Teachers and Other Public Sector Employees: How Can We More Effectively Respond to the Concerted Activity Questions

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Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol29/iss3/9
I. INTRODUCTION

"The King can do no wrong." This sentiment lies at the heart of the law of sovereignty.¹ For many years this phrase governed the relationship between public employees and their government employers. Consequently, labor relations in the public sector have evolved differently than in the private sector. Due process,² property rights³ and prohibitions on the right to strike are features of public employment which can be contrasted with the private sector.

In recent years public sector labor relations have become more closely aligned with private sector principles.⁴ In California, crucial public sector collective bargaining principles were called into question in 1985 with the case of County Sanitation District No. 2 v. Los Angeles County Employees’ Association.⁵ In County Sanitation, the California Supreme Court held for the first time that a right to strike exists for public sector employees under the Meyers-Millias-Brown Act.⁶ However, allowable public employer responses to strikes were not addressed.

The purpose of this Comment is to address the scope of the County Sanitation decision and to examine the responses available to the public employer. Although this Comment focuses on public school employment, many of the principles discussed apply generally to other public sector employment as well.

² See infra section V(b)(1).
³ See infra section V(b)(1).
⁴ 29 U.S.C. § 152 (1982). The private sector consists of those businesses which are affecting commerce and not expressly excluded by statute. Id.
⁶ Id. at 592, 669 P.2d at 854, 214 Cal. Rptr. at 443, ("[t]here is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of employment, unless it has been determined that the work stoppage poses an imminent threat to public health or safety." Id.).
Section II addresses the laws governing private sector employment. Analogies between the private and public sectors are presented to help illustrate the development of public sector labor relations. Section III discusses public sector employment and examines the development of statutes governing public school employees. Section IV examines the right to strike in private and public sector employment. Although the focus of this Comment is public employer responses to employee strikes, it is necessary to address the right to strike in order to fully examine the issue of public employer responses. Sections V and VI focus on public employer responses to public employee strikes. Existing impediments and potential employer responses are also examined. Section VII proposes that the Legislature provide for the right to strike and develop a scheme of reasonable public employer responses to strikes.

II. PRIVATE SECTOR EMPLOYMENT

The collective bargaining relationship between private sector employees and employers is governed by the National Labor Relations Act (NLRA). The NLRA is composed of four major bodies of federal legislation: the Norris-La Guardia Act, the Wagner Act, the Taft-Hartley Act, and the Landrum-Griffin Act.

The Norris-La Guardia Act, passed in 1932, removed the power of the courts to issue restraining orders or injunctions in labor disputes. This Act protected employees participating singly or in concert in certain organized labor activities.

The Wagner Act of 1935 guaranteed employees the freedom to join or assist labor organizations; the freedom to bargain collectively with their employer; and the right to engage in concerted activities.

The Taft-Hartley or Labor Management Relations Act

11. Landrum-Griffin Act, id. §§ 401-531.
12. Id. §§ 101-115.
13. The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee. Id. § 152(g).
14. Id. § 104.
15. Id. §§ 151-169.
(LMRA) was passed in 1947. Its purpose was to restrict the power of labor unions with respect to interrupting or influencing the flow of commerce. The LMRA also established union unfair labor practices, as well as procedures for dealing with labor-management strife during national emergencies.

Finally, the Landrum-Griffin Act, known as the Labor-Management Reporting and Disclosure Act, was passed in 1959 in response to the corruption and lack of democratic procedures within unions. It established reporting regulations for internal union activities and a “Bill of Rights” for members of labor organizations.17

Collectively these four statutes (together referred to as the NLRA) govern the labor relations of all businesses engaged in or affecting commerce within the United States. The NLRA is interpreted broadly and preempts state labor laws wherever the two overlap.10 Its provisions set forth the rights of employees and employers with respect to labor relations, and defines unfair labor practices. The NLRA is administered by the National Labor Relations Board (NLRB).19 Activities commonly performed by the Board include investigating and litigating unfair labor practices, certifying bargaining units, and conducting elections.21

III. PUBLIC SECTOR EMPLOYMENT

A public sector employee is one who is employed by “the United States or any wholly owned government corporation and any state or political subdivision thereof.”22 The NLRA does not address collective bargaining in the public sector.23 Specific federal and state statutes govern the employment relationship of public employees.

16. Id. §§ 141-197.
18. Id. § 152(7).
20. The National Labor Relations Board was created by the National Labor Relations Act as a board concerned with the administration of labor relations, and for purposes of avoiding, through adjustment, serious labor disputes which, if permitted to reach the strike stage, would necessarily hurt employers, employees, and the public. It is a statutory public, administrative, agency having a constitutional function, and acting in the public interest. Although not a court, it is generally regarded as quasi-judicial in character, possessing judicial as well as administrative functions. 51A C.J.S. Labor Relations § 501 (1967) (footnotes omitted).
22. 51 C.J.S. Labor Relations § 33 (1967).
23. “The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof.” 29 U.S.C. § 152(2) (1982).
Consequently, the legal nature of public employment may vary from state to state, in contrast with private employment which is uniformly governed by the NLRA. Public sector collective bargaining statutes tend to be largely modeled after the NLRA.\textsuperscript{24} However, material differences between the two can and do exist.\textsuperscript{25} A review of the history of public sector educational employment within the State of California will demonstrate the differences between public and private sector employment.

During the past twenty-five years, California public school employees have been subject to vast changes in the laws governing their employment relationship. Those changes were brought about by a series of statutes, including the Brown Act,\textsuperscript{26} the Winton Act\textsuperscript{27} and the Rodda Act (EERA),\textsuperscript{28} which were designed to establish an effective approach to public sector labor relations by recognizing the unique elements inherent in the public sector.

\textbf{A. The Brown Act}

The Brown Act\textsuperscript{29} played a significant role in the development of public sector labor relations. It was the first legislation to set forth collective bargaining rights for public employees. Previously, public

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\textsuperscript{24} Compare Cal. Gov't Code § 3502 (West 1980) ("Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer - employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations. . . .") and 29 U.S.C. § 157 (1982) ("Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . for the purpose of collective bargaining . . . and shall also have the right to refrain from any or all such activities. . . .")
\end{quote}

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\textsuperscript{25} A major difference lies in the right to strike: with respect to the right to strike, the state legislature has the power to provide in what manner public employees may enforce their right to collectively bargain. City of New York v. De Lury, 23 N.Y.2d 175, 243 N.E.2d 128, 295 N.Y.S.2d 901 (1968). A statute prohibiting strikes by public employees has been held valid. Di Maggio v. Brown, 19 N.Y.2d 283, 225 N.E.2d 871, 279 N.Y.S.2d 161 (1967).
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\textsuperscript{28} The Rodda Act, Cal. Gov't Code § 3540 et seq. (West 1980 & Supp. 1989). The Rodda Act, also known as the Educational Employee Relations Act (hereinafter EERA), established collective bargaining within the educational sector of public employment. It is the statute which currently governs educational employees in California.
\end{quote}

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\textsuperscript{29} See supra note 26.
\end{quote}
employees had no right to bargain collectively and the employer could unilaterally determine working conditions. Most significantly this Act established the “meet and confer” requirement which compelled employers to meet with employees and consider their employment concerns. The employer, however, still retained the ultimate decision-making power over employee working conditions. The Brown Act only applied to public school employees for a short time. In 1965, the labor relations of public school employees became specifically governed by the Winton Act.

