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The Collective Bargaining Process at the Municipal Level Lingers in its Chrysalis Stage

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THE COLLECTIVE BARGAINING PROCESS AT
THE MUNICIPAL LEVEL LINGERS
IN ITS CHRYSALIS STAGE

INTRODUCTION

In the past twelve years California has passed three laws in
the area of public employer-employee relations,1 which have
aroused considerable controversy, outrage, and confusion between
the involved parties.2 Whereas the law regulating private em-
ployer-employee relations provides explicit provisions concerning
the interaction between parties, ambiguities and vagueness in criti-
cal areas of the law regulating the public labor makes litigation
inevitable as does the failure of these laws to provide for en-
forcement or penalties. Legal problems regarding the intent of
such laws have already arisen in practically every jurisdiction in
California.3

The most recent public employee relations law, the 1969
Meyers-Milias-Brown Act4 gives important new rights to employee
organizations, but these rights go only to those organizations for-
maiy "recognized" by the public employer.5 This comment will

(covering state employees); The Winton Act, CAL. GOV'T CODE §§ 13080-88
(West 1965) (covering public school employees); The Meyers-Milias-Brown Act,
2. Personal interview with Philip Trenholm, past President of the Western
Council of Engineers, City of Santa Clara Chapter, April 26, 1973.
3. See, e.g., San Mateo County Employee's Ass'n v. County of San Mateo,
Civil No. 142834 (San Mateo Super. Ct., Feb. 27, 1969). The San Mateo
County Superior Court issued a temporary injunction in an action brought by the
San Mateo Employees Association against the Board of Supervisors. The board
sought proposals from independent contractors to manage the food services at
San Mateo County General Hospital. The court found that the contracting pro-
cedure would affect both hours and working conditions of association members,
and therefore was a matter within sections 3504 and 3505 of the California Gov-
ernment Code (Meyers-Milias-Brown Act). In San Diego v. American Fed'n of
State, County and Municipal Employees, Local 127, Civil No. 312056 (San Diego
Super. Ct., June 9, 1969), the City of San Diego obtained a restraining order
enjoining a strike threatened by the American Federation of State, County
and Municipal Employees, (AFSCME) Local 127. The union's proposed action
was based on a complaint that the city had consistently refused to meet and
confer in good faith. The union maintained, that sections 3500-11 of the Cali-
fornia Government Code (Meyers-Milias-Brown Act) were at least neutral with
respect to the right of public employees to strike and possibly created an impli-
cation that such strikes are legal.
4. Hereinafter referred to as MMBA or the Act.
outline a range of problems facing public employees who seek "recognition" for their organization in order to gain the bargaining advantages provided for in the MMBA. It will then analyze how some public jurisdictions are presently handling this issue, and suggest possible amendments to the Act which might eliminate "recognition"\(^6\) and its ally "unit determination"\(^7\) as major areas of confusion and conflict. Emphasis will be placed on arbitration as the most desirable manner to resolve disputes in the public sector. Since the MMBA does not apply to employees of State agencies,\(^8\) only the problems of employees of subordinate governmental units such as cities and counties will be considered.

**HISTORY OF CALIFORNIA PUBLIC EMPLOYEE ACTS**

It is practically impossible to appreciate the magnitude of the problems involved under the MMBA without first examining the legislative and historical background of public employer-employee relations in California. Along the continuum of public-employee labor relations—from complete prohibition of unionism at one end to the private-sector model at the other—California has progressed less than most industrial states.

**Practice Prior to 1961**

Before passage of the George Brown Act of 1961,\(^9\) no state statute governed public employer-employee relations. Such issues as employee organization, employee representation, and grievances were dealt with in as many ways as there were state and local public agencies. For example, the State Conciliation Service reported in 1957 that in one local government agency there were 23 collective bargaining agreements in effect, covering approximately 5000 employees at the local government level.\(^10\) In contrast, county employees in many jurisdictions complained they had no opportunity to present their views on employee-employer relations.\(^11\)

Many associations testified to active agency hostility toward employee organizations which attempted to represent their mem-

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11. Id.
bers. Employees expressed fear of reprisals for joining a bargaining organization. In fact, some local governmental units prohibited the joining of an employee organization which included employees in other agencies and insisted that persons already members resign.

