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# NEGOTIATING WITH THE PUBLIC. MONTANA'S PUBLIC EMPLOYEE COLLECTIVE BARGAINING ACT

Candace C. Fetscher

## INTRODUCTION

In 1973 the Montana legislative assembly joined a large number of other states which have been trying within the last decade to come to grips with the problems of labor rights of public employees. The result of this attention is the Public Employees Collective Bargaining Act, REVISED CODES OF MONTANA, (hereinafter R. C. M.), 1947, §59-1601 through §59-1616. Since the passage of this act, the rights, duties, and privileges of public employees vis a vis their employer units of government and the public itself have become a matter of increasing public interest. Consequently, the Act is coming under scrutiny from courts, local and state government and unions. This comment will attempt to survey the background of public sector labor relations, Montana's Act and its possible constructions, comparing it with similar laws in other states and finally will attempt to make recommendations for clarification and change.

## I.

### *COLLECTIVE BARGAINING IN THE PUBLIC SECTOR*

Although collective bargaining has been a fact of life in the private sector for many years, it is a relatively new development in the public sector. The reasons for this are varied. One consideration had always been the difference between public and private employers' objectives. It is a truism that a controlling objective of private employers is profit. This factor is nonexistent in the public sector which is concerned primarily with providing services to the public. The question arises, "Who is the public employer?" Although public employees and their representatives negotiate with mayors, county commissioners, department heads and school boards—or their appointed agents—these employer representatives do not bear the ultimate consequences of poor labor management relations. It is the public at large which suffers the hardships resulting from impasses, strikes, or other conflicts. Yet the public can have little direct effect upon labor negotiations as they progress. The public merely concurs or opposes a general course of action at periodic elections by supporting or unseating incumbent officials.

At the outset, then, certain fundamental differences must be recognized between public and private labor relations. The courts have repeatedly recognized that public employees do not enjoy the same rights to bargain collectively as do private sector employees.<sup>1</sup> As pointed out by a Seventh Circuit court, "there is no constitutional duty to bargain

<sup>1</sup>Local 611 IBEW v. Town of Farmington, 75 N.M. 393, 405 P.2d 233 (1965) citing 31 ALR2d 1142, 1155 (1953).

collectively with an exclusive bargaining agent. Such duty, when imposed, is imposed by statute."<sup>2</sup> In this connection it is important to note that the National Labor Relations Act does not apply to public employers, and, in fact, specifically excludes "The United States or any wholly owned Government corporation, . . . or any State or political subdivision thereof . . . ."<sup>3</sup>

In 1970 it was noted that thirty states had adopted some form of public employee collective bargaining laws, and that twenty-six of these had " 'mandatory' bargaining laws covering some or all of their public employees."<sup>4</sup> At this writing the number appears to be approximately the same, although some states, like Montana, have considerably expanded the scope of their bargaining laws for public employees. There remain eight states<sup>5</sup> in which there are no laws, opinions of attorneys general or court decisions sanctioning collective bargaining for public employees, and in many of these jurisdictions it is specifically prohibited. Thus, the public employee and his or her representative associations must cross a number of hurdles before they can even begin to bargain. In many states for example, they must first lobby for enabling legislation allowing or compelling collective bargaining. The public employer, on the other hand, is also bound by restrictions which are non-existent in private industry. Counties and municipalities are bound by law to provide certain kinds of services yet they are often restricted by statute from over-reaching a certain millage level. Similarly, state executives may be without authority to obligate the legislature to make appropriations in future sessions.

It is little wonder that statutory and decisional law developed over the years for private industry labor-management relations is not well suited for use in the public sector. In many jurisdictions, after passing the initial hurdle of securing legislation allowing collective bargaining, many negotiating parties, boards, and state courts are faced with the task of interpreting sometimes vague statutes which have been modeled so closely on the National Labor Relations Act,<sup>6</sup> that they are unsuited for application to the public. The problems are compounded by the sheer numbers of workers directly affected. One writer quotes a study estimating that, "(i)n 1975 there will be over eleven million public sector employees outside the federal service who may be covered by collective bargaining agreements."<sup>7</sup>

<sup>2</sup>Indianapolis Education Association v. Lewallen, 72 L.R.R.M. 2071, 2072 (7th Cir. 1969).