B. The Winton Act

Patterned after the Brown Act, the purpose of the Winton Act was to strengthen existing procedures by establishing uniform and orderly methods of communication between public school employees and their employers. Although similar in principle to the Brown Act, the Winton Act also provided dispute resolution mechanisms, such as fact-finding and non-binding recommendations by a third party. To agree to any proposal or require the making of a concession. Id.

30. CAL. GOV'T CODE § 3505 (West 1980). “Meet and confer” means the performance of the mutual obligation of the employer and the exclusive representative of its employees to meet at reasonable times and to confer in good faith with respect to matters within the scope of representation. The process should include adequate time for the resolution of impasses. If agreement is reached between representatives of the employer and the exclusive representative, they shall jointly prepare a written memorandum of such understanding which shall be presented to the employer for concurrence. However, these obligations do not compel either party to agree to any proposal or require the making of a concession. Id.

    It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the various public agencies in the State of California by providing a uniform basis of recognizing the right of public employees to join organizations of their own choice and be represented by such organizations in their employment relationships with public agencies.

Id.


    In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:
    (1) State and federal laws that are applicable to the employer.
    (2) Stipulations of the parties.
    (3) The interests and welfare of the public and the financial ability of the public school employer.
    (4) Comparison of the wages, hours, and conditions of employment of the employees involved in the fact finding proceeding with the wages, hours, and conditions of employment of other employees performing similar services and with other employees generally in public school employment in comparable
party. Additionally, the Act expanded the scope of the “meet and confer” requirement to include not only employment related issues, but also issues involving the professional interests of educators.

Thus, the Winton Act clarified many aspects of public education employment. However, it did not change the status of the right to bargain collectively or the right to strike. Although the scope of representation allowed under the Act included elements traditionally found within the private sector, agreements reached under the Act were not binding. Attempts to interpret the Act as conferring collective bargaining rights were met with resistance. The courts

35. Id. § 3548.3. A nonbinding third party recommendation consists of the fact finding panel making a recommendation to management and the bargaining unit after finishing the fact finding process. However, the parties are not bound by the decision; it is advisory only. Id.

36. The Winton Act, ch. 2041, 1965 CAL. STAT. 4660 (codified in CAL. EDUC. CODE §§ 13080-13088 (West 1975)) (repealed 1975); The Winton Act, ch. 1413, § 5, 1970 CAL. STAT. 2683, 2686. See also Rodda, Public Employment Relations Symposium: Collective Bargaining in the California Schools, 18 SANTA CLARA L. REV. 845 (1978). Professional interests include educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. Id.

37. The Brown Act originally applied to all public sector employees. The Winton Act separated public school employees and added provisions that were of particular interest to this group. One of the most significant additions was the inclusion of professional interests in the scope of representation. See supra note 36.


39. CAL. GOV'T CODE § 3543.2(a) (West 1980 & Supp. 1989). This section reads in pertinent part:

The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. “Terms and conditions of employment” mean health and welfare benefits, . . . leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security, . . . procedures for processing grievances and the layoff of probationary certificated school district employees.

Id.


41. See, e.g., Grasko, 31 Cal. App. 3d at 302, 107 Cal. Rptr. at 342; California Fed'n of
focused on the differences between the Winton Act and the National Labor Relations Act (NLRA) and concluded that "it is firmly established that the Winton Act does not authorize collective bargaining." The wording of the Winton Act was unclear. Confusion regarding which aspects of employment were subject to the "meet and confer" requirement resulted in a variety of interpretations and implementations by school districts throughout California. In *San Juan Teachers Association v. San Juan Unified School District*, the court stated that the Legislature intended a sweeping definition of the scope of the "meet and confer" requirement to compensate for the employees' inability to bargain collectively or to strike. It was this type of broad interpretation which led to inconsistent applications of the Winton Act.

The inconsistent applications of the Act motivated school administrators, board members, employees and legislators to work towards enacting a law which would be interpreted in a uniform manner, and which would improve negotiations with public school employees. Thus, a series of bills was introduced beginning in 1970 and culminating in 1976 with the repeal of the Winton Act and passage of the Educational Employee Relations Act (EERA), or the Rodda Act.

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   Employer-employee relations in private industry are generally governed by the National Labor Relations Act and section 923 of the [California] Labor Code, which secures substantially similar rights for employees in intrastate business. Public employees, however, have historically been on an entirely different footing, and separate and distinctive legislative treatment has been given to the regulation of their employment relations.

45. *Id.* at 249, 118 Cal. Rptr. at 670.
46. *See Rodda*, supra note 36 (Senator Rodda discusses the various problems existing under the then current statutes and traces his attempts to introduce legislation which would clarify major features of labor relations within the educational sector.).
C. The Rodda Act (EERA)

The EERA maintained the focus of previous labor relations statutes but added formerly unrecognized aspects of collective bargaining, such as the right of employees to join employee related organizations of their choice.\(^4\) Now in its thirteenth year, EERA has afforded public school employees the most consistent statutory guidance to date. Case law throughout this period, and the terms of the Act itself, have helped to interpret the definition of both the scope of representation\(^5\) and unfair labor practices\(^5\) under the Act. Amendments to the statute have further defined such terms as “managerial


It shall be unlawful for a public school employer to:
(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
(b) Deny to employee organizations rights guaranteed to them by this chapter.
(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.
(e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

CAL. GOV'T CODE § 3543.5 (West 1980).

California Government Code section 3543.6 defines unfair labor practices for employee organizations:

It shall be unlawful for an employee organization to:
(a) Cause or attempt to cause a public school employer to violate Section 3543.5.
(b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.
(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

Id. § 3543.6.
employee" and "confidential employees." 51

1. The Public Employment Relations Board

The Public Employment Relations Board (PERB), 53 was established by EERA to administer the Act. This five person board operates in a manner similar to the National Labor Relations Board (NLRB). 54 PERB investigates unfair labor practices, makes bargaining unit determinations, and conducts hearings on public employment issues. 55 Hearings are conducted pursuant to the rules and regulations of the Office of Administrative Law. 56 PERB has the authority to bring an action in the appropriate court to enforce any of its orders. 57 Parties may request judicial review before the California Court of Appeal after exhausting PERB procedures. 58

IV. THE RIGHT TO STRIKE IN PUBLIC AND PRIVATE SECTOR EMPLOYMENT

Although the EERA established rights which are similar to those granted under the NLRA, a significant difference exists between private and public sector employment with regard to the right to strike.