The George Brown Act of 1961

In 1961, the George Brown Act granted all public employees the right to join organizations of their choice and required employing agencies to “meet and confer” with representatives of employee organizations. The public employer, however, was only required to consider the employee presentations, such as proposed salary increases and fringe benefits, as fully as it deemed reasonable before determination of policy or course of action. In effect, the Act provided for little more than the right to join or not to join employee organizations and the right of the organization to be heard by the employer. The Act made no provision for the resolution of impasses on any matter within the scope of representation. Ultimately, the decision on any dispute was made unilaterally by the employer as had been done prior to the passage of the Act.

Most California public employee organizations did not believe that the 1961 legislation contributed to their effectiveness in representing their members’ interests. By the end of 1964 there emerged a definite rejection of the “consultation” system of the George Brown Act by some employee organizations and a shift toward hard demands for the right to be heard on a systematic basis. Between 1964 and 1967, for example, there were strikes in several California cities, including Antioch, Concord, Pittsburg, and in Humbolt County; social workers struck once in Sacramento County and three times on Los Angeles County.

12. Personal interview with Philip Trenholm, past President of the Western Council of Engineers, City of Santa Clara Chapter, April 26, 1973.
13. Id.
15. Fancey, Employer-Employee Negotiations Procedure is Outcome of Antioch Labor Relations Dispute, WESTERN CITY, Aug., 1968, at 11. In 1966 a city employee organization was dissatisfied with the existing method of presenting salary and fringe benefit requests to the city manager of Antioch, California. The group went on strike resulting in the attainment of a “negotiation procedure” which entitled them to at least join in the discussions of salary and fringe benefits before the city council acted on the proposed budget.
The Meyers-Milias-Brown Act of 1968

The Meyers-Milias-Brown Act emerged out of the unrest among public employees in the 1960's. Passed in 1968, the Act appears to have come as somewhat of a surprise.\textsuperscript{17} The MMBA's major contribution to public labor law was that it offered a means for formalizing employer-employee relations in the public sector by strengthening the right of "recognized" employee organizations to be heard and to have their views seriously considered. The direction of the Act is to ensure that a form of bargaining shall take place.\textsuperscript{18} That is, the public employer is put under an obligation to endeavor to reach an agreement, although not required to actually agree.\textsuperscript{19}

Presumably this change answered the complaint of many employee associations that the right to meet and confer is meaningless so long as the employer retains the unilateral right to act when and how he chooses. Under the MMBA, advance notice of changes in employee-employer relations must be given and personal good faith communication between the employer and the "recognized" employee organization must take place.\textsuperscript{20}

The MMBA, however, like most legislation, is the child of compromise and should be considered an interim measure. The general intention of those who supported the Act was to provide for some form of compulsory bargaining between employers and employee representatives, but to do so in such a way as to accommodate comfortably the quite different situations which exist in California's local public jurisdictions. However, the attempt to be both gently directive and permissive has resulted in legislation which contains confusing and ambiguous features.

While the expanded rights embodied in the Act go only to "recognized organizations," the Act provides no standards or guidelines for granting recognition. Must all employee organizations be recognized? Can recognition be extended only to majority representatives? To help answer these questions, the views

\textsuperscript{17} Id. at 21.
\textsuperscript{18} CAL. GOV'T CODE § 3505 (West Supp. 1973).
\textsuperscript{19} A similar requirement exists under federal labor legislation. Cf. Labor Management Relations Act § 8(d), 29 U.S.C. § 158(d) (1971). The key definition of collective bargaining in this federal labor legislation is:
the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment [This part of the definition is almost identical to that contained in section 3505 of the MMBA.] or the negotiation of an agreement, or any question arising thereunder, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. Id.
\textsuperscript{20} CAL. GOV'T CODE § 3504.5 (West Supp. 1973).
COLLECTIVE BARGAINING

and characteristics of public employers, employee associations and unions must first be examined.

Any public employee relations bill which attempted to spell out definite recognition procedures in 1968 invariably had to fail in the state legislature. Dozens of suggested bills had been unsuccessful in the past because of the impossibility of resolving differences between unions, employee associations, and employer groups. The MMBA succeeded in the legislature in large part because it was ambiguous on the issue of recognition procedures.

