Public Labor Disputes - A Suggested Approach for New Mexico

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PUBLIC LABOR DISPUTES—A SUGGESTED APPROACH FOR NEW MEXICO

The fastest growing business in the United States today is government. Over the past three decades the number of public employees has increased dramatically, both absolutely and in proportion to the rest of the working force. In July of 1968, over 17 percent of the total nonagricultural work force of the nation was government employed. Nearly nine million people were employed at the state and local level and estimates indicate that by 1975 this number will increase to 11.4 million. As a result of the rising level of government employment, membership in public employee unions has vaulted and demands on the public employer for better wages and working conditions, and for a larger role in policy making have now become commonplace. The corresponding increases in government employment and public employee unionism have been and will continue to be a source of labor disputes in the public sector.

Labor disputes are not strangers to the American economy. Employees in private industry have long possessed the right to organize, bargain collectively and strike, and have been quite successful in utilizing these tools to improve their working conditions and standards of living. However, at common law the public employee does not possess these rights in most states. The jurisdictions where they are recognized have granted them by statute.

These facts produce some very curious questions that should con-

4. See cases cited notes 20 & 34 infra.


Only Vermont has recognized a right to strike for situations in which the exercise of such right does not endanger the public health, welfare, or safety. Vt. Stat. Ann. tit. 21, § 1704 (Supp. 1968).
cern anyone interested in a rational approach to public labor disputes. Why are public employees in many states denied some of the rights which their counterparts in the private sector of the economy have possessed for years? Are there any sound reasons for different treatment? Assuming that granting government employees the right to strike is inimical to the health and welfare of society, will denying them that right be effective to insure that vital governmental services will not be interrupted? Are alternative means of achieving better working conditions, etc., available to the public employee which would make strikes unnecessary—or at least less desirable? The purpose of this Note is to discuss these questions with particular emphasis on New Mexico law and to suggest that New Mexico follow the lead of other states by enacting legislation which would provide more adequate procedures for settling labor disputes in the public sector.

THE RIGHT TO ORGANIZE

The right of public employees to organize into unions has only recently come to be recognized. Initially, the concept of public employee unionism was looked upon with considerable disfavor. A statement from a 1943 New York decision is representative of the early attitude:

To tolerate or recognize any combination of Civil Service employees of the Government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our Government is founded. Nothing is more dangerous to public welfare than to admit that hired servants of the State can dictate to the Government the hours, the wages and conditions under which they will carry on essential services vital to the welfare, safety and security of the citizen. To admit as true that Government employees have power to halt or check the functions of Government, unless their demands are satisfied, is to transfer to them all legislative, executive and judicial power. Nothing would be more ridiculous.

This early view was based upon a waiver concept, which served as a rationale for upholding statutes prohibiting public employees from engaging in union activities as well as certain political activities. Its

supporters argued that since the functions of government and the services it provides are so vital to the welfare of its citizens, and since public employees voluntarily accept employment, they waive some of their first amendment rights for the general benefit of society.

Recent Supreme Court decisions have placed the waiver concept in serious jeopardy. The premise that public employment may be conditioned upon the surrender of constitutional rights is no longer accepted without qualification. A balancing test has been developed where the danger of limiting the free exercise of protected first amendment rights is weighed against the particular state interest which is sought to be promoted by restricting these rights. The Supreme Court has not yet decided the question of whether a state may constitutionally prohibit public employees from organizing into unions. However, three recent lower federal court decisions have applied the balancing test to uphold the right to organize. In each of these cases, the court was unable to find any paramount public interest which warranted limiting the first amendment freedom of association.

The states of the union present a multiplicity of reactions to public employee organization ranging from statutory condemnation to constitutional guarantee. New Mexico does not prohibit public employee union membership by constitution or statute. The right has been expressly granted by statute only to a specific class of public employees. N. M. Stat. Ann. § 14-53-15 authorizes municipalities to recognize an appropriate union representing employees of the municipal transit system in order to qualify for a federal grant under the Urban Mass Transportation Act of 1964. The enactment of the statute appears to have been motivated by a desire to make funds available to municipal transit systems rather than to grant employees the right to organize. It would be extremely difficult to construe the statute as a recognition of the right of all public employees within the state to organize since it expressly refers to municipal transit employees.

The New Mexico courts have not been squarely presented with the question of whether other public employees may organize. The right was impliedly recognized in a case involving the authority of a


municipality to enter into a collective bargaining agreement with a union representing employees of a town-owned public utility.\textsuperscript{15} No decisions were found which impliedly recognized the right of public employees other than those employed by municipalities to organize into unions. However, in view of the recent trend in the federal courts elevating the right to organize to constitutional status, the right is probably firmly established in New Mexico.

**THE RIGHT OF COLLECTIVE BARGAINING**

The importance of effective collective bargaining in the private sector has long been recognized as essential to meaningful labor relations.\textsuperscript{16} However, the labor laws of many states, including New Mexico, are made specifically inapplicable to government employees.\textsuperscript{17} Unlike the right to organize, collective bargaining is not considered a constitutionally protected right, and therefore state legislatures are free to enunciate whatever public policy they wish concerning collective bargaining by government employees.\textsuperscript{18} No state specifically precludes public employees from collective bargaining by statute; however, eighteen states have statutes expressly authorizing it.\textsuperscript{19}

Although the states may authorize collective bargaining through legislation, some courts have held that in the absence of such legislation, the government may not bargain with representatives of public unions.\textsuperscript{20} The rationale for this rule is that the government employer is cloaked with continuing legislative discretion over such matters as hours, wages and working conditions, and to bargain away this discretion would be an unlawful delegation of legislative authority, amounting to government by contract rather than government by law.\textsuperscript{21} Another line of cases has departed somewhat from this rule

\textsuperscript{15} International Bhd. of Elec. Workers v. Town of Farmington, 75 N.M. 393, 405 P.2d 233 (1965).

\textsuperscript{16} See e.g., Taft-Hartley Act, 29 U.S.C. § 151 (1964);

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife. . . .

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury . . . by encouraging practices fundamental to the friendly adjustment of industrial disputes. . . .


\textsuperscript{19} See note 5 supra.


\textsuperscript{21} See note 17 supra.
by holding that although the government cannot be forced to bargain with a public employee union, it may voluntarily negotiate with the union concerning employment, salaries, grievance procedures and working conditions of its members, provided there is no statutory prohibition.²²

Neither of these views is without shortcomings. First, there are many bargaining issues—promotions, working conditions and grievance procedures—within the discretion of administrative officials which could be made the subject of negotiation without usurping legislative or executive authority.²³ For example, in 1962, President Kennedy issued Executive Order No. 10988²⁴ authorizing federal agencies to bargain to a limited extent with their employees. A study of its effect "...indicated at least forty-four subjects which federal agencies and employee organizations considered within the scope of bargaining under the Executive Order."²⁵ Although the order concerned collective bargaining in the federal service, the argument applies as well to state labor relations.

Secondly, even if there are subjects which may be negotiated without being construed as a delegation of legislative or executive authority or alternatively, even if a governmental organization voluntarily chooses to negotiate, there is a possibility that the agreement reached would be unenforceable. Some courts have held that in the absence of express statutory authorization, a government official may not contract because the agreement would abdicate his duty to exercise continuing discretion in matters of employee relations.²⁶ Thus, even though bargaining between the government and its employees may under certain circumstances take place without express legislative authority, the binding nature of the agreements reached is doubtful without such authority.

The status of collective bargaining in the New Mexico public sector is unclear. Municipal transit employees are the only public workers expressly authorized by statute to bargain collectively with their employers.²⁷ Only one case gives any indication of whether public employees not covered by this statute may bargain collectively with their employers. International Brotherhood of Electrical

²⁶. See e.g., Mugford v. Mayor & City Council, 185 Md. 266, 44 A.2d 745 (Ct. App. 1945), and cases cited note 17 supra.
Workers v. Town of Farmington\textsuperscript{28} involved the question of whether the town of Farmington had authority to make a binding agreement, consummated through a process of collective bargaining, with a union representing employees of a town-owned public utility. Municipalities were authorized by N. M. Stat. Ann. § 14-19-12 to enact an ordinance establishing a merit system for the "hiring, promotion, discharge and general regulation of municipal employees."\textsuperscript{29} It was noted by the court that under N. M. Stat. Ann. § 14-19-13:

\begin{quote}
[t]he provisions of an ordinance establishing a merit system and all rules and regulations issued pursuant thereto shall become a part of the contract of employment between the city and all employees thereof in positions covered by the merit system when the employment relationship exists at the time of the passage of such ordinance....\textsuperscript{30}
\end{quote}

The court held that a merit system established pursuant to § 14-19-12 would not be self-executing because the statute provided for selection of a personnel board to administer it. If an ordinance was enacted establishing a merit system, but a personnel board had not been appointed, or an appointed personnel board had not yet adopted rules and regulations, the municipality would have the authority to bargain with the employees because § 14-19-13 recognized contracts between a municipality and its employees. "While collective bargaining contracts are not specifically mentioned in § 14-19-13, such agreements would certainly be within the language."\textsuperscript{31} However, the court indicated that if a personnel board is appointed under an ordinance establishing a merit system and the board adopts rules and regulations providing for matters usually contained in a collective bargaining agreement, the authority of the municipality to enter such an agreement with its employees should be denied because the agreement would conflict with the regulatory power of the municipality and constitute bargaining away legislative discretion.

Thus, it appears that municipal employees may bargain with their employers only upon matters not within the scope of a merit system when rules and regulations have been adopted under an ordinance establishing such a system. When no rules and regulations have been adopted, they may bargain on any matter concerning their hiring.

\textsuperscript{28} 75 N.M. 393, 405 P.2d 233 (1965).
\textsuperscript{29} This section now appears in substantially the same form as N.M. Stat. Ann. § 14-12-4(A)-(B) (Repl. 1968).
\textsuperscript{31} 75 N.M. at 397, 405 P.2d at 236.
promotion, discharge and general regulation. The agreements reached in either situation would be binding. However, as a practical matter, the period of time between the enactment of an ordinance establishing a merit system and the adoption of implementing regulations by the personnel board is likely to be very short. Once the regulations are in force, the municipality is limited to discussing subjects not covered by the merit system, which are apt to be few.

The status of the collective bargaining rights of non-municipal employees in New Mexico is governed to some extent by *International*. In 1961, the state legislature passed the Personnel Act which established a system of personnel administration based solely on qualification and ability. Under the rule of *International*, the state agencies covered by the act would not have the authority to bargain with their employees concerning matters within the scope of the regulations adopted pursuant to the act. Among the matters required in the regulations by the act are a pay plan, discharge and demotion procedures, and hours of work, holidays and leave. Thus, many of the matters which are most important to the employee are not within the permitted area of negotiation.

Procedures for collective bargaining between the government and its employees in New Mexico are grossly inadequate. The number of subjects that may be negotiated are severely limited and agreements reached on those that may be negotiated are probably not binding. Many problems in public employment are complex. Moreover, the problems of one type of public employee may be quite different from those of others. It is difficult for the state legislature to predict, much less solve, the variety of labor disputes that may occur in the future. The disputes should be handled at the administrative level as they occur. Without legislative authority, however, administrative officials are helpless to deal with labor problems effectively. Suggested solutions to these difficulties are discussed, *infra*.

THE RIGHT TO STRIKE

At common law, employees in the public service have generally been denied the right to strike, although a few cases have permitted strikes by statutory construction. The reason most often given for

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the denial of the right is the sovereignty of the governmental employer.\textsuperscript{35} A strike against a public body is often thought of as equivalent to a revolt against governmental authority and therefore comes close to the crime of treason. President Franklin D. Roosevelt advanced this theory when he said:

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\ldots \text{I want to emphasize my conviction that militant tactics have no place in the functions of any organization of government employees.}\ldots \text{A strike of public employees manifests nothing less than an intent on their part to obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of government by those who have sworn to support it, is unthinkable and intolerable.}\textsuperscript{36}
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This theory has been criticized as a “fiction” in public labor relations since it has no more relevance to modern labor relations in the public service than it does to other areas of state and municipal law. It is strange that the government can impose a higher standard of fairness in labor relations on the private employer than it imposes on itself.

Other reasons advanced by courts and commentators for denying the right to strike include the possible danger to public health and safety which may result from a strike by public employees;\textsuperscript{37} the availability of the political process to achieve employee aims coupled with the benevolence of the public employer;\textsuperscript{38} and the responsibility assumed by public employees, by virtue of their acceptance of government employment, to refrain from interfering with the operation of government services.\textsuperscript{39}

There is no doubt much validity to such arguments. Many government services are obviously essential, and a disruption of these services often has a serious detrimental effect on the health and welfare of society.

The recent strike of the New York Transit Workers Union \ldots\text{prevented one-half of New York City’s working force from reaching their jobs, and left hundreds stranded with no access to their homes. Before the strike was over, many hospital clinics were forced to close, and the city’s blood bank supply dwindled to a dangerously
low level. The strike cost the transit authority $243,000 a day, and retail sales were off 41% resulting in a loss of nearly $100 million a day to the city.\textsuperscript{40}

However, strikes in the private sector can also be seriously detrimental to the economy and the public welfare, yet, these strikes will not be enjoined unless they would result in a national emergency. Work stoppages in many essential private industries could have a far more serious effect than one by the janitors at the state capitol. Yet, the latter would be prohibited, while the former would not. Moreover, strikes of some public employees do not constitute as serious a threat to the health and safety of society as strikes by others. For example, a strike by playground supervisors of a city-operated summer recreation program would be far less detrimental than one by city policemen or firemen.

These distinctions have led many commentators to suggest different treatment of public employees performing services that vary in importance. One approach has been suggested which would permit work stoppages for employees performing "nonessential" services.\textsuperscript{41} However, there are disagreements over which services are essential and which are not, as well as whether the determination should be made by the legislative branch or the judiciary.\textsuperscript{42}

Denying employees in the public service the right to strike has also been criticized as reducing the effectiveness of collective bargaining. As one commentator said, "[g]ranting the right to engage in collective bargaining...and then denying...the right to strike is like inviting a child to a candy parlor without allowing the child to taste the candy."\textsuperscript{43}

Many states have expressly prohibited public employee strikes by statute.\textsuperscript{44} These statutes provide a variety of penalties for violation, ranging from none at all to a termination of employment.\textsuperscript{45} Of those providing for dismissal, some permit reinstatement of striking em-

\textsuperscript{40} See Comment, note 36 supra at 117.
\textsuperscript{41} Note, Labor Relations in the Public Service, 75 Harv. L. Rev. 391, 408 (1961).
\textsuperscript{43} Clary, Pitfalls of Collective Bargaining in Public Employment, 18 Lab. L. J. 406, 408 (1967).
\textsuperscript{44} See note 45 infra.
\textsuperscript{45} For statutes providing no penalty, see e.g., Cal. Labor Code \textsuperscript{\textsuperscript{\textsuperscript{46}}} 1960-63 (19-\textsuperscript{\textsuperscript{\textsuperscript{47}}}\textsuperscript{\textsuperscript{\textsuperscript{48}}}); Neb. Rev. Stat. \textsuperscript{\textsuperscript{\textsuperscript{49}}} 48-802 to -810 (1960); Ore. Rev. Stat. \textsuperscript{\textsuperscript{\textsuperscript{50}}} 243.730-243.760 (1963).
Only the federal statute makes the offense a felony. 69 Stat. 625, 5 U.S.C. \textsuperscript{\textsuperscript{\textsuperscript{55}}} 118r (1964).
ployees under certain conditions, but most are generally quite inflexible and do not give administrators a choice of sanctions to apply to the particular circumstances of a given case. The effectiveness of the prohibitions and the penalties has been limited. When conditions have reached the point where a strike has become necessary because of lack of alternatives, the legislative sanctions have not been effective deterrents to strikes. Moreover, many of the penalties are so severe that administrators find it difficult to enforce them. The primary concern of administrators is to reinstate the interrupted government service, and many have refused to implement the legislative sanctions in order to achieve this objective. Moreover, it is often impossible to reinstate the service expeditiously without rehiring the striking employees.

New Mexico has only one statute dealing with strikes in the public service. That statute prohibits strikes by employees of the municipal transit systems. Thus, the status of the right to strike in the New Mexico public sector is determined by the common law, which uniformly denies the right.

Many supporters and critics of strikes by governmental employees appear to be directing their attention toward the wrong issues. Few will disagree that some strikes in the public sector can have serious effects upon the communities in which they have occurred. Determining which governmental services are "essential" or which are similar to those in the private sector for purposes of delineating a limited right to strike does not reach the important issue. The problems of employees performing "essential" services will remain. Nor does prohibiting strikes and imposing penalties for work stoppages help preserve uninterrupted government services, since strikes continue to occur in the face of the prohibitions and penalties. Attention should instead be focused on the goals of and the reasons for strikes. Employees strike for a variety of reasons—better pay, working conditions and hours, and more voice in policy making concerning their employment are but a few. The strike occurs when communication lines between their representatives and employers have broken down. Emphasis should be placed upon establishing or improving negotiation procedures between the government and its

47. After the settlement of the 1957 New York City Transit Authority strike, the strict statutory penalties for engaging in an illegal strike were not invoked because, in the words of the chief administrator: "We'd never have got the subways running." Illinois Legislative Council, Rep't No. 132, Public Employee Labor Relations at 13 (1958).
employees. Since the courts are ill equipped to provide these procedures, the task belongs to the legislatures.49

ALTERNATIVES TO THE STRIKE

Society is faced with a serious dilemma in the area of public labor relations. On the one hand is the necessity of maintaining an uninterrupted flow of government services to the taxpaying public, which precludes strikes by the employees providing them; on the other is the need to provide employees in the public service with an effective means of airing grievances and improving working conditions. New Mexico’s approach to the dilemma has been passive. It has neither expressly granted nor denied public employees the appropriate tools necessary to settle and avoid labor disputes. However, the inaction has in effect withheld these tools, since they generally are not recognized at common law.

It is incumbent upon the legislature to establish procedures to resolve and avoid public labor disputes. The emphasis should be on procedures which would make the strike weapon less necessary and less desirable to aggrieved employees. The approach should not, however, be limited to assisting employees. Legislators should realize that improved procedures would serve to carry out their responsibility to the public, since government services will be interrupted less often and a lower standard of public service avoided.

The primary goal of any comprehensive approach to labor relations should be the promotion of effective collective bargaining between employer and employee, whereby the parties can mutually agree on a satisfactory solution to their problems. Some have maintained that denying the right to strike severely restricts the effectiveness of collective bargaining on the part of the employee. Without it, it is said, his bargaining position is unequal to that of the employer. However, armed with the power to strike, his bargaining position becomes disproportionate to that of the employer. It is conceivable that the employer will be faced with a choice between acceding to the excessive demands of the union, or a serious interruption of a vital government service. Either choice can place him in an un-

49. At this point it should be noted that many state and municipal employees in New Mexico are members of unions and that contrary to the conclusions just reached, many of these unions have bargained with the public employer and two have engaged in strikes. This does not mean that either device is authorized by existing state law. It seems that both sides of the public labor dispute are forced to ignore state law in order to settle their differences. Hopefully, this note will show that it is much better to provide methods for preventing and coping with labor disputes through legislation than to leave the parties to the dispute free to rely upon or ignore existing state law depending upon the strength of their bargaining positions.
favorable position in terms of public opinion. It is therefore extremely important to both sides of a labor dispute—and to the public—to devise effective alternatives to the strike.

The alternatives most often suggested are political persuasion, mediation, compulsory arbitration and fact finding. It should be emphasized that these are alternatives to the strike and not to collective bargaining. Public policy should seek to encourage collective bargaining whenever possible. Some of these alternatives are less desirable than others because the tendency has been to use them as substitutes for, rather than extensions of, the process of collective bargaining.

Political Persuasion

Political persuasion is probably the least desirable alternative to the strike. Although public employees have the opportunity to lobby for new laws which would provide increased wages and new sources of revenue for improved benefits, the usefulness of such an approach is limited. First, the results obtained through this approach are apt to be piecemeal. It is impractical to use specific legislation to resolve a labor problem each time one occurs. Secondly, many labor disputes and problems require immediate attention and the process of legislation is slow. Such problems lend themselves to resolution at the administrative rather than the legislative level (although ultimately, the administrator must be given the authority by statute). Finally, although political persuasion was available to public employees long before the right to organize and bargain collectively were recognized, it has proved to be ineffective to avoid strikes.

Mediation

Mediation is the process whereby a neutral third party helps the parties to a labor dispute reach a voluntary agreement. The suggestions and recommendations of the mediator are not binding on the parties—his function being only to assist the disputants in making their own agreement. The theory of mediation is based on the idea that suggestions made by a neutral party are more likely to be accepted than identical ones proposed by a party to the dispute. It is thus an extension of the collective bargaining process, serving to help the parties talk to one another about their differences before their relations deteriorate to the point where a strike is the only course of action remaining.

Mediation has been successfully used in many states to resolve labor disputes in the public service. Current state statutes vary in

their methods of implementing the mediation process. In Michigan, mediation is available at the request of either party; if one party refuses, the state agency has the authority to force that party to attend the mediation hearing.\textsuperscript{51} Wisconsin allows mediation to be used only upon the request of both parties,\textsuperscript{52} while in New York, it may be ordered by the state Public Employee Relations Board.\textsuperscript{53} Michigan's approach is useful when one of the parties is reluctant to negotiate and its mandatory appearance feature forces the recalcitrant party to appear in hopes of breaking down resistance at an early stage. However, it does not reach the situation where neither party requests mediation. This may occur because both sides may not wish to initiate the mediation process out of fear of showing weakness. New York's statute covers this situation. The best approach would appear to be a blend of the Michigan and New York approaches whereby mediation could occur if only one or if neither party requests it.

The statutes also vary with respect to the selection of the mediator. California permits the parties to consult outsiders;\textsuperscript{54} Michigan and Wisconsin provide formal mediation by general labor mediators;\textsuperscript{55}\textsuperscript{56} and New York provides formal mediation by specialists in public employee disputes.\textsuperscript{55} California's approach has the advantage of providing the parties with considerable leeway in selecting their mediator. However, labor disputes in public employment have problems quite different from those in the private sector, stemming from the necessity of protecting the interests of a third party—the public. Hence, it would seem more advisable to follow New York's approach of selecting the mediator from specialists in public employee disputes.

\textit{Compulsory Arbitration}

Arbitration may be either compulsory or voluntary. Voluntary arbitration, often referred to as fact finding, is discussed, \textit{infra}. The difference between mediation and compulsory arbitration is that in the latter, the dispute is turned over to the arbitrator whose suggestions and recommendations are binding on both parties; in the former, the mediator merely assists the parties in making their own agreement and his suggestions are not binding.

\textsuperscript{54} Cal. Govt. Code § 3505.2 (West 1968).
\textsuperscript{56} N.Y. Civ. Serv. Law § 209 (McKinney Supp. 1968).
The arbitration machinery may take three general forms. In the tripartite approach, each party chooses one member of the panel and then mutually agrees upon a neutral third panel member. Another approach utilizes the services of a professional arbitrator, usually chosen by agreement of the parties to the dispute. In a third approach, the arbitrator is selected by an outside body.

Compulsory arbitration has been characterized as the only effective alternative to the strike since it is the only way in which the government employer may be bound by an agreement against its will. It is argued that it is the only tool other than the strike which provides the public employee with sufficient bargaining power.

Compulsory arbitration is not without shortcomings, however. First, allowing third parties to resolve disputes by making decisions which are binding on the government may be an unconstitutional delegation of authority. It is argued that submitting the dispute to an arbitrator whose decision is binding on the government would be an abdication of governmental responsibility. If the public body involved in the dispute is a local governmental unit, the abdication argument loses its vitality, since the local official will not have abdicated his responsibility. Instead, it will have been removed by a higher governmental authority (assuming of course, that the legislature has provided for compulsory arbitration by statute). It can also be argued that the legislature itself abdicates its governmental responsibility by providing for the settlement of labor disputes in the public service through compulsory arbitration. This objection is removed if the arbitrator is a governmental body or if the delegating statute sets out sufficient standards to guide the arbitrator in making his decision.

A second weakness of compulsory arbitration is that instead of being an aid to collective bargaining, it is relied upon as a substitute. Since collective bargaining is relatively new in the public sector, both sides are apt to be inexperienced and lacking the bargaining skills

61. Id.
62. See Comment, note 59 supra at 284.
necessary to reach agreements and resolve disputes. Instead of sharpening bargaining skills, the availability of compulsory arbitration may hinder their development, particularly if the parties rely upon it whenever an obstacle in the bargaining process occurs.

A third shortcoming of compulsory arbitration is that decisions in the resolution of labor disputes are made by a body not directly responsible to the public. In the settlement of governmental labor disputes, the effect the settlement has on the public should always be considered, since it finances the services through the payment of taxes and is the recipient of them. If the arbitrator is not responsible to the public, its interests may not be adequately protected. The problem could be avoided if the arbitrator is a governmental body which would be responsible to the public, at least indirectly.

**Fact Finding**

Fact finding, sometimes called advisory arbitration has also been used as an alternative to the strike. It has been defined as "an investigation by a public body aimed primarily at discovering the issues, and usually making recommendations for their settlement." Fact finding is in many ways similar to compulsory arbitration and mediation, but the procedure is probably best characterized as a hybrid of the two. It is usually carried out by a panel which examines the merits of the dispute—often by conducting hearings and collecting evidence through the use of the subpoena power—and makes recommendations to a political authority or to the public. It differs from compulsory arbitration because the recommendations are not binding, and from mediation because its purpose is not to reach a compromise between the parties, but to determine the most practical settlement of the dispute on the basis of the facts. The rationale behind the procedure is that if the facts are determined by a neutral third party, the disputants will be induced to agree either on the basis of the facts as made apparent to both the employer and the union, or by public opinion forcing them to reach an agreement based on the fact finder's recommendations.

In the states where it has been used, fact finding has been quite

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69. See Note, note 42 supra at 566.
successful in preventing public employee strikes, often before the fact finder has made a report of his recommendations.

In Massachusetts for example, out of 200 cases submitted to fact finders in two-year period, 140 were resolved prior to the issuance of recommendations. In Michigan, 56% of such cases were resolved prior to recommendations.\(^\text{70}\)

When the disagreement has not been resolved prior to the issuance of the report, the recommendations have usually been accepted by the parties.

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\text{... [O]ut of fifty cases in Wisconsin in the two-year period, the fact finder's recommendations were accepted in 90\% of them, and in only three cases were strikes experienced. In Massachusetts, fact\-finding was used in 200 cases, but only four strikes ensued.}^{71}
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The use of fact finders for settling labor disputes in the public service has been criticized, because when it is available, the parties may tend to rely on the fact finder, rather than settling their disputes through the process of collective bargaining.\(^\text{72}\) This is no doubt true to a certain extent. However, although communication between employer and employee via collective bargaining should be promoted by public policy, it should not be the ultimate goal. That goal should be the peaceful settlement of labor problems and the avoidance of crippling strikes. Collective bargaining is the most desirable method of resolving these disputes, but is not the only one. Since experience has proved fact finding to be a successful means of settling labor disputes in the public sector, it should continue to be used when collective bargaining has reached an impasse.

RECOMMENDATIONS

Throughout this Note, inadequacies in New Mexico law concerning labor relations in the public service have been pointed out. Although problems in this area have not as yet seriously affected the state, sooner or later they will occur as the number of public employees increases, and as employees become aware of many of the procedures in use in other states. It is incumbent upon the state legislature to establish a comprehensive approach to these problems before they occur. A suggested approach follows:

(1) Statutory recognition of the right of public employees to organize into unions.

(2) Statutory recognition of the right of public employees to

\(^{70}\) See Comment, note 59 supra at 279, n. 94.

\(^{71}\) Id. at 279, note 95.

\(^{72}\) See Northrup, note 65 supra.
bargain collectively with their employers, worded in such a way as to constitute a statement of public policy encouraging collective bargaining as a means of resolving labor disputes in the public service.

(a) The statute should set out a procedure by which an appropriate bargaining unit representing the employees would be recognized. (A unit selected by a stated percentage of the employees would be one method).

(b) The statute should specifically state the matters which would be permitted subjects of negotiation.

(3) Statutory prohibition of strikes by all public employees—without penalties—worded in such a way as to constitute a statement of public policy against such strikes.

(4) Creation of a state Public Labor Commission, independent of the state Labor and Industrial Commission, which would supervise and provide services for the settlement of labor disputes in the public service. The Commission should have the following authority and responsibilities:

(a) Upon the request of either the appropriate bargaining representative of the employees or the appropriate representative of the public employer, or within the discretion of the Commission in the absence of a request, the Commission should appoint a mediator, experienced in the settlement of public labor disputes, to assist the parties in reaching an agreement. The Commