Less flattering definitions of "fact-finding" may be found in word and cartoon in the January 17, 1969, issue of the *Public Employee Press*, published by District Council 37 of AFSCME, a labor organization that represents some 60,000 New York City employees, wherein fact-finding is compared to the medieval rack. The city employee is depicted as being on the rack with the fact-finders busily at work tightening the screws. The caption under the cartoon states that fact-finding is recommended by city officials who are worried about union demands that will stretch the city's budget. If the district council publication accurately reflects the views of the international union led by Jerry Wurf, we'll be in for a rough afternoon.

The term "fact-finding," as used in this discussion, refers to the findings of fact and the nonbinding recommended solutions made

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