Management groups, such as the League of California Cities, took the position that employee relations could best be handled through local ordinances rather than general state legislation. That organization now views the Act as permissive and in line with its own general policy of maintaining flexibility.\(^2\)

Employee associations and unions, on the other hand, generally have preferred to have a more uniform basis for determining "recognition," but even among these groups there has been little agreement on detail. Their inability to reach agreement is largely due to important structural differences between independent employee associations and AFL-CIO affiliated unions. Most of the independents are organized in only one jurisdiction and accept all the employees of the agency. The unions, however, have tended to concentrate on certain occupations or groups of occupations and to organize across agency lines.

Moreover, independent associations and unions have different goals. Unions favor collective bargaining and if not the right to strike, at least impartial settlement of disputes. The associations concentrate on special services to their members, such as low cost insurance, and tend to believe that collective bargaining is inappropriate because economic gains can best be made through rational presentations to governing bodies.

The compromise that the MMBA represents has not succeeded in pacifying these interest groups. The following section will examine the problems arising under the Act when employers and employees try to impose their interpretations of its ambiguous language upon one another.

THE IMPLEMENTATION PROBLEM

The Requirement of "Recognition"

Since the MMBA became effective on January 1, 1969, local government agencies in California have been faced with the necessity of deciding what rules and regulations should be adopted

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to determine how recognition and unit determination should be granted. Competing associations are keenly interested in what criteria will be established because whichever organization gains formal recognition will concurrently acquire important new rights.22 "Recognized" employee organizations23 and the public agency are now mutually obligated to meet and confer in good faith and endeavor to reach agreement on matters within the scope of representation.24

In addition, "recognized" employee organizations gain three other advantages: (1) a reasonable number of employee representatives must be allowed time off without loss of pay or other benefits when formally meeting with the employer on matters within the scope of representation;25 (2) the employer shall give reasonable written notice to affected organizations of proposed changes relating to matters within the scope of representation;26 (3) if an agreement is reached by representatives of the two sides, the parties must jointly prepare a written memorandum of understanding for presentation to the governing body for final approval binding on both parties.27

Since recognition precedes the right to bargain, clearly, without first becoming formally recognized by the public agency an employee organization has little power.

Unit Determination

Unit determination, an allied issue to recognition, is also of vital concern to all parties. For example, employee organizations seeking majority recognition will favor units which encompass as many of their membership as possible; employee organizations which have scattered membership may prefer large, all-inclusive units; craft or occupation-oriented organizations may desire narrowly defined units. Employers, however, do not wish to bargain with a mass of small specialized organizations or with

24. The scope of representation includes all matters relating to employment conditions such as pay, hours, and employer-employee relations except, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order. CAL. GOV'T CODE § 3504 (West Supp. 1973).
two or more organizations which represent employees subject to identical conditions of employment.

The general objectives of unit determination are to make bargaining rights effective by defining the area within which bargaining will take place and allowing the employees in the unit to democratically select their representative. Unit determination is not required by the MMBA, nor is it prohibited. Under the terms of California Government Code section 3507, the employer has the unilateral right to adopt rules on recognition and, therefore, unit determination in order to administer the Act. Prior to this action, however, the employer must consult in good faith with representatives of employee organizations on their views concerning appropriate units and recognition rules but the employer need not adopt their suggestions.

Different Levels of Recognition: What are the Choices?

Given the fact that employee organizations in California must be "recognized" in order to gain the expanded benefits of the MMBA, and the fact that the employer has authority to unilaterally adopt rules on recognition after consultation in good faith, how should the law on the recognition-determination issue be interpreted? There are two possible interpretations: the employer can recognize all employee organizations or he can establish a differential recognition system. Either system can be supported by reference to various sections of the MMBA.

Case 1: All Employee Organizations Must Be Recognized

Section 3501(a) defines an employee organization as one which includes employees of the public agency, with one of its prime purposes being the representation of its members in their relations with that agency. Within the same section a narrower definition describes employee groups which have been formally acknowledged by the public agency as representing employees of the governmental subdivision. These groups are identified as being "recognized employee organizations". Once

28. Cf. National Labor Relations Act §§ 7, 9(a), (b) & (c)(5), 29 U.S.C. §§ 157, 159(a), (b) & (c)(5) (1971). In contrast to the MMBA, under the NLRA careful rules govern unit determination. Appropriate units for bargaining are determined on the basis of custom, and in some cases by consent to union claims. Where a voluntary agreement regarding the appropriate bargaining unit cannot be reached, hearings are held by the regional director of the NLRB; his determination is subject to limited review by the Board. In establishing the bargaining unit, the Board has a wide variety of choices; employees in a single plant might be grouped as a unit or divided according to craft or department, or placed in larger classifications.