A. The Private Sector

"A 'strike' is a concerted refusal by employees to do any work for their employer, or refusal to work at their customary rate of speed, until the object of the strike is attained, that is, until the employer grants the concession demanded." 59 Strikes within the private

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51. " 'Managerial Employee' means any employee having significant responsibilities for formulating or administering agency or departmental policies and programs or administering an agency or department." CAL. GOV'T CODE § 3513(e) (West 1980 & Supp. 1989).
52. California Government Code section 3540.1(c) states: " 'Confidential employee' means any employee who, in the regular course of his or her duties, has access to, or possesses information relating to, his or her employer's employer-employee relations." CAL. GOV'T CODE § 3540.1(c) (West 1980 & Supp. 1989).
53. See California Government Code section 3541 which explains in more detail the rights, duties and scope of powers contained within PERB. Id. § 3541.3.
54. See supra notes 20-21 and accompanying text.
55. See CAL. GOV'T CODE §§ 3545, 3541.5 (West 1980).
56. Id. § 3541.3(g) (West 1980 & Supp. 1989).
57. Id. § 3541.3(j).
58. Id. § 3542.
sector are protected by the NLRA so long as they are undertaken for purposes and by methods not prohibited by the NLRA. The right to strike is granted by section 7 of the NLRA which states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment.

Although strikes are not expressly addressed in this section of the NLRA, the phrase “other concerted activities for the purpose of collective bargaining or other mutual aid or protection” is commonly interpreted by the courts to include strikes. Utilization of this phrase in other collective bargaining statutes, in both the private and public sectors, has been held to represent an express grant of the right to strike.

B. The California Public Sector

Traditionally, California public sector employees were prohibited from striking. Such collective action by public employees was viewed as a conspiracy against the government. This prohibition against public sector strikes was known as the sovereignty concept. In City of Cleveland v. Division 268 of Amalgamated Association the court articulated the sovereignty concept by stating:

It is clear that in our system of government, the government is a servant of all of the people. And a strike against the public, a strike of public employees, has been denominated . . . as a rebellion against government. The right to strike, if accorded to

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62. See infra note 82.
64. See infra text accompanying note 110.
66. Id. at 574-75, 699 P.2d at 841-42, 214 Cal. Rptr. at 431.
public employees . . . is one means of destroying government.\textsuperscript{68}

In a series of California cases\textsuperscript{69} the courts have echoed the words of one court that "in the absence of legislative authorization public employees in general do not have the right to strike. . . ."\textsuperscript{70} In 1985, the California Supreme Court addressed this issue in \textit{County Sanitation District No. 2 v. Los Angeles County Employees' Association}.\textsuperscript{71} This case held that the right to strike exists under the Meyers-Millias-Brown Act (MMBA),\textsuperscript{72} which governs local government employees. The right to strike under EERA was subsequently addressed by PERB in \textit{Compton Unified School District v. Compton Education Association}.\textsuperscript{73} These cases arrived at contradictory conclusions despite the apparent similarities between the MMBA and the EERA.\textsuperscript{74}

1. The MMBA and the EERA

The Meyers-Millias-Brown Act governs the employment relationship of local government employees.\textsuperscript{75} It was implemented in 1968 to revise the Brown Act.\textsuperscript{76} The MMBA is in many respects similar to the EERA. In fact, several sections of these statutes are identical.\textsuperscript{77} Provisions governing collective bargaining are generally the same,\textsuperscript{78} with the exception of dispute resolution. The MMBA

\textsuperscript{68} Id. at 239, 90 N.E. 2d at 715.


\textsuperscript{71} County Sanitation Dist. No. 2 v. Los Angeles County Employees' Ass'n., 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424 (1985).

\textsuperscript{72} Id. See also supra note 26.


\textsuperscript{74} See infra notes 77-82 and accompanying text.

\textsuperscript{75} CAL. GOV'T CODE § 3500 et seq. (West 1980 & Supp. 1989).


\textsuperscript{77} Compare CAL. GOV'T CODE § 3500 (West 1980) and CAL. GOV'T CODE § 3540 (West 1980); compare CAL. GOV'T CODE § 3502 (West 1980) and CAL. GOV'T CODE § 3543 (West 1980).

\textsuperscript{78} Compare CAL. GOV'T CODE § 3502 (West 1980) and CAL. GOV'T CODE § 3543 (West 1980).
contains no clear mechanism for dispute resolution.\textsuperscript{79} Parties at an impasse may agree to appoint a mediator, but no statutorily mandated procedures exist. This is in direct contrast to the EERA which contains extensive procedures for dispute resolution.\textsuperscript{80}

\textit{County Sanitation} and \textit{Compton} addressed identical provisions of the MMBA and the EERA. MMBA section 3509 and EERA section 3549 state: “The enactment of this chapter shall not be construed as making the provisions of section 923 of the [California] Labor Code applicable to public employees.”\textsuperscript{81} In the private sector, section 923 is interpreted as granting employees the right to strike.\textsuperscript{82} Controversy has centered around whether the omission of this language represents legislative intent not to grant the right to strike absent statutory authorization.\textsuperscript{83}

2. \textit{County Sanitation}

In \textit{County Sanitation}, the defendant union, Local 660, represented the blue collar employees of the Los Angeles Sanitation District. The plaintiff was a sanitation district within Los Angeles County. Local 660 and the County Sanitation District had conducted negotiations pursuant to the MMBA and had in past years reached agreement. On July 5, 1976, a majority of the district’s employees went out on strike after negotiations between the district and the union reached an impasse.\textsuperscript{84}

The California Supreme Court examined the common law prohibition against public employee strikes.\textsuperscript{85} These strikes were viewed as a denial of governmental authority or sovereignty.\textsuperscript{86} Additionally, to allow such strikes was thought to afford excessive bargaining leverage, distort the political process, improperly delegate legislative authority and threaten the public welfare.\textsuperscript{87} The California Supreme Court

\textsuperscript{80} See supra notes 48-52 and accompanying text.
\textsuperscript{81} CAL. GOV’T CODE § 3509 (West 1980); \textit{Id.} § 3549 (West 1980).
\textsuperscript{82} A. Cox, D. Bok, & R. Gorman, BASIC TEXT ON LABOR LAW 503 (1986). “Concerted activities commonly consist of strikes, picketing, and boycotts.” \textit{Id.}
\textsuperscript{83} See Compton, PERB Order No. IR-50 at 74-75.
\textsuperscript{84} County Sanitation, 38 Cal. 3d at 567-568, 699 P.2d at 837, 214 Cal. Rptr. at 426.
\textsuperscript{85} “Impasse” means that the parties have reached a point in meeting and conferring at which their differences in position are such that further meetings would be futile. CAL. GOV’T CODE § 3540.1(f) (West 1980).
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 574, 699 P.2d at 835, 214 Cal. Rptr. at 430.
Court addressed each of these arguments individually and found the common law prohibition to be without merit.  

