Labor Relations Law IN State and Local Government

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Preface

Labor law in the public sector is different from that found in the private sector. In the private sector there are only two major bodies of law that apply: the Railway Labor Act, which applies to the nation's railroads and airlines, and the Taft-Hartley Act, which applies to the remainder of the private sector that has a substantial effect on interstate commerce. The presentation and analysis of private sector labor law is therefore relatively easy.

Federal sector labor law has grown out of several executive orders. Congress passed the 1978 Civil Service Reform Act to replace the federal executive orders and establish statutory enabling law. The labor law in the federal sector recognizes a significant body of federal statutes, rules, and regulations, thereby making the legal landscape more complex than private sector law.

Labor law governing labor–management relations for state and local government is far different from either private or federal sector labor laws. Each state is responsible for its own public policy towards public employee unions. To date, more than four dozen state labor laws are in force. There are also dozens of city and local ordinances governing labor management relations. To

further complicate the scene, most of these statutes and ordinances incorporate or recognize external law as binding in governing labor-management relations. This complicated tangle of law has discouraged analysis and presentation. The purpose of this book is to present a unified and useful analysis of the labor law found at the state and local level.

There are several persons who deserve recognition for their contributions to this project. Naturally, our wives and children have sacrificed time so that the research could be accomplished and the manuscript prepared. Our indebtedness is acknowledged and will be repaid.

We also wish to thank our editors, Eric Valentine and Meg Fergusson, for their patience and support. Fred Witney provided a great deal of inspiration, and Bill Walsh gave many helpful contributions. To these four go our undying gratitude.

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Introduction

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Introduction to Public Sector Labor Law

This chapter provides a brief discussion of what the authors intend to accomplish with this text, a plan of the book, and brief introductory discussions of employee–employer relations and labor law in the public sector. The plan of the book offers a preview of the topics to be covered. The discussion of public sector employer–employee relations is intended to develop a basic understanding of why unionization and collective bargaining in the public sector are such controversial topics. Discussion of why unions were late bloomers in the public sector also provides some insights into the nature of public sector collective bargaining as well as its environment.

Public sector collective bargaining is one of the few areas in which unions can still claim some degree of growth. Much has been written concerning labor relations and collective bargaining in the private sector. There is also a wealth of published knowledge concerning labor law in the private sector. There is, however, a slim but growing literature concerning labor relations in the public sector. Very little has been written on public sector labor law, and what little there is has focused on the Civil Service Reform Act of 1978 dealing with federal employees. In the case

of state and local government, the variety of statutes has limited the general applicability of law and thus has discouraged writers working in this area.

The National Labor Relations Act specifically excludes governmental employers from coverage.[1] The Civil Service Reform Act of 1978 applies only to federal employees.[2] Therefore, if the collective bargaining rights of state and local government employees are to be protected, each jurisdiction, for example, the state, must enact its own labor law.

This book is written with both practitioners and academics in mind. It will offer a full range of topical coverage of public sector law. Because of the numerous state and local statutes it is impossible to provide a detailed analysis of each statute. Where possible, generalizations will be offered, where not possible, comparisons will be drawn concerning the variety of ways jurisdictions have dealt with specific legal issues.

Two of the authors are professional arbitrators and fact finders; the third is a labor economist. The authors are neither pro-union nor pro-management, but are neutral. That does not mean the book will be free of the authors' own views on how the world works; it simply means that one should not expect the authors to side with either labor or management in the presentations contained herein.

PUBLIC SECTOR BARGAINING AND LABOR LAW

The public sector includes many levels of government and a large array of occupations. The focal point of this book are the state and local governmental levels. There are differences in collective bargaining at the federal and state levels, but for the most part these differences revolve around the sizes of the respective agencies and the nature of the legal environment. Some of what is examined here is fully applicable to the federal sector but is packaged to be most useful to those interested in such state and local governmental employees as firefighters, police

officers, teachers, state highway employees, and the agencies in which they work.

It is the negotiators operating in the public sector who have been largely ignored by authors of labor relations and labor law texts. At best, a chapter may be found that gives a general overview of the public sector or discusses a specific, often technical point in either the labor law or collective bargaining, but these single-chapter treatments offer little in the way of practical and useful information in preparing for labor disputes, organizations, or contract negotiations.[3]

With the exception of a few articles in academic literature and even fewer in trade literature, little has been written concerning the labor law the public sector.

OUTLINE OF THE BOOK

This book is divided into two major parts: Part I provides an introduction to public sector labor law, and Part II offers an in-depth analysis of specific legal issues important to collective bargaining in the public sector.

Chapter 1 is devoted to a brief overview of state collective bargaining statutes. It examines why it was left to the states to enact their own collective bargaining laws and makes comparisons among the various states concerning the coverage of those statutes. It introduces election policies, scope of bargaining, employee rights, unfair labor practice provisions, and other portions of the various statutory schemes important to an understanding of collective bargaining.

The current status of public sector labor law is introduced in Chapter 2. This chapter examines the extent of state labor law and the basic structure of these statutes. Chapter 3 focuses on collective bargaining in the public sector and why labor law is a patchwork of statutes applicable only to specific state or local jurisdictions. It examines the unique characteristics of public employers and their impact on both the labor law and collective bargaining that have evolved in state and local government.

Part I is the foundation upon which the discussion of the specific elements of the public sector labor law is built. Part II begins with Chapter 4, an analysis of the structure and operation of the various administrative law agencies charged with the responsibility of enforcement of the jurisdiction's labor law. Applicable unfair labor practice provisions will also be examined in this chapter.