"recognized," section 3503 provides, through mandatory language, that these organizations have the right to represent their members in employment relations with the public agency. Sections 3502 and 3506 give public employees the right to join organizations of their choosing for the purpose of being represented on matters pertaining to employer-employee relations, and the employers are prohibited from interfering with this right.

In view of these sections, the argument is posited that if all employees have a right to join organizations "for the purpose of representation on all matters of employer-employee relations" without interference from the employer while only "recognized" employee organizations have the right to so represent their members, then clearly all employee organizations must be "recognized." Subsequent to passage of the MMBA, this view was expressed in an opinion by the legislative counsel, in which he stated that the only reason a public agency could refuse to formally acknowledge an organization as a "recognized employee organization" is that the organization failed to meet the criteria set forth in section 3501(a) of the Act. He further stated that a refusal on any other basis would impair the rights of public employees to form, join and participate in the activities of employee organizations of their own choice and would therefore be clearly contrary to the purposes of the Act.

Some local jurisdictions have adopted rules which allow recognition for all employee organizations. Among these are the Valley Central Municipal Water District, Tulare County, and the cities of Downey and Manhattan Beach. There are some obvious shortcomings to such an approach. The general recognition policy might encourage vigorous competition to recruit and retain members and is likely to lead to exaggerated demands on the employer who under the MMBA is committed to deal with organizations he has "recognized" regardless of how unrepresentative they may be or how time consuming the process becomes.

Case 2: Differential Recognition

A second interpretation, which is supported by the League of California Cities, holds that "recognition" may be granted

33. Schneider, supra note 30, at 9.
only to organizations with majority support, so long as minority groups may make presentations to the employer and have such presentations taken into consideration. The majority organization would be recognized; the minority organization would only be given informal recognition. Support for this interpretation is derived from several sections of the MMBA.

A primary purpose of the Act, as indicated in sections 3500 and 3505, is to provide a "reasonable" method of resolving disputes. Arguably, this requirement could not be met in situations where competing employee organizations are given equal recognition or where many organizations represent only a small percentage of employees with common employment conditions.

The employer is allowed to adopt reasonable rules on recognition through section 3507 of the Act. This clause leaves open the possibility of various systems of recognition which may be utilized by the public agency. An argument could be advanced that if the legislature intended all organizations to be recognized it would not have allowed this latitude for variation. The proponents of this position believe that general recognition will lead to chaos. They assert that through recognition procedures management can determine that only one union may represent a certain class of employees with an identifiable common interest regardless of department. For example, they maintain that each laborer has a common interest in salary terms with all other laborers, regardless of the department in which he works. The same is true of clerks, stenographers, and even truck drivers—all of whom are found in many different departments of local government.

Management is attempting to avoid the situation where an employee organization signs as members a majority of the employees of one department but only a minority of the public agency's total employment of a given class of employees. Under a general recognition system, that organization would then represent the minority group in salary negotiations despite the fact that the salary schedule covers all employees of that class in all departments. Management's proposed resolution of the problem is to recognize such an organization on an informal basis only. The organization could then present pay demands to the employer and represent its member in grievances, but would have to accept decisions negotiated by the majority organization with regard to department-wide working conditions.

The problems presented by the differential recognition system

35. 1 LABOR-MANAGEMENT RELATIONS NEWSLETTER, No. 6 (Nov., 1970).
are exemplified by the experiences of a typical employee organization attempting to gain recognition. The Western Council of Engineers (WCE) seeks to represent civil engineers working for public agencies in the San Francisco Bay Area. Under section 3507.3, professional employees such as engineers cannot be denied the right to separate representation from non-professionals. Therefore, professionals as a class are defined by law as an appropriate employee unit. Disputes over the application of the language of section 3507.3 have given rise to considerable litigation. Moreover, the WCE would prefer to represent an even smaller unit comprised only of public works engineers. To gain recognition, however, they have had to conform to a morass of different criteria which vary from jurisdiction to jurisdiction.