The court also examined the omission of California Labor Code section 923 from the MMBA.  

California Labor Code section 923 states in part:

> Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees . . . [I]t is necessary that the individual workman . . . be free from the interference . . . of employers of labor . . . in the designation of representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

In the private sector, this language is interpreted as granting employees the right to strike. The court held that the express omission of California Labor Code section 923 from the MMBA was not intended as a prohibition against strikes.

The court examined two other California public employment statutes. It found that one statute contained a provision identical to the MMBA which also omitted Labor Code section 923, and additionally contained an express prohibition of the right to strike. The other statute was the EERA. The court noted a case in which it was held that the identical section of the EERA did not specifically prohibit strikes.

Although the holding of County Sanitation broadly established the right to strike under the MMBA, the court imposed a limitation on this right where essential services are interrupted or health and safety considerations are relevant. Strikes affecting these areas are prohibited by public policy.

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88. Id. at 585, 699 P.2d at 856, 214 Cal. Rptr. at 438.
89. California Government Code section 3509 (MMBA) states: “The enactment of this chapter shall not be construed as making the provisions of Section 923 of the California Labor Code applicable to public employees.” CAL. GOV’T CODE § 3509 (West 1980).
90. CAL. LAB. CODE § 923 (West 1971).
91. County Sanitation, 38 Cal. 3d at 573, 699 P.2d at 840, 214 Cal. Rptr. at 429.
92. get this cite from author
93. County Sanitation, 38 Cal. 3d at 573, 699 P.2d at 840, 214 Cal. Rptr. at 429.
95. See CAL. GOV’T CODE § 3549 (West 1980).
96. County Sanitation, 38 Cal. 3d at 573, 699 P.2d at 840, 214 Cal. Rptr. at 429.
97. Id. at 581, 699 P.2d at 846, 214 Cal. Rptr. at 435.
3. Compton

In Compton\(^88\) the defendant, Compton Education Association ("Association"), was the exclusive representative of the teachers of the Compton Unified School District ("District"). The District and the Association were engaged in collective bargaining negotiations pursuant to the EERA. The parties were unable to reach agreement during negotiations and subsequently reached an impasse. The parties engaged in both mediation\(^99\) and fact-finding. The fact-finding panel issued a recommended decision on October 28, 1986; however, the Association did not agree with the recommendation. Between November 1986 and February 1987, the District and the Association engaged in post fact-finding negotiations. During this time the teachers engaged in strike activities on several occasions which significantly disrupted school operations.

In Compton, PERB held that strikes by public employees are both unprotected and unlawful under EERA.\(^100\) PERB described three types of strikes in which public school employees might engage: 1) the pre-impasse\(^101\) economic strike; 2) the post-impasse economic strike;\(^102\) and 3) the unfair practice strike.\(^103\) Of these three types, only the unfair practice strike had previously been protected.\(^104\) Pre-impasse economic strikes had been held to constitute unfair practices under EERA.\(^105\) Post-impasse economic strikes, the type in which the District was engaged, had not been ruled upon prior to Compton. In reaching its conclusion that all types of strikes under EERA are unlawful and unprotected, PERB solved the uncertainty regarding post-impasse economic strikes and overruled its

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\(^{99}\) CAL. GOV'T CODE § 3543.2 (West 1980). "Mediation" means the efforts of a third person, or persons, functioning as intermediaries, to assist the parties in reaching a voluntary resolution to an impasse. Id.

\(^{100}\) While the County Sanitation court held that public employee strikes are lawful under MMBA, PERB held no such right exists under EERA. Compton, PERB Order No. IR-50 at 95.

\(^{101}\) See supra note 84.

\(^{102}\) An economic strike refers to a strike engaged in to achieve bargaining goals prior to impasse or before the exhaustion of statutory procedures. See Id. §§ 3548-3548.5 (West 1980).

\(^{103}\) A post economic strike refers to a strike engaged in to achieve bargaining goals after the exhaustion of the statutory impasse procedures. See CAL. GOV'T CODE §§ 3548-3548.5 (West 1980 & Supp. 1989).

\(^{104}\) An unfair practice strike refers to a strike engaged purportedly in response to an alleged unfair practice by the public school employer, which may occur pre-impasse, during impasse, or post impasse. Compton, PERB Order No. IR-50 at 95.

\(^{105}\) Compton, PERB Order No. IR-50 at 95.

\(^{106}\) Compton, PERB Order No. IR-50 at 124.
prior holding in *Modesto City Schools District v. Modesto Teachers Association*\(^{107}\) concerning unfair practice strikes. The *Compton* decision is significant because it narrows the alternatives available to dissatisfied public school employees.\(^{108}\)

The rationale set forth in *Compton* focused on the intent of the Legislature and constitutional considerations. In the lead opinion, PERB Member Porter examined the language of the EERA. He determined that the omission of section 923 of the California Labor Code\(^{109}\) from the EERA clearly indicated a legislative intent not to grant public school employees the right to strike.\(^{110}\)

PERB also examined the selective granting or withholding of the right to strike among various groups of public employees by the Legislature.\(^{111}\) The Board concluded that the Legislature’s express granting of the right to strike in twelve of the twenty-five public employer-employee statutes indicated an intent not to allow the right where the language did not expressly grant the privilege.\(^{112}\)

In addition to examining the intent of the Legislature, *Compton* addressed constitutional considerations. It stressed that “[i]n analyzing any legislative enactment affecting the operation of our public schools, one must recognize and be ever mindful of the predominant position of the public school system within California’s constitutional and statutory scheme, as well as its premier role in the public policy of the state.”\(^{113}\) PERB stressed that education is a fundamental interest\(^{114}\) and focused on the constitutional and statutory right to have public schools open.\(^{115}\)

Finally, PERB examined the landmark case of *County Sanitation District No. 2 v. Los Angeles County Employees’ Association*,\(^{116}\) which held that “the common law prohibition against public sector strikes should no longer be recognized in California and, accordingly, that public employee strikes are not tortious under California com-

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108. Previously, under holding in *Modesto City Schools*, strikes were protected under EERA in response to employer unfair labor practices. PERB Decision No. 291 (1983). The *Compton* decision reverses *Modesto City Schools* thereby eliminating this option. See *Compton*, PERB Order No. IR-50 at 160.
111. Id. at 74-75.
112. Id. at 87.
113. Id. at 11.
114. Id. at 17.
115. Id.
However, the lead opinion interpreted County Sanitation narrowly. It focused on the exact language of the holding to find limitations on the applicability of the decision to employees covered under EERA. Member Porter characterized the County Sanitation decision as one of a “divided and splintered Court,” thereby implying that the holding is foundationally weak.\textsuperscript{118}