<sup>3</sup>29 U.S.C. § 152(2) (1964).

<sup>4</sup>Note, *Public Employees—The Right to Organize, Bargain, and Strike*, 19 CATH. U.L. REV. 361, 365 (1970), relying on REPORT, ABA COMMITTEE ON STATE LABOR LAWS (1969).

<sup>5</sup>Arizona, Colorado, North Carolina, Ohio, Tennessee, Utah, Texas, West Virginia. In Virginia an Attorney General's Opinion holds collective bargaining permissible but probably not enforceable.

<sup>6</sup>29 U.S.C., §§ 151-167 (1964).

<sup>7</sup>Wolfe, *Union Security and the Nonunion Public Employee: Harmony or Conflict?* 21 CATH. U.L. REV. 615 (1972), relying on National Governors' Conference, Executive

Too many of the states enacting public employee collective bargaining acts have approached the job in a piece-meal fashion. They have variously passed laws covering only nurses or firefighters, teachers or policemen. Some acts have excepted state workers while covering municipal workers and vice versa.<sup>8</sup> A writer in Minnesota, where hospital employees are covered by an act different from the general Public Employment Labor Relations Act,<sup>9</sup> believes that, "(s)eparate treatment of hospital employees is arguably a denial of equal protection within the new context of public employment labor relations."<sup>10</sup> In this line a fairly recent decision held that it was a denial of Fourteenth Amendment equal protection to fail to bargain collectively with teachers when other employees had been permitted to engage in collectively bargaining.<sup>11</sup>

Other problems existing in many jurisdictions result from laws that are either too weak or lack specificity, allowing but not compelling bargaining, or compelling bargaining but not providing for either binding arbitration or a right to strike. In general, problems with public employee collective bargaining acts have tended to fall into three main categories: Right to Strike, Scope of Bargaining, and Union Security Clauses.

#### A. RIGHT TO STRIKE

At this writing, strikes by public employees are prohibited in thirty-five jurisdictions by either statutory mandate or appellate court decision.<sup>12</sup> Yet only seventeen of these jurisdictions provide for some form of binding arbitration.<sup>13</sup> There are now, however, eight jurisdictions allowing a limited right to strike: Alaska, Hawaii, Idaho, Minnesota, Montana, Oregon, Pennsylvania, and Vermont. It is interesting to note that of this group only Idaho, Minnesota, and Vermont do not also have some kind of provision for binding arbitration. There are no jurisdictions in

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Comm. Report on Task Force on State and Local Government Labor Relations at 29

<sup>8</sup>See, for example, KENTUCKY REVISED STATUTES § 345.010 *et seq.* and § 78.010 *et seq.* covering only firemen and policemen; PENNSYLVANIA STATUTES ANNOTATED § 1101.101 *et seq.* covering all public employees except police and firefighters; and CONNECTICUT GEN. STATUTES § 7-467 *et seq.* providing coverage for municipal employees but not for state employees (teachers in Connecticut are covered by CONNECTICUT GENERAL STATUTES § 10-153a *et seq.*).

<sup>9</sup>MINNESOTA STATUTES ANNOTATED §§ 179.61-179.76.

<sup>10</sup>Note, *The Minnesota Public Employment Labor Relations Act of 1971: Another Public Employment Experiment* 57 MINN. L. REV. 134 (1972).

<sup>11</sup>*Beauboef v. Delgado College*, 303 F. Supp. 861 (E.D. La. 1969).

<sup>12</sup>States prohibiting public employee strikes: Alabama, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin.

<sup>13</sup>States providing only some form of binding arbitration: California (only in City and County of San Francisco), District of Columbia, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Nebraska, Nevada, New York, Oklahoma, Rhode Island, South Dakota, Tennessee, and Wisconsin. It should also be noted that Wyoming provides binding arbitration for its only covered employee group—firemen—and has no ruling regarding the right to strike.

which an unlimited right to strike is permitted. The limitations on strikes in all states are intended to protect against threats or clear and present dangers to public health, welfare and safety.