The City of Santa Clara, California requires an employee organization to represent at least five percent of the total number of full time employees before granting recognition to that organization. Since there are approximately five hundred employees working for the city, of which only fifteen are engineers, the WCE may not gain recognition despite the fact that one hundred percent of the engineers desire this organization to represent them. To be "recognized," the WCE must find ten other professionals, such as architects, accountants, or city attorneys, who would allow an engineer's employee organization to represent them.

On January 17, 1972, the Superior Court of the County of Santa Clara ordered the City of Santa Clara to amend its Employer-Employee Relations and Implementing Rules and Regulations, Oct. 28, 1971.
er-Employee Relations Rules and Regulations to eliminate discriminatory effects upon professional employees who seek to be represented separately from other employees within the city.41

The County of San Mateo, on the other hand, has what amounts to a general recognition system. In its proposed draft of an ordinance covering employer-employee relations, the only requirement for "recognition" is that the organization include employees of the county who had designated the organization to represent them. In contrast to the percentage requirement imposed by the City of Santa Clara, the County of San Mateo has formally recognized the WCE although it represents far less than five percent of the county's total employees.

In Sacramento County the principal criterion for recognition and unit determination is a finding of a community of interest among the employees comprising the proposed unit.42 The City of Berkeley's resolution requires that the Personnel Board designate the representation unit. The Board is required to consider but is not bound by such factors as internal and occupational community of interest, history of representation, and the effect of the representation unit on the efficient operation of the city.48

Reliance upon the "community of interest" doctrine as the principle unit determination criterion in Sacramento County unfortunately does not resolve the conflict. For example, the WCE argues that public works engineers are an appropriate unit, with a community of interests, based upon the existence of a single profession with common interests and goals. The State Legislative Counsel has taken a similar position and stated that separate representation of each profession was intended by the MMBA. The representation of professional employees against their wishes by an employee organization composed of a variety of professional employees is contrary to the declared intention of the Act to permit employees to choose their own representative.44

The city management of Oakland and Berkeley have interpreted section 3507.3 literally and argue that although the section grants professionals the right to be represented separately from nonprofessionalans, it is silent as to whether professional em-

42. County of Sacramento, Calif., AMENDED PROVISIONS OF THE SACRAMENTO COUNTY CODE RELATING TO EMPLOYEE RELATIONS (July 26, 1970).
ployees in each profession must be represented separately. Thus they insist upon large units in an attempt to maintain efficiency and avoid competition among small special interest units over such items as salaries.

In Alameda County, the Board of Supervisors established a county wide unit consisting of approximately 360 non-health-related professional employees. Organizations representing engineers and public defenders claimed the unit violated section 3507.3. In a court action it was held that "under the provision of Government Code section 3507.3 attorneys and engineers have a right to be represented separately from non-professional employees, but they do not have a right to be represented separately from other professional employees." 47

Resolving the Problem of Unit Determination

As the experiences of the WCE demonstrate, problems arise from “fair” application of “reasonable” criteria. Management reasonably seeks to avoid proliferation and institutionalization of union competition over wages and working conditions. Employees and their organizations logically refuse to abandon those criteria which encourage self-determination in favor of the employer’s emphasis upon the need for efficiency of government operations. Where employers and employee representatives have been unable to compromise their differences over criteria for recognition and unit determination, the common resolution in California has been for the employer to make the final decision.

Section 3507.1, a 1971 addition to the MMBA, provides limited improvement in this situation:

In the absence of local procedures for resolving disputes on the appropriateness of a unit of representation, upon the request of any of the parties, the dispute shall be submitted to the Department of Conciliation of the Department of Industrial Relations for mediation or for recommendation for the resolving of the dispute. 48

The key phrase which brings this section into operation, if elected by one of the parties, is “in the absence of local procedures.” It does not require that local procedures conform to any particular standards of neutrality nor does it provide for any review

47. Id.
of a determination reached through local procedures. An example of neutral procedures for unit determination exists in the system adopted by the County of Sacramento, where the determination is made by a neutral arbitrator. 49

The MMBA provides no sanctions for noncompliance with the provisions of the Act and no means of enforcement. This does not mean that recourse cannot be had for a refusal to conform to the requirements of the Act. A group of employees who believe that they are being damaged or will be damaged by non-conformance with the Act may file suit in a superior court for injunctive and/or declaratory relief. The WCE, for example, filed suit against the City of Santa Clara 50 for "recognition" and is considering filing a similar complaint against the City of Berkeley.