The dissent in Compton examined the language of EERA and found no statutory prohibition against the right to strike. It highlighted the fact that the Meyers-Millias-Brown Act language construed by the Supreme Court in County Sanitation is identical to the language of EERA,\textsuperscript{120} and stated “whether [PERB] likes it or not, this issue has been definitively resolved.”\textsuperscript{121}

4. The Present Status of the Right to Strike under EERA

The Compton decision is arguably challengable on grounds similar to those set forth by PERB in its analysis of County Sanitation. The Compton opinion literally construed the aspects of County Sanitation which focused on the common law prohibition against strikes. PERB refused to apply the broader interpretation that this decision granted public employees in California the right to strike.\textsuperscript{122} The portion of County Sanitation which construed the legislative silence on the right to strike was also attacked. “It would appear that the County Sanitation plurality proceeded on an invalid premise as to the legislature's silence with respect to public employee strikes.”\textsuperscript{123}

It is questionable whether PERB's Compton opinion is controlling on the issue of whether public employees covered by EERA have the right to engage in strikes. The Compton decision is itself a plurality opinion in which a dissenting member agreed with the California Supreme Court's County Sanitation case. Member Craib, a member of the plurality, stressed the holding of County Sanitation and stated that public employee strikes are now legal in California.

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\textsuperscript{117} Id. at 585, 699 P.2d at 849, 214 Cal. Rptr. at 438 (1985).

\textsuperscript{118} Compton, PERB Order No. IR-50 at 106.

\textsuperscript{119} It should be noted that County Sanitation was decided by the Bird Supreme Court.

\textsuperscript{120} See Compton, PERB IR-50 at 172.

\textsuperscript{121} Id.

\textsuperscript{122} County Sanitation, 38 Cal. 3d at 585, 699 P.2d at 849, 214 Cal. Rptr. at 438.

\textsuperscript{123} Compton, PERB Order No. IR-50 at 115. A plurality opinion is “[a]n opinion of an appellate court in which more justices join than in any concurring opinion (though not a majority of the court) . . . as distinguished from a majority opinion in which a larger number of the justices on the panel join than not.” Black's Law Dictionary 1039 (5th ed. 1979).
provided that there is no statutory prohibition or substantial and imminent threat to public health or safety.124

In examining the nature of the Compton strike, Members Hesse and Craib, both in the plurality, characterized the strike as intermittent. Member Craib found this to be a solid basis for holding the strike unprotected, but he carefully distinguished unprotected status from illegal status.125 Member Hesse refused to analyze the strike on the basis of its intermittent nature and instead focused on the disruptive nature of strikes in general.126 In doing so, however, Member Hesse actually analyzed Compton in a manner consistent with the County Sanitation decision. Her determination that the Compton strike caused “a total breakdown of two discrete activities that are guaranteed by statute and case law”127 may fit within the “interruption of essential services” limitation imposed by the court in County Sanitation.128

Member Hesse’s concurrence with Member Porter’s constitutional arguments was supported by evidence which particularly addressed problems within the Compton Unified School District. Factors such as low academic achievement, dramatic absenteeism among students and a loss of special programs for both teachers and educationally disadvantaged students are elements which, when weighed against the extreme disruptiveness of this particular strike, may support a finding that the strike was unprotected. This conclusion is consistent with the State Supreme Court’s County Sanitation decision.

Compton emphasizes that the issue regarding the right to strike under EERA is neither clear nor settled. In light of the California Supreme Court’s opinion in County Sanitation, it is logical to assume that the right to strike may exist or may be developing under EERA in the future. This uncertain nature of strikes under EERA causes the issue of employer responses to strikes to remain unclear. Conversely, in the private sector, the right to strike is a settled issue and employer responses have been tested both practically and legally.

124. See County Sanitation, 38 Cal. 3d at 580-81, 699 P.2d at 846, 214 Cal. Rptr. at 435.
125. Compton, PERB Order No. IR-50 at 176.
126. Id. at 162-64.
128. See supra note 97 and accompanying text.
A strike is not merely an exercise of protected rights by a union. It also operates as an effective economic weapon against an employer. Although the employer may not openly retaliate against strikers, action may be taken to protect the business. In the private sector, two of the most common responses are locking out strikers and hiring permanent replacements. A lockout occurs when an employer refuses to allow employees to work in an attempt to gain bargaining concessions. A hiring permanent replacements is also a legitimate response to an economic strike so long as it is done in a non-discriminatory manner. These two employer responses have generally been considered correlative with the right of employees to strike.

Although the employer may not discharge employees for striking, hiring permanent replacements may result in an employee being permanently removed from the position. The distinction between discharging employees for striking and permanently replacing striking employees was set forth by the United States Supreme Court in the landmark case of NLRB v. Mackay Radio & Telegraph Co. In Mackay, several employees who engaged in an economic strike were replaced by employees transferred from other divisions of the company. When the strike ended, employees who had been replaced attempted to return to their jobs and were denied that right.

The Court held that the strikers were still “employees” under the NLRA. However, the Court construed the Act to offer only remedial protection against coercion and discrimination. The Court clearly upheld the permanent replacement response and stated, “the employer is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.”

In the years since Mackay was decided several cases have clari-
fied the boundaries of the permanent replacement response. It is clear that strikers retain their employment status and, consequently, the remedial protections under the NLRA. Strikers cannot be discriminated against and must be offered reinstatement when a position for which the employee is qualified becomes available. Cases throughout the years have defined discrimination and employees’ rights with respect to employer responses to strikes. Within the parameters of the NLRA and these cases, locking out strikers and hiring permanent replacements remains a common employer response within the private sector.

B. The Public Sector

In the public sector, employers’ choices of response have been varied. Employer responses have been reflective of the historically illegal status of public employee strikes. The most common responses include injunctive relief, termination of striking workers and tort damages. Although these options remain intact as viable responses to illegal strikes, the California Supreme Court’s County Sanitation decision fails to address the issue concerning employer responses to legal public sector strikes.

In California, public sector strike responses have not been explored with respect to legal public sector strikes. It is conceivable that as they develop and expand they will be patterned, as are many other aspects of public sector labor law, after the private sector. However, significant differences between the status of private and public sector employees must be reflected.

Three significant differences between the private and public sectors determine the availability of strike responses. The first is the existence of the property interest which public sector employees possess in their jobs. The second is the administrative burden associated with public employees. The third is the unique nature of public employment.

137. See NRLB v. Erie Resister Corp., 373 U.S. 221 (1963) (employer guilty of unfair labor practices by granting superseniority rights to strike replacements); NRLB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967) (employer guilty of unfair labor practices by granting vacation benefits to strikers who returned to work while denying those same benefits to employees who remained on the picket line); NRLB v. Fleetwood Trailer Co., 389 U.S. 375 (1967) (absent substantial business justification employer is obligated to offer reinstatement to striker if and when a job for which employee is qualified becomes available).