In many jurisdictions, conducting a prohibited strike is severely punished, resulting in misdemeanor prosecution, dismissal of the striking employees,<sup>14</sup> union loss of exclusive representative designation,<sup>15</sup> union loss of check-off privileges,<sup>16</sup> or damages recoverable by the employer.<sup>17</sup>

The traditional justification for prohibiting strikes and collective bargaining in the public sector has been the theory that the sovereign was legally incapable of delegating or otherwise losing its authority to the extent that it became bound to give up any part of its absolute right to act. Recent legislative and judicial actions throw some doubt on the suitability of this approach to the modern public employment situation. Limitations currently imposed by statute, and by judges, are usually based on the public employer's duties involving protection of public health, safety, and welfare. One writer assesses the situation as follows:

Whether or not a limited right to strike should be granted depends upon whether the imposition of sanctions effectively prevents strikes and whether a limited right to strike will promote meaningful bargaining without concomitant and irreparable damage to the public interest . . . the reasons generally cited for prohibiting strikes in the public sector are that (1) the sovereignty of the state demands the prohibition, (2) the essentiality of services is difficult to determine and (3) strikes exert improper economic pressure upon the government.<sup>18</sup>

Thus, no public employee organizations possess as a bargaining tool the same powerful right to strike which private industry employees have so often had to utilize in asserting their rights and interests. This restriction on the right to strike is not necessarily untenable. As the Pennsylvania supreme court noted in *State College Ed. Ass'n. v. Pennsylvania Labor Relations Board*,<sup>19</sup> the Public Employee Relations Act must be construed as intending to favor the public interest. That court went on to note that for this reason, statutes governing public employee labor relations could not be construed solely by reference to rulings, decisions and case law interpreting laws governing private sector labor relations.

Given this limitation on the right to strike, it is obvious that public employees find themselves in a weakened bargaining position, especially when they have no concomitant right to assert binding arbitration. Many

<sup>14</sup>WISCONSIN STATUTES § 111.89; CODE OF VIRGINIA 40.1-55.

<sup>15</sup>OKLAHOMA STATUTES ANNOTATED § 548; ANNOTATED CODE OF MARYLAND 77-14½,0 § 160(m).

<sup>16</sup>NEW YORK SERVICE LAW § 210(3).

<sup>17</sup>WISCONSIN STATUTES § 111.89.

<sup>18</sup>Note, *The Minnesota Public Employment Labor Relations Act of 1971: Another Public Employment Experiment*, *supra* note 10, at 143.

<sup>19</sup>State College Ed. Assn'. v. Pennsylvania Labor Relations Bd., 9 Pa. Comwlth. 229, 306 A.2d 404, 409 (1973).

times public employee organizations feel that a strike, even though conceding its illegality, is the only way they can forcefully assert their positions and needs. Merton Bernstein explains this position as follows:

Many leaders of public employee unions come from the ranks of organized labor in the private sector, where the strike is a legally protected central tactic of bargaining and a means of enhancing organizational spirit and loyalty. Perhaps more important, strikes have been the weapon for transforming public employer intransigence into union recognition, better bargaining and even legislation for protecting union activities. Thus, while statutes have banned strikes as a matter of law, even those with the most draconian sanctions have failed to prevent them as a matter of fact when bargaining deadlocks occur.<sup>20</sup>

As noted, much difficulty with strikes in the public sector arises from their traditional use in private sector labor relations. Prohibitions against strikes do not adequately remedy the situation unless another avenue is opened to public employees. In many states it is not.

## B. SCOPE OF BARGAINING

The scope of bargaining between employer and employee groups is often a problem in the public sector because of the very nature of the work done by many public employees. Private sector employees have historically been concerned with wages, hours, working conditions, and benefit plans. The concerns of public employees often go beyond the matters negotiated in the private sector. Teacher groups, for example, may be as concerned with curriculum, teaching procedures, and the amount of independent classroom judgment allowed as they are with wages, sick leave, and vacation time. Nurses, firemen and law enforcement officers have similar special concerns related to the objectives of their professions. This becomes an even more controversial area as collective bargaining begins to function on university campuses and in policy-making branches of state governments.