Generally speaking, an injunction is an effective way to bring a reluctant party into a meet-and-confer situation. However, for the embryonic employee organization, trying to build membership and establish itself, costly litigation can have a definite chilling effect on its growth. As the suits are appealed, the membership becomes more and more reluctant to dip into their pockets. Interest quickly wanes and enrollment drops. It is thus important to analyze the alternatives to resolving recognition impasses in the courts and to consider the factors which should be studied before trying to amend the MMBA.

The Right to Strike

One means of resolving an impasse in employer-employee relations in the public sector would be to use the ultimate weapon of the private sector, the strike. In almost every state, however, public employees do not have the legally protected right to strike. Although California law does not expressly prohibit striking by public employees (except with regard to policemen and firemen), the courts of this state have interpreted legislative silence as denying this right. In Almond v. County of Sacramento 51 the court stated that "[i]n the absence of legislative authorization public employees in general do not have the right to strike . . . " 52 That case reaffirmed the earlier view expressed

in Newmarker v. Regents of the University of California\textsuperscript{53} in which the court held that,

as public employees they do not have the same rights to strike and to bargain collectively as their counterparts in private industry, [and if they were unhappy about it] plaintiff's remedy lies with the Legislature, not with the courts.\textsuperscript{54}

Any right to strike by public employees must therefore depend upon a statutory change to expressly grant that right. This author, among others,\textsuperscript{55} believes that a comparison of public and private sector employment relations demonstrates that a statutory change to permit public employee strikes is not an appropriate means of resolving the public employment impasse.

In the private sector there are significant restraints on union power. For example, wage increases which exceed rises in productivity usually result in higher prices. A price increase for one product relative to others will generally cause a decrease in the number of units of that product sold as consumers adjust their preferences to changed price relationships. Reduced demand may then result in lay-offs.

In the public sector, on the other hand, the products and services of the government generally do not have close substitutes and are not subject to competition. A reduction of services caused by wage increases will be resisted not only by the employee organization but also by the beneficiaries of those services—the local voters. The public employee strike thus becomes a powerful political weapon. Government officials are pressured from two sides. The voters, inconvenienced by the interruption of services, call upon their elected officials to press for a settlement, and, at the same time, resist any increase in taxes to provide additional funds. If the government tries to redistribute its finances, other employee organizations will strongly contest any cutbacks or layoffs that affect their members.\textsuperscript{56}

Clearly, public employee organizations will have a disproportionate share of political power if the strike becomes the normal method for breaking impasses. Bargaining would become only a formality. Public employee strikes rely heavily for their success on voter inconvenience caused by cessation of vital services. But the relatively modest effect of a strike by librar-
ians, accountants, planners and other white collar workers cannot compare with the impact of a strike, in terms of public discomfort and safety, by policemen, firemen, or maintenance forces. The immediate effect on the public as a whole of a strike by municipal planners or engineers, for example, is not dramatic. If required the public agency can easily contract out the public work to private counterparts of the striking groups. The superior bargaining position is then left with those striking groups whose actions produce an immediate effect on the public, and are not easily replaceable by private organizations capable of providing the same service. Thus with increasing strikes, the disparity in political power would enlarge until employee organizations, whose effect on the public is minimal, will subsidize stronger groups as the public agency is forced to accede to the latter's demands for greater benefits, thereby reducing the available municipal funds for remaining employee organizations. 57

Arbitration

The relative merits of public employee strikes have been fully discussed elsewhere, 58 however, a far more satisfactory means of resolving impasses in the public sector can be found in an alternative to the strike: arbitration.

Two arguments have been advanced against arbitration: first, public employers argue that arbitration of public employment disputes could constitute an unconstitutional delegation of legislative and executive authority; second, they argue arbitration will destroy free collective bargaining and the willingness of the parties to resolve their own disputes. Through arbitration, a third party who might not understand the peculiar intricacies of local affairs and who would have no continuing responsibility for the results would have binding power to resolve disputes and thus significantly influence the operation of local government.