Chapter 5 is a discussion of employer, employee, and union rights; the law governing union organization and certification procedures. Specific examinations of the assignment of rights to the various principles is followed with an analysis of the certification process and its variants.

Chapter 6 concerns contract negotiations. The various legal requirements concerning the scope of bargaining are examined. The duty to negotiate and unfair labor practice provisions concerning bargaining activities are also examined in this chapter.

Chapter 7 is a detailed discussion of the law concerning impasse procedures. The enabling statutes concerning mediation, fact finding, and interest arbitration are examined, as are enforcement and the scope of neutral authority.

Chapter 8 examines the effects of statutory impasse procedures on collective bargaining. Attention is turned to the long-run effects of impasse resolution procedures on the nature and conduct of the parties' collective bargaining relations.

Chapter 9 examines the duty to bargain during the life of the collective bargaining agreement. Topics presented include grievances, grievance arbitration, and modification or repudiation of a negotiated contract.

Chapter 10, the last chapter, presents conclusions concerning the current status of labor law concerning state and local labor law.

The appendix offers an example of a state collective bargaining law followed by an annotated bibliography of books and articles concerning public sector labor law.

EMPLOYEE–EMPLOYER RELATIONS IN THE PUBLIC SECTOR

The growth of the public sector has been rather steady over recent U.S. history. One out of every five employed persons in the United States works for either federal, state, or local governments.[4] The importance of the public sector as a major source of jobs, hence income, should be obvious from this fact alone. The public sector is also of prime importance in the U.S. economic system because of the idea of public goods. There is often a distinction made between public and private goods. Private goods are those that can be distributed to a single end-producer who can reserve their consumption to himself or herself exclusively. These goods have a value to the specific person who is willing to pay for them since the consumption cannot be had any other way. Economists typically use the examples of beer and pizza, and both of these are good examples of private goods. A public good differs in that the end consumer cannot necessarily provide the service without participation by others and frequently cannot preclude others from its consumption even if able to provide it to himself or herself. National defense, highways, and schools are examples of public goods. A highway, school, or army are very expensive propositions, and it is doubtful that any single consumer could provide those goods for himself or herself. A school is a good that can be duplicated in the private sector, but only by those with sufficient incomes or wealth to pay for its services. Schools become a public good in most respects because the education of the general population provides basic and marketable skills for those who could not otherwise provide themselves with such educations, so it's better to educate than to provide public welfare or simply allow starvation to rid society of those unable to afford schooling.

A highway, once it is built, is difficult to patrol and therefore to deny access to one's neighbors. Turnpike authorities have been successful in building, maintaining, and charging for the services of highways, but generally only through the public

sector. National defense falls under this category. Since all of society benefits from national defense and transportation and no single person is easily excluded from the system, they become public goods.

The requirement to provide public goods requires government. Government, to function properly, requires employees with various skills. Employees require incomes to maintain themselves and their households. The government then exchanges compensation for services rendered, and taxpayers exchange tax dollars for services provided by government. This is a simple flow of goods and services, except that one portion of it involves government and its ability to tax. The American public has always been suspicious of this because of a perceived lack of motivation by elected officials to properly control government and the general apathy of the voting public. Government and its role are therefore highly controversial topics and have been so throughout U.S. history.[5] These components can be thought of as roughly defining the economic environment of public sector collective bargaining. The power to tax combined with the necessity of providing public goods and with an economic history of suspicion of government provide the general framework for the economic environment. These issues will be discussed in greater detail in Chapter 3.

Labor unions have not always enjoyed popularity in this country; even today they are viewed with a great deal of suspicion from certain quarters. In early U.S. history, unions were regarded as criminal conspiracies per se because their objective was to raise wages and improve conditions for the working classes. This was regarded by many, including the courts, as theft, because if more was spent on labor, then someone would have to pay a higher price for goods and services, and workers ought not be allowed to band together for the purposes of theft.[6] In the first of these court cases shoemakers (private sector employees, not public) were found guilty of a criminal conspiracy because they formed a union to prevent wage cutting. The lot and public image of labor unions improved only slightly over the next 125 years, so this country has a long history of little regard for collective bargaining or unions.[7]

It cannot be any wonder to anyone why labor relations and collective bargaining in the public sector are such controversial topics. The wedding of two extremely controversial and visible institutions could not help but provide for public debate and skepticism. What is maybe more astounding is that public sector collective bargaining has been as widely adopted and successful a system of employee–employer relations as it has over the past few decades.

For decades prior to the advent of the widespread unionization of the public sector, traditional organizing attempts met with failure. This was especially true during the 1930s and 1940s, the boom period for industrial unions. Several reasons have been offered for this difficulty in organizing public employees. Public employment offered benefits not found in the private sector; "merit hiring, broad fringe benefits, almost absolute job security, and an assured income (not dependent on vagaries of weather, availability of risk capital, or the ebb and flow of fads and fashion)" more than offset any of the claimed benefits from unionization.[8] "In truth, these were the trade-offs for private-sector unionism."[9]

As these public-employment benefits declined during the post-war 1950s and the benefits and compensation associated with private sector employment overtook the public sector, then public employees became more inclined to organizing and collective bargaining. Public employers by the 1970s were far behind private sector employees in compensation and were beginning to find that job security and most of the other amenities associated with public employment had disappeared; unions were the only way to prevent further erosion and possibly the reclamation of lost benefits.[10]

This discussion illustrates why employee–employer relations and especially collective bargaining in the public sector has been so controversial. This sociopolitical environment of public sector collective bargaining has provided one significant obstacle to the evolution of mature collective bargaining in this arena. The sociopolitical aspects of the environment are those public opinions developed over the years concerning the role of government