At these levels there are additional problems which arise in distinguishing qualified and group-represented employees from non-covered "supervisory personnel" due to the wider policy interests of many of the employees. In private industry it is usually clear whose interests are more closely aligned with labor and whose with management. The differentiation is much more difficult in many branches of public employment. For example, it is difficult to place the faculty department head on one side or the other. He or she is a teacher, like others, and also a 'supervisor' and liaison with the administration. The interests of employees in the gray area between labor and management can obscure what should be the legitimate objectives of labor representatives at the bargaining table.

It appears that the best solution to vagueness in the scope of areas subject to collective bargaining is specificity in the enabling statutes.

<sup>20</sup>Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 462 (1971).

This clarification by statute is often to be preferred over clarification by administration regulation. This is so, due to the close identification that can exist between the state as employer and the state as promulgator of regulations. The checks provided by the legislative process seem to offset to a degree the almost monopolistic stance from which the public employer comes to bargain. Care must be exercised, however, in leaving sufficient bargaining areas open to allow both labor and management to set forth—and resolve—their concerns.

The interest of professional public employees in affecting policy-making in their fields is further complicated by the unique positions of supervisory employees and “management”. The authority to sanction policy changes may not exist outside of those designated through the electoral process. Bernstein summarizes:

(P)rofessional employees often bargain over programs. For example, teachers' unions may demand certain kinds of educational offerings or limits on class size. Even if arbitrators were capable of dealing with the complexities of budgeting and choosing programs, elected officials should not delegate the duty they owe the electorate to settle these questions. Deciding policy issues is the vocation of officials, not of arbitrators. Furthermore, when decisions lack an adequate electoral base, they will be short-lived, as the drastic re-trenchments of Medicaid demonstrate.<sup>21</sup>

This problem of defining and justifying the scope of bargaining in public sector labor relations has begun to reach the courts in recent years. In *Cheltenham Township v. Cheltenham Township Police Department*, for example, the court held that the act authorizing policemen and firemen to bargain collectively with a public employer excluded from its scope any subjects which would require the employer to perform any duty or take any action specifically or impliedly prohibited by laws governing the employer's affairs.<sup>22</sup> Thus, in municipalities prohibited by statute from furnishing certain kinds of benefits such as hospitalization or transportation, such things must be beyond the scope of bargaining.

Once collective bargaining is authorized, the scope of this bargaining must be determined and similarly understood by all parties. Otherwise, bargaining will succeed, if at all, with great difficulty and expense to both labor and management.

### C. UNION SECURITY

Before any problems arise for a union regarding its security, it must attain some kind of recognition. Most states, like private sector employers, have procedures providing for recognition of an exclusive employee representative organization. There is at present only one state prohibiting exclusivity in public employee representation, and this prohibitive Minnesota statute applies only to teachers.<sup>23</sup> Another variant, allowed

<sup>21</sup>*Id.* at 467.

<sup>22</sup>*Cheltenham Township v. Cheltenham Township Police Dept.*, ..... Pa. ...., 312 A.2d 835 (1973).

<sup>23</sup>MINNESOTA STATUTES ANNOTATED § 125.22(3).

in California,<sup>24</sup> is proportional representation, which provides for a bargaining team composed of a proportionate number of representatives from whatever employee organizations have members in the employee unit involved in negotiation.

This usual procedure for recognition of a representative bargaining group is through election sanctioned by a state or local labor relations regulatory agency. Unions are often placed on the ballot by petition of employees who are members of or wish to join a particular union. Challenges to the first step of mere union membership have been resolved by now in most jurisdictions.<sup>25</sup> Furthermore, affiliation with private sector labor unions and with federations of unions has been sanctioned.<sup>26</sup>

In recognizing an exclusive employee bargaining organization, the public employer should take care to define the employees covered by the bargaining unit, specifying which employee positions are included in or excluded from any bargaining done by the parties. Usually an employer must bargain with the union chosen by a majority of covered employees. The results of this negotiation, however, are binding on the right of all employees in the bargaining unit, not just the union members. Thus, exclusivity and stability in labor-management relations both raise the issue of union security. As one commentator points out, "(a) union is not unlike a politician. It campaigns for election, and if it wins, immediately begins to worry about re-election . . . Once elected, the union seeks to become the undisputed employee representative through the integration of union security clauses into the collective bargaining agreements."<sup>27</sup> If this kind of stability is lacking, however, public employers and employees have great difficulty developing a productive working relationship.

There are a number of forms of union security covering a wide spectrum of union strength. Some of the more common are briefly described as follows:

1. **Closed shop**—requires union membership at the time of hiring as a condition of employment for duration of contract.
2. **Union shop**—requires union membership after hiring as a condition of employment for duration of contract.
3. **Preferential shop**—requires employer to give preference in hiring to union members.

<sup>24</sup>WEST'S CALIFORNIA GOVERNMENT CODE ANNOTATED 10.5 §§ 3527, 3528, 3529.

<sup>25</sup>See, e.g., *Classroom Teacher's Assn. v. Board of United Tp. High School District No. 30, East Moline*, 15 Ill. App.3d 224, 304 N.E.2d 516 (1973), holding that public employees have a right to join a union; *AFSCME v. Woodward*, 406 F.2d 137 (8th Cir. 1969), holding that discharge of union-joining public employees was discriminatory and violated employees' first amendment right to freedom of association; *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D. N.C. 1969) in which a three-judge court held unconstitutional on its face a North Carolina Statute which prohibited firemen and policemen from joining national or international labor unions.

<sup>26</sup>*Escanaba v. Michigan Labor Mediation Board*, 19 Mich. App. 273, 172 N.W.2d 836 (1969): ". . . membership of public employees in a union which includes private employees or which is affiliated with a federation of trade unions, is lawful and valid." See also 40 ALR 3d 728.

<sup>27</sup>Wolfe, *supra* note 7 at 616.



4. **Agency shop**—requires, as a condition of employment for duration of contract, that worker pay a fixed sum each month to defray expenses of union, whether or not he is a member of the union.
5. **Maintenance of membership**—requires, as a condition of employment for duration of contract, union membership of (a) those who are members of union on a certain day and of (b) those who subsequently join the union.
6. **Maintenance of dues**—requires that union members' dues be checked off during term of contract as a condition of employment. If he withdraws or is expelled from union, check off continues but he can't be fired for loss of membership.
7. **Check off**—requires employer to deduct union dues from union members' wages for the benefit of the union.
8. **Harmony clause**—employer agrees to encourage union membership without making union membership a condition of employment.<sup>28</sup>

An open shop, of course, furnishes no union security since the employer makes no agreements at all regarding employee membership in or contributions to unions.

Union security clauses may conflict with other objectives imposed upon public employers, such as civil service merit systems, veteran preference systems, teacher tenure, and also the religious freedoms and beliefs of some public employees. In addition, nineteen states<sup>29</sup> nullify any realistic attempt to effect union security by having "right-to-work" provisions in their labor relations statutes. Union security is further limited in many jurisdictions by judicial decision and by statute. In *Farrigan v. Helsby*,<sup>30</sup> for example, the court held that a teacher could not be compelled, under the existing civil service statute, to form, join, or participate in a teachers' association and that any forced payment of dues or agency shop requirements would be illegal. Minnesota, while sanctioning exclusive representation, provides that "(p)ublic employees shall have the right to form and join labor or employee organizations, and shall have the right not to form and join such organizations . . ."<sup>31</sup> This statute goes on, however, to provide for mandatory check-off procedure in the absence of union membership, thus providing some measure of security for unions. Wisconsin provides<sup>32</sup> that while state employees have the right of self-organization, they also have the right to refrain from such activity.

Check off procedures are bolstered by decisions such as *Kraemer v. Helsby*,<sup>33</sup> which held that check off "in no way interferes with an employee's right to associate with a minority union which is still free to collect dues or premiums by other means."

<sup>28</sup>1 PRENTICE-HALL PUBLIC PERSONNEL ADMINISTRATION LABOR MANAGEMENT RELATIONS 6211, ¶ 6211 (Prentice-Hall 1974).

<sup>29</sup>Alabama, Arizona, Arkansas, Florida, Georgia, Iowa, Kansas, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Wyoming.

<sup>30</sup>*Farrigan v. Helsby*, 346 N.Y.S.2d 39 (1973).

<sup>31</sup>MINNESOTA STATUTES ANNOTATED § 179.65(2).

<sup>32</sup>WISCONSIN STATUTES ANNOTATED § 11.82.

<sup>33</sup>*Kraemer v. Helsby*, 316 N.Y.S.2d 88, 90, 76 L.R.R.M. 2317 (1970).

Finding a form of union security acceptable to the public employer and public employees can be very difficult, especially when it must be sufficiently strong to promote the stability resulting from a relatively secure union. The majority of commentators favor the agency shop as best fitted for this role in public sector labor relations.<sup>34</sup> In some jurisdictions, however, the agency shop is prohibited, and even dues check-offs are considered unacceptable.<sup>35</sup> Statutory guidelines for determination of union security clauses should be the best approach. In this way both labor and management are apprised of the bounds within which they are working, and if the statute does not provide sufficient union security—or management rights—it can be amended through public pressure and lobbying.

### THE MONTANA ACT

The Montana Public Employees Collective Bargaining Act as passed in 1973 was not Montana's first attempt to deal with labor relations in the public sector—but it is its first comprehensive law in this area. In 1969 the legislature enacted a law providing for collective bargaining for both public and private sector nurses.<sup>36</sup> Most labor relations under this act are overseen by the Department of Health and Environmental Sciences rather than a labor-related agency. Employee exclusive representatives, for example, are determined by election procedures through the state department of health, unless, in certain cases, this determination is mutually agreed upon by the health care facility and its employees.<sup>37</sup> This act does provide for a limited right to strike provided that thirty days' notice of the strike is given and there is not "another strike in effect at another health care facility within a radius of 150 miles."<sup>38</sup>

In 1971 the Professional Negotiations Act for Teachers<sup>39</sup> was enacted, thus enabling a second public employee group to participate in collective bargaining. Under this act, which is more specific in many of its provisions than is the Nurses Act, strikes are prohibited as an unfair practice by teachers,<sup>40</sup> and the scope of bargaining is clearly delineated. The act specifies, "(t)he matters of negotiation and bargaining for agreement shall not include matters of curriculum, policy of opera-

<sup>34</sup>Wolly, *supra* note 7 at 631: "The agency shop, unlike the closed and full union shops . . . promotes stability in the bargaining unit while requiring no more of dissenting employees than that they pay their way in bargaining." (Referring to Comment, 55 CORNELL L. REV. 547, 548 (1970).

<sup>35</sup>*See*, for example, ARIZ. OP. ATTN'Y GEN. No. 6858 (1971) and F.S. MISSOURI SUPP. 1967, § 105, 510.

<sup>36</sup>REVISED CODES OF MONTANA, §§ 41-2201—21-2209 (1947) [Hereinafter R.C.M. 1947].

<sup>37</sup>R.C.M. 1947, §§ 41-2204, 41-2205, 41-2206, 41-2207. *See also*, *St. John's Lutheran Hospital v. State Board of Health*, 161 Mont. 406, 506 P.2d 1378 (1973) dealing with assignment of nurse's bargaining right.

<sup>38</sup>R.C.M. 1947, § 41-2209.

<sup>39</sup>R.C.M. 1947, §§ 75-6115—75-6128.

<sup>40</sup>R.C.M. 1947, § 75-6120(2)(c).

tion, selection of teachers and other personnel, or physical plant of schools or other facilities . . . ."<sup>41</sup>

Thus, two areas of difficulty in many jurisdictions, scope of bargaining and right to strike, are clarified in Montana's law for teachers. The third sensitive area, union security, is quite clearly provided for, but the result is a relatively weak security provision. In the first place, employee representatives are determined, when no majority of membership clearly exists, by elections sanctioned by the same school board with which the selected representative must later bargain.<sup>42</sup> Furthermore, there is no dues check off provision, and it appears that the strongest union security available other than exclusive recognition, is an agency shop arrangement without provision for monetary support.<sup>43</sup> As a practical matter at present, however, most teachers do belong and contribute to some teacher organization. As competing teacher organizations equalize their strength, this area could very well lead to extremely unstable labor relations. With respect to union security, the 1971 Teacher's Act is in line with an earlier Montana court decision, *Benson v. School District No. 1 of Silver Bow County*.<sup>44</sup> In that case, the court disapproved a strong union shop contract which included maintenance of membership requirements. It held that in the same manner that an employer could not discriminate against union members with regard to hiring, so it could not "impose a penalty for not becoming members by seeking to withhold the increase in salary to those who do not belong to the union."<sup>45</sup>

Montana's 1973 Collective Bargaining Act for Public Employees provides very comprehensive coverage for all public employees of local and state units of government except supervisory, temporary, and elected personnel, professional engineers, and of course the nurses and teachers covered by earlier acts. This act is far more sophisticated than either of its predecessors, containing not only provisions for agency shops,<sup>47</sup> and dues check off,<sup>48</sup> but also for management rights<sup>49</sup> and detailed grievance procedures for resolution of allegedly unfair labor practices before the Board of Personnel Appeals.<sup>50</sup> The Act is further enhanced

<sup>41</sup>R.C.M. 1947, § 75-6119.

<sup>42</sup>R.C.M. 1947, § 75-6121.

<sup>43</sup>R.C.M. 1947, § 75-6118 provides in part, "It shall be lawful for teachers to organize, form, join or assist in employee organizations or to engage in lawful activities for the purpose of collective bargaining or to bargain collectively through representatives of their own free choice. Teachers shall also have the right to refrain from any or all such activity but shall be bound by a professional negotiations agreement involving the appropriate unit of which they are a member."

<sup>44</sup>*Benson v. School District No. 1 of Silver Bow County*, 136 Mont. 77, 344 P.2d 117 (1959).

<sup>45</sup>*Id.* at 122, 123.

<sup>46</sup>R.C.M. 1947, §§ 58-1601—59-1616.

<sup>47</sup>R.C.M. 1947, § 59-1605(2)(c).

<sup>48</sup>R.C.M. 1947, § 59-1612.

<sup>49</sup>R.C.M. 1947, § 59-1603(2).

<sup>50</sup>R.C.M. 1947, §§ 59-1607, 59-1608, 59-1613, and 82A-1014.

by a detailed definitional section<sup>51</sup> and provisions for voluntary binding arbitration,<sup>52</sup> mediation, and fact-finding proceedings.

In 1974 the Act was amended to exempt from agency shop check check offs those public employees whose religious beliefs oppose such contributions.<sup>54</sup> In the interest of equal treatment of all public employees, however, amounts equal to dues check off are required to be contributed to a "nonreligious, nonunion charity designated by the labor organization."<sup>53</sup> Further 1974 amendments extended the act's coverage to "professional instructors and teachers,"<sup>56</sup> thus considerably expanding the scope of the act and taking the important step of including Montana's units of higher education.

The scope of bargaining under this act is delineated to some extent by the management rights provisions reserving to management rights to do such things as "determine the methods, means, job classifications, and personnel by which government operations are to be conducted," to "take whatever actions may be necessary to carry out the missions of the agency in situations of emergency," and to "establish the methods and processes by which work is performed."<sup>57</sup> This kind of scope of bargaining provision may be challenged by employees as too restrictive, especially now that universities are included in coverage, but the very fact that a concrete statement of scope does exist will aid in determining whether, and if so which, modifications are necessary.

The Act is not so definitive with regard to the other two troublesome areas, as recent litigation illustrates. There is no clear statement in the Act regarding existence of or limitations on the right to strike. At this writing the state supreme court is considering an appeal challenging a district court determination that public employees do have the right to strike. If this decision is upheld, Montana may allow its employees the strongest possible strike since there exist no statutory limitations on such a right. (See Postscript Note).

With regard to union security, a June, 1974, informal opinion of the Attorney General construes the Collective Bargaining Act as follows:

Under section 59-1605(1)(c) . . . a public employer cannot discriminate in hiring by forcing prospective employees to join a union. Therefore, it would be an unfair labor practice for a public employer to enter into an agreement containing a closed or union shop provision.<sup>58</sup>

This question, too, is currently being litigated in a district court

<sup>51</sup>R.C.M. 1947, § 59-1602.

<sup>52</sup>R.C.M. 1947, § 59-1610.

<sup>53</sup>R.C.M. 1947, § 59-1614.

<sup>54</sup>R.C.M. 1947, § 59-1603(5).

<sup>55</sup>R.C.M. 1947, § 59-1603(5).

<sup>56</sup>R.C.M. 1947, §§ 59-1603.1 and 59-1603.2.

<sup>57</sup>R.C.M. 1947, § 59-1603(2)(e), (f), and (g).

<sup>58</sup>Unofficial opinion by letter of June 17, 1974, from Attorney General Woodahl to Missoula County Attorney Deschamps.

declaratory judgment action.<sup>59</sup> In this case, employee organizations contend that the Act will allow a union shop clause (in this case a requirement to become a member within 30 days after hiring), while the public employer believes that the act authorizes only an agency shop as the maximum allowable union security provision.

Both questions, right to strike and union security, would better be settled by the legislature. In that forum, labor organizations and public management personnel can both present arguments before a body which most truly represents the public. As the United States Supreme Court has pointed out, "labor legislation is peculiarly the product of legislative compromise of strongly held views . . . ."<sup>60</sup> This should be particularly true with respect to public sector labor relations, for here there is a crucial third interested party—the public. It is most appropriate that the public should affect the labor relationship by means of legislative amendment, publicly discussed and decided.

One proposal the policy makers would do well to consider is Merton Bernstein's alternative to the strike in public labor relations.<sup>61</sup> He explains:

In a non-stoppage strike, operations would continue as usual, but both the employees and the employer would pay to a special fund, an amount equal to a specified percentage of total cash wages. Thus, while both parties would be under pressure to settle, there would be no disruption of service. In a graduated strike, employees would stop working during portions of their usual work week and would suffer comparable reductions of wages. Here, there would be pressure not only on employees and employer, but also on the community; however the decrease in public service would not be as sudden or complete as in the conventional strike.<sup>62</sup>

A combination of these two strike variations within guidelines set forth by statute, could accomplish the same objectives as the traditional private sector strike while tailoring it to the peculiar requirements of the public sector. If it proves successful, union security may be less of a problem as union membership would become more attractive.

### CONCLUSION

Montana has enacted a progressive forward looking statute providing for public sector labor relations. Its few short comings have become readily apparent, reaching the courts within months of the act's effective date. Increased specificity can help to remedy these problems. If the public, through the legislature, wishes to provide for the agency shop as the maximum allowable union security provision, it should say so.<sup>63</sup>

<sup>59</sup>Missoula County v. Operating Engineers Local No. 471 et al.

<sup>60</sup>N.L.R.B. v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 176 (1967); *reh. den.* 389 U.S. 892 (1967), *citing* Local 1976 Carpenter's Union v. Labor Board, 357 U.S. 93 (1957).

<sup>61</sup>Bernstein, *supra* note 20.

<sup>62</sup>*Id.* at 470.

<sup>63</sup>Wolly concludes that "the straight agency shop seems to be the solution. True, it may encourage union membership but at the same time it effectively prevents dis-

If it wishes to permit a union shop or some other kind of security, it should clearly indicate what is permissible. The same should be done with impasse<sup>64</sup> and strike procedures. If strikes are to be condoned, their limits should be identified. In this area, the legislature should continue in its earlier vein of attempting to raise public employees to an equal plane with private employees, giving them the equipment to assert their concerns, while providing some kinds of safeguards for the public welfare. Bernstein's graduated and non-stoppage strikes might provide the answer. In Montana's Act we have a very good foundation for building stable and equitable labor relations in the public sector. If skilled finish work is done on the act quickly, labor, management, and the public itself will be well served by the avoidance of unnecessary dispute and the promotion of a harmonious, and therefore productive, working relationship.

*AUTHOR'S NOTE*—A December, 1974, decision of the Montana supreme court unanimously upheld the trial court's ruling that Highway Department workers do have the right to strike. This decision was reached on the theory that the statutory language providing for "concerted activities" included the right to strike. As a result, Montana may presently have the most liberal strike policy of any available to public employees in the United States.

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couragement of membership. The rights of the dissenter are protected, the security of the bargaining representative is achieved, and the powers of the government are not improperly delegated. The agency shop is a key to stability for labor relations in the public sector.' Wally, *supra* note 7 at 638.

<sup>64</sup>Impasse generally refers to the condition existing when labor negotiations can no longer lead to productive bargaining, and therefore cease.