Several court decisions 59 have construed laws which provide for public employment arbitration and have met the issue of unconstitutional delegation of power. The Wyoming Supreme Court held a compulsory arbitration statute for firemen valid rejecting

the argument that it was an unconstitutional delegation of power expressly reserved to the state legislature. The court found that the statute conferred on the arbitrators the power to execute but not to make the law.\textsuperscript{60}

The Pennsylvania Supreme Court has upheld the constitutionality of a compulsory arbitration statute for police and firemen. The court relied on a recent amendment to the Pennsylvania State Constitution expressly authorizing compulsory arbitration and found the legislative purpose to be the protection of the public from strikes by policemen and firemen.\textsuperscript{61} Finally, the Rhode Island Supreme Court found no "delegation of power" because arbitrators were public officers or agents of the legislature when they were carrying out their arbitration duties pursuant to the statute.\textsuperscript{62}

Undoubtedly, these three state supreme court decisions will not be the final word on the subject. However, they do indicate that while legal questions are important, courts may not consider them paramount to the question of whether arbitration can work effectively to resolve public employee disputes.

A more serious problem area is the threat that arbitration will destroy bargaining in the public sector. Experiences in other states such as Michigan, Pennsylvania, Wyoming, and Rhode Island have provided some evidence that there can be effective bargaining without the protected right to strike.\textsuperscript{63} Furthermore, arbitration procedures can be established which will actually stimulate bargaining.\textsuperscript{64} In practical terms, as administrators of arbitration statutes become more experienced they learn to decline or defer the submission of disputes to arbitration until serious efforts at negotiation have been tried.\textsuperscript{65}

\begin{itemize}
\item \textsuperscript{60} Wyoming v. City of Laramie, 437 P.2d 295 (Wyo. 1968).
\item \textsuperscript{61} Harney v. Russo, 255 A.2d 560 (Penn. 1969).
\item \textsuperscript{62} City of Warwick v. Warwick Regular Fireman's Ass'n, 256 A.2d 206 (R.I. 1969).
\item \textsuperscript{64} See, e.g., AARON, FINAL REPORT OF THE ASSEMBLY ADVISORY COUNCIL ON PUBLIC EMPLOYEE RELATIONS 187 (1973).
\item \textsuperscript{65} To ease the hypothesized "chilling effect" of arbitration on collective bargaining, the arbitrator's power could be confined to either accepting the proposal of one or the other party. This would place a greater burden on the parties to bargain in good faith and to reach a mutual agreement. See, note 50 supra.
\end{itemize}
Scope of Arbitration

The effectiveness of arbitration as a means of settling other types of disputes in the public sector indicates its potential for resolving issues of recognition and unit determination under the MMBA. As discussed above, the resolution of the unit determination issue should not be left solely to the administrative discretion of each public agency in the state. Instead, an impartial administering organization should be created and invested with sufficient authority to develop detailed standards for final unit determinations within statutory guidelines. This recommendation goes beyond the proposal made by the State Personnel Board before the Assembly Committee on Public Employment in October, 1969, that recognition and unit determination issues be resolved by an independent board. It is the contention of this author that the board's determination must be made binding upon the parties in order to be effective. A board with such power would provide a means of peacefully resolving disputes in the public sector without resorting to costly litigation.

A further question which must be confronted is who should establish this independent board: should each public agency set up its own board, or should it go through the process of selecting arbitrators for each new impasse? Procedures will vary from jurisdiction to jurisdiction making it difficult for unions organizing across agency lines to conform to different requirements. Also, if a local arbitration board is established on a permanent basis, there may be a danger of partiality toward either the employer or the union. On the other hand, if the agency requires a new set of arbitrators to be chosen for each new impasse in order to eliminate the possibility of prejudice, precious time will be wasted, resulting in inefficency.

A far better solution is the establishment of an independent body that is not directly affiliated with any particular local government. Such a body offers the greatest flexibility and impartiality in resolving controversial unit determination problems as well as other "meet-and-confer" issues, such as grievances, scope of representation, and recognition. The obvious choice is a state level agency which is empowered by the legislature to perform a dual function: first, to enforce the provisions of the state statute and to implement impasse procedures; second, to take on functions delegated to it by local regulation. The state statutory provision would provide minimum standards which would be aimed at encouraging local initiative, but, at the same time, would guard against local inaction by establishing concurrent power. Thus,
if a municipality desired to adopt different impasse procedures than those provided in the state statute, this agency could administer them. The value of such a state agency would stem from the experience and specialized skills it would develop, plus its neutral position with regard to local employer-employee disputes.

A state level agency would also minimize the effect of the intrusion by a third party into employer-employee bargaining. A common argument against submitting disagreements to outside arbitration is that the arbitrators will not be sensitive to such local government issues as fiscal structures, budgetary practices and strict limitation on taxes. But, subordinate government units such as towns, counties, and cities derive their power from the state. Many of the limitations which constrain their bargaining with employee associations are the result of restrictions imposed by the state. Therefore, state officials are likely to be more sensitive to local problems than other independent arbitrators.

Another advantage to placing arbitration powers exclusively in a state agency is that the problem of unconstitutional delegation of legislative authority is easily met. If the legislature establishes recognition guidelines, and in turn creates an agency to administer the law, the courts would have difficulty in holding that powers reserved to the governing bodies are unlawfully placed in the hands of persons not responsible to the electorate.

Finally, although the independent agency would initially consider non-fiscal problems such as recognition and unit determination, inevitably it would be compelled to consider monetary issues. The resulting arbitration decisions could be made binding for non-fiscal matters and advisory for fiscal issues, thus avoiding legal problems which might force local governments into debt thus requiring additional taxes. This method has been successfully employed in Maine where a statute covering municipal employees provides for binding arbitration of enumerated issues but for advisory arbitration on fiscal matters.67

Advisory arbitration is advisory in the sense that the legislative body of the particular local governmental unit has the final authority to approve or disapprove the contract terms. For example, in Connecticut bargaining is usually between the executive and employee representatives, but the legislative body must approve any negotiated agreement between these parties which results in budgetary consequences. The agreement, however, takes effect if the legislative body fails to modify the recommendations within a specified time period.68

68. CONN. GEN. STAT. ANN. § 7-474(b) (Supp. 1969).
To date, only one jurisdiction in California has made use of the experiences of other states. The City of Vallejo has become the first public entity other than transit districts) to include compulsory and binding arbitration as the final step in a dispute settlement procedure. On April 1, 1972, the first arbitration award settling a negotiation's dispute in California local government was handed down by a three-man board of arbitrators as provided by the Vallejo City Charter. Under the revised charter, impasses between the city and any of its recognized employee organizations are first subject to mediation, then fact finding with public recommendations, and finally compulsory binding arbitration. There is as yet no case law in California regarding the legality of this new provision. However, because this provision was approved by the voters, the argument that this is an unlawful delegation of public sovereignty would be difficult to raise.

CONCLUSION

The MMBA is at best an interim measure for it provides no appropriate machinery to resolve recognition, unit determination, and representation disputes arising out of employer-employee impasses. Neither does it ensure adherence by all parties to the law, nor provide the means for facilitating resolution of controversies. New legislation is necessary to authorize voluntary and binding arbitration of contract terms and to establish standards and criteria for arbitration which would overcome the objections of unconstitutional delegation of legislative authority and the absence of arbitration standards.

The state should continue to prohibit public employee strikes but counter the effects of this restriction by establishing mandatory recognition and impasse resolution procedures. For example, local governments might permit different collective bargaining procedures, redefine mandatory subjects of bargaining and establish procedures for resolution of nonmonetary issues. The state statute would merely set the minimum standards. Such a statutory scheme providing for concurrent power would both encourage local initiative and, at the same time, guard against local inertia.

69. See, e.g., CALIF. PUB. UTIL. CODE §§ 25051 (West 1973) (Alameda & Contra Costa Counties); § 70120 (West 1973) (Marin); § 28850 (West 1973) (San Francisco bay area).


71. Id. City of Vallejo, Calif., VALLEJO CITY CHARTER §§ 809-10, as amended, (June 1970).

Finally, the legislature should provide for a state arbitration agency which would enforce the law uniformly throughout California and assure that any additional local procedures are within the scope and intent of the Act. In spite of the emotional, legal, and practical objections to arbitration, there is evidence from other states that a system of binding arbitration for non-fiscal issues is gaining acceptance in the public sector. In California, it is clear that if steps are not taken soon to strengthen the Meyers-Milias-Brown Act, litigation will inevitably increase as public employees press harder to be represented by organizations of their own choice, and public employers continue to insist on maintaining efficiency by limiting that choice.

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