1. Property Interests

Property rights and procedural due process safeguards are features of public sector employment not found in the private sector. Property rights make it more difficult to terminate public sector employees. As a result, public sector workers have been afforded a level of job security not generally found in private industry.

A person has a property interest in his position when there is a legal right not to be removed from that position without due process. Generally, in positions protected by property interests, persons may be removed only for specifically enumerated reasons after notice and a chance to respond. This principle was set forth in the U.S. Supreme Court case of Board of Regents v. Roth, which held that a property interest in continued employment is safeguarded by due process. However, the case failed to define the method of determining property interests, and failed to state what due process is required to satisfy the protection. This holding allowed individual states to define, within Roth's parameters, the elements necessary for a property interest.

California adopted and expanded upon the Roth principles in

139. See Dichter, infra note 178.
141. California Education Code section 87732 states:
   No regular employee shall be dismissed except for one or more of the following causes:
   (a) Immoral or unprofessional conduct.
   (b) Any violation of Article 4 (commencing with Section 114000) of Chapter 3 of Title 1 of Part 4 of the Penal Code.
   (c) Dishonesty.
   (d) Incompetency.
   (e) Evident unfitness for service.
   (f) Physical or mental condition which makes him or her unfit to instruct or associate with students.
   (g) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the community colleges by the board of governors or by the governing board of the community college district employing him or her.
   (h) Conviction of a felony or of any crime involving moral turpitude.
   (j) Knowing membership by the employee in the Communist Party.

CAL. EDUC. CODE § 87732 (West 1979).
143. 408 U.S. 546 (1972).
144. Id. at 577.
145. Id.
the case of *Skelly v. State Personnel Board*.\textsuperscript{146} In *Skelly*, the California Supreme Court found that under the California statutory scheme public employees who achieve “permanent”\textsuperscript{147} status have a property interest in their job.\textsuperscript{148}

Due process must be afforded to an individual before job protection can be removed. In *Skelly*, the court held that due process requires fulfilling certain procedural steps before disciplinary action may be taken. Minimum safeguards include notice of the proposed action and the reasons such actions are to be undertaken, and a reasonable chance to respond.\textsuperscript{149} The California Education Code identifies similar procedures which must be followed prior to removal of a permanent public school employee.\textsuperscript{150}

The dismissal of public school employees for cause is governed by several provisions of the California Educational Code.\textsuperscript{151} These sections address the grounds for dismissal of regular employees and list the causes for which an employee may be terminated. They codify the property interest by removing the employer’s option to terminate at will.\textsuperscript{152}

California Education Code sections 44932 and 87732 both address grounds for dismissal of permanent employees. The language of these two sections is virtually identical. Section 44932 states in relevant part:

(a) No permanent employee shall be dismissed except for one or more of the following causes:

(1) Immoral or unprofessional conduct.
(2) Commission, aiding, or advocating the commission of acts of criminal syndicalism. . . .
(3) Dishonesty.
(4) Incompetency.
(5) Evident unfitness for service.
(6) Physical or mental condition unfitting him to instruct or as-

\textsuperscript{146} Skelly, 15 Cal. 3d 194, 539 P.2d 774, 124 Cal. Rptr. 14.

\textsuperscript{147} A “permanent employee” is an employee who has satisfactorily completed a statutorily defined probationary period (three years) and has been retained as an employee beyond that period. *Cal. Educ. Code* § 44929.24 (West 1980 & Supp. 1989).

\textsuperscript{148} Id. § 87732 et seq. and § 44932.

\textsuperscript{149} Generally, a contract of employment for an indefinite term is a ‘contract at will’ and may be terminated by either party.” *Joshua v. McBride*, 716 S.W.2d 215, 217 (1986) (citing *Griffin v. Erickson*, 277 Ark. 433, 436-37, 642 S.W.2d 308, 310 (1982)).
Persistent violation of or refusal to obey the school laws. 

Conviction of a felony or any crime involving moral turpitude.

Violation Section 51530 of this code.

Violation of any provision in Sections 7001 to 7007, inclusive, of this code.

Knowing membership by the employee in the Communist Party.\(^{153}\)

Since “engaging in concerted activities” is not one of the “causes” listed within these sections, or addressed elsewhere in the California Education Code, it has been argued that management is barred under the existing structure from replacing employees who strike. However, it is arguable that these code sections don’t apply to employees locked out or permanently replaced during a strike.

One significant aspect of public employment discharge statutes is that they guarantee that the employee retains full employment status unless and until that status is revoked by actions specified within the statutes. Consequently, in order to remain outside the reach of the discharge statutes, “permanently replacing” strikers must be distinguished from “discharging” strikers.

One distinguishing feature is the right to reinstatement. These code sections address discharge of employees where there exists no right to reinstatement. Cases since \textit{NLRB v. Mackay Radio \\& Telegraph Co.}\(^{154}\) have clearly held that a right to reinstatement exists where striking employees have been permanently replaced. In \textit{NLRB v. Laidlaw Corp.},\(^{155}\) the Board stated that a right to reinstatement exists “upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.”\(^{156}\) This right to reinstatement places the employers’ action outside the statutorily mandated discharge procedures. As a result, full employment status guaranteed until exhaustion of the “just cause” discharge provisions does not apply. Thus, a standard

\begin{itemize}
  \item 156. \textit{Id.} at 1369-70.
\end{itemize}
somewhat lower than full protection. Providing remedial protection against coercion and discrimination may arguably suffice.

2. The Administrative Burden

An additional feature of public sector employment not found in the private sector lies in the administrative processes associated with available responses. Due process requires notice and an opportunity to respond. Generally, public employees are entitled to both pre-discharge and post-discharge due process protections. It would clearly be administratively impossible to provide the typical termination process to every employee engaged in a widespread strike. Both the staffing requirements and timing issues presented by such a process would render it ineffective. Thus, in order to provide the public employer with a realistic response to a strike, the due process requirement must be modified to overcome this limitation.

An alternative to the current system could require a streamlined hearing process. Consideration of written statements submitted by the parties may accommodate both sides. Although the protection afforded the public employee is lessened under this procedure, protection still remains greater than in the private sector. In addition, the employee is still offered the opportunity to present his case before a neutral third party. Thus, the public employee would not be required to relinquish his “termination for cause only” status.

Prejudice under such procedures would be minimized if the procedures were applied only to concerted activity situations. Consequently, this situation would require extensive definitions determining the scope of concerted activities.

Although this suggested modification to the administrative procedures represents an erosion of some of the employees’ rights, it may be viewed as a reasonable trade-off for gaining the right to strike. Where the employee gains the right to engage in concerted activities, a traditionally private sector right, it is suggested that employment status should more closely correspond to the private sector as well. Public sector employees would be offered a choice under this method. They could either remain within the traditional public sector employment relationship and its due process guarantees, or exercise rights commonly granted within the private sector and assume the corresponding status. Under this model, public sector employees still retain limited due process rights unlike private sector employees who are terminable at will.
3. Unique Features of the Public Sector

Features unique to the public sector have also been used as a basis for questioning the applicability of traditional collective bargaining principles. Its industry is primarily one of providing public service. While a company within the private sector may lose profits and deprive the market of its product, services offered by the public sector are often essential and have widespread impact. These factors clearly distinguish the public and private sectors.

One major purpose of an economic strike is to create economic incentives for management to make concessions. This generally affects the ability of the organization to function effectively, and the availability of protective devices such as the lockout then becomes critical.

In private industry, if the business does not function satisfactorily, customers may choose to do business elsewhere. It has been argued that in the public sector, this choice is not generally available. Statutorily governed services usually do not exist within a competitive market. There are few alternatives for “customers” within the public sector in the event of a strike. Whereas one has a choice of whether or not to buy a product or service within the private sector, choice is often non-existent in the public sector. Children attend public schools designated by residence. Police, fire protection and public transportation allow for little personal choice. In the private sector, one may choose among a variety of brands for the same product. If a brand is unavailable there is usually an alternative. However, this analogy does not apply to most of the services and products offered in the public sector. Legal limitations on concerted activity by the public employee provide incentives for the public employee to quickly resolve disputes with a focus on the affected public as well as collective bargaining issues.

Clearly the scope of a public sector strike is broad. Diminishing or curtailing services to the public will always be problematic. The scope of the problem will be defined by the seriousness of deprivation of services. These concerns were addressed in County Sanitation.


and were found to be of minimal consequence in today’s labor market. The availability of subcontractors decreases the prospect that essential services will be interrupted. The recent air traffic controller’s strike\textsuperscript{160} demonstrated the government’s ability to hold firm against a strike which caused substantial inconvenience and lasted a considerable amount of time.

Additionally, political factors are more prevalent within the public sector. Labor unions commonly endorse candidates and are influential campaigners. Election or re-election considerations often underlie concerns where labor problems exist. These concerns may influence the desire for a quick outcome without focusing entirely on the issues.\textsuperscript{161} Traditional private sector responses become less effective when the employer’s ultimate goal is a rapid settlement.

Consequently, strict adoption of the private sector model is problematic. While recognizing that the private sector is a vastly complex environment, it is afforded the “luxury” of having primarily economic issues with which it must contend. The unique aspects of the public sector must be reflected in any comprehensive scheme dealing with this problem.

4. Models

Several states and countries have adopted statutes which recognize a right to strike within the public sector.\textsuperscript{162} These statutes tend to be similar in many respects.\textsuperscript{163} The most common approach utilizes several levels of negotiation prior to reaching the strike stage. These levels include mandated negotiation procedures, mediation, and fact finding.\textsuperscript{164} Often, external groups are appointed to regulate the collective bargaining relationships. This method of managing the process ensures statutory compliance and introduces an important neutral mediating force.

a. The Alaskan Example

One example of this type of statutory scheme exists in the state of Alaska. Alaska statute 23.40.200 divides public employees into

\begin{itemize}
  \item \textsuperscript{160} The strike resulted in the case of PATCO v. Federal Labor Relations Auth., 685 F.2d 547 (D.C. Cir. 1982).
  \item \textsuperscript{161} Id.
  \item \textsuperscript{163} See supra note 162.
  \item \textsuperscript{164} See supra note 162.
\end{itemize}
three groups; 1) public employees with no right to strike; 2) public employees with a limited right to strike; and 3) public employees with an unlimited right to strike.\footnote{166}

Employees with no right to strike include “police and fire protection employees, jail, prison and other correctional institution employees, and hospital employees.”\footnote{166} Employees in this class are automatically subject to injunctions, restraining orders, or “other order[s] which may be appropriate”\footnote{167} in the event of a strike. Collective bargaining impasses or deadlocks are first submitted to mediation and then to binding arbitration.\footnote{168}

Public employees subject to the limited right to strike include “public utility, snow removal, sanitation and public school and other educational institution employees.”\footnote{169} This section requires such employees to first exhaust mediation procedures before undertaking formal strike activities. Then, if a majority vote by secret ballot is in favor of striking, the group may engage in a strike for a limited period of time.\footnote{170}

The inclusion of public school employees in this section is somewhat misleading. Teachers and non-certified school district employees are not subject to the provisions of this statute and possess no right to strike. In Anchorage Education Association v. Anchorage School District\footnote{171} the court held that teachers and non-certified employees are not public employees covered by A.S. 23.40.200.\footnote{172} The Anchorage Education Association argued that this construction “renders the term ‘public school . . . employees’ in section 200(c) meaningless.”\footnote{173} The Anchorage court responded by identifying other certified employees, such as principals and counselors, who would not be excluded by this construction and who may possess a right to strike.\footnote{174} Teachers were recognized as filling a special role in society.\footnote{175} The court cited “functional limitations” as a reason for the

\begin{footnotes}
\item[166] Id. § 23.40.200(b).
\item[167] Id. § 23.40.200(b).
\item[168] Arbitrations are conducted in accordance with Alaska Stat. § 09.43.030 (1962).
\item[169] Id. § 23.40.200(c).
\item[170] Id.
\item[171] Id.
\item[172] “At first glance, section 200(c) includes teachers. But the definition section of PERA [Public Employee Relations Act], A.S. 23.40.250(5), excludes ‘teachers’ from PERA wherever ‘public employee’ appears. Thus, teachers, who are not ‘public employees’ for the purposes of PERA, are not covered by A.S. 23.40.200.” Id. at 995.
\item[173] Id.
\item[174] Id.
\item[175] Id. at 996.
\end{footnotes}
inability to extend a right to strike to this group.176 Without the privilege and protection of a concerted strike, teachers in Alaska are provided with only collective bargaining rights and binding arbitration in grievance procedures.177

b. The Swedish Example

Another similar system exists in Sweden. Sweden enacted a statute which addressed strikes within the public education sector.178 This statute outlines a very structured approach to collective bargaining which includes the option to strike. Several limitations apply to this right to strike, including a limit on who may call the strike,179 a mandatory seven-days notice before striking, and the option to submit the dispute to mediation. In response to striking teachers, the Swedish government may call a lockout. Once a lockout is called, the union may not return to work until a contract settlement is reached.180

The type of system employed by Sweden has proven effective for several reasons. First, striking is extremely costly to both sides. Second, the structured approach ensures that all attempts to reach agreement are exhausted. Third, the seven-days notice forces both sides to live with, and reflect upon, their decision before it becomes effective. The prospect of frivolous strikes is minimal under this statute.

The Swedish system is similar to one aspect of the County Sanitation holding in that they do not permit public sector strikes where a danger or threat to the health, safety or welfare of the public is a factor. This system also requires that the union give notice of the intent to strike. Responses available to the government employer range from injunctions to binding arbitration.

The experiences of other countries and states demonstrate that a

176. Id.
177. Id. at 997.
179. See Dichter, supra note 178, at 947. “The power of the confederation is stronger than that of the local, since only central organizations have the legal authority to call a strike.” Dichter supra note 178, at 947.
180. Dichter, supra note 178, at 947 n.93 “A lockout occurs when the government closes down a school that has been struck, and employees, both striking and nonstriking, cannot return to work until an agreement is concluded between the union and the struck school employer.” Dichter, supra note 178, at 947 n.93.
limited right to strike can work within the public sector. The focus on appropriate procedure protects both government and employee interests.

VI. ANALYSIS

The County Sanitation decision presents a difficulty for public sector employees, in that it provides the right to strike but remains silent on allowable employer responses. The court has in effect provided a right to employees without addressing corresponding management concerns. Responses which have typically been applied to legal economic strikes within the private sector, such as lockouts and hiring permanent replacements, are in direct conflict with the property interests which exist in most public sector positions. Ironically, this creates an unequal bargaining position where laws enacted for the protection of the weaker group, the employees, instill a level of power not previously contemplated by giving employees the power to disrupt government and societal affairs.

Justice Lucas' dissent in County Sanitation rightfully acknowledges the difficulty the courts face in trying to govern an employment relationship which requires a "comprehensive regulatory scheme." Justice Lucas' dissent also stresses the devastation that public sector strikes may wreak on a city. Until recently, public sector strikes have always been illegal. Nevertheless, they have consistently occurred. By preserving the illegal status of public sector strikes, the state has not prevented their occurrence but, instead, has been prevented from developing an effective system for dealing with strikes.

Legislation legalizing public sector strikes could provide a limited right to strike and set forth the "comprehensive regulatory scheme" which is missing. Under the current legislative scheme, the blanket prohibition against public sector strikes is not viewed seriously. Employees ignoring such prohibitions have, for years, gone on strike. The legalization of public sector strikes in several other states has fueled the belief that these blanket prohibitions are outdated. In addition, they provide tested systems from which California could develop its own approach.

Such legislation could categorize the various types of public sec-

tor employees by job type. Thus, strikes involving critical health and safety concerns would not unexpectedly arise and could be prevented. *Compton* and *County Sanitation* demonstrate that a case by case basis is not the most effective manner of resolving these disputes. This task remains unmanageable so long as the present structure remains.

In order to fully consider the issue of employer responses to strikes, two major issues must be addressed. They are: (1) the type of employee and (2) the type of strike. The *County Sanitation* decision, as well as several state laws, fairly articulate a distinction between “essential” and “non-essential” functions. The differences between these functions are critical and thus compel a different standard of employer response. In addition, the legality or illegality of the strike will also determine the appropriate employer response.

A. Type of Employee

The service orientation of public sector employment provides a basis by which public employees can be categorized. Public sector jobs cover the spectrum between essential and non-essential functions. Any statutory scheme addressing public sector concerted activity must minimize the interruption of essential services. However, there is no reason for treating non-essential functions in the same manner. Striking electricians or clerk-typists generally do not pose the same level of threat as striking police or firefighters.

B. Type of Strike

This Comment suggests that legalizing public sector strikes could provide a basis for developing a comprehensive scheme for dealing with such strikes. However, this in no way suggests that all public sector strikes should be legal. Concerted activity falling outside the parameter of any legislative scheme would remain illegal. Current responses to illegal public sector strikes should remain intact.

VII. Proposal

One of the clearest concepts to emerge from *County Sanitation* and *Compton* is the proposition that the public sector is in need of guidance in the area of employment relations. One alternative currently being pursued within the legislature proposes to amend the California Constitution to prohibit strikes by public employees.183

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Another alternative, which recognizes the right to strike, allows for traditional private sector responses such as lockouts and hiring permanent replacements. Under the present statutory scheme, lockouts and hiring permanent replacements cannot be utilized. The major obstacle lies in the property rights possessed by public employees. As the statutes presently read, public employees may not be summarily dismissed for strike activities. Consequently, dismissal of public employees for strike activities would require individual due process and dismissal hearings. This administrative burden could not reasonably be met by the public school employer. It is, therefore, necessary that more effective responses be available to the employer if public strikes are to be legalized.

The Legislature could address this problem by amending the statutes which grant property rights. This amendment could provide that while public employees are engaged in concerted activities, they waive the property interests in their jobs. Modification of the present due process requirements would provide a more effective system while still preserving the public employee’s right to due process. The employer would then have available the options of lockouts and hiring permanent replacements without the crippling effect of implementing the current due process procedures. This type of amendment would both reconcile the statutory block against implementation of strike responses and defeat the imbalance created by the due process requirements.

The approach to this solution must be twofold. First, specific statutory amendments to the current scheme must be implemented before any new structure could be adopted. These amendments would provide that any new statutes would not be in conflict with the current state of the law.

Second, a modified approach based on one of the proven systems, such as the Alaskan or Swedish model, could be adopted. Categorizing employee groups, distinguishing between legal and illegal strikes, and providing mechanisms for dispute resolution must all be included in a workable system. Legislation addressing public sector strikes must then include definitions describing the various types of employees. In addition, standards should be established to address the differing levels of job security which must be afforded to these employees, and include distinctions for legal and illegal strikes. By enacting legislation addressing these issues, the State of California could define a limited right to strike, provide definitional guidelines

184. CAL. EDUC. CODE § 87732 (West 1989).
and more effectively address the issue of employer responses to public strikes.

VIII. CONCLUSION

The longstanding illegal status of public sector strikes has done little to prevent their occurrence. Recognition by the Legislature of a right to strike would provide the means to develop a comprehensive scheme for dealing with public sector strikes. The employee would be provided with a realistic standard by which concerted activities could be governed. The employer would be provided with an effective tool for responding to such activities.

This Comment has addressed various aspects of the right to strike within California's public employment sector. It examined the scope of County Sanitation and discussed its applicability to employees covered by the Education Employee Relations Act. The Public Employment Relations Board's Compton decision which attempted to distinguish County Sanitation lacked consensus on both the analysis and final decision. Consequently, no clear holding exists on whether there is a right to strike under EERA. However, the similarities between EERA and MMBA present a strong argument in favor of the existence of a right to strike for public school employees.

Realistic and effective employer strike responses must be developed for use in the public sector. Proven models exist within other jurisdictions and provide models from which California could derive its own system. The limited right to strike and traditional private sector remedies could be applied after laying the proper foundation. Statutory and common law obstacles can be removed through legislative amendments to existing laws.

It appears the right to strike will not only remain prevalent in our society but is likely to expand. Likewise, the incentive to explore potential responses remains equally strong.

Donna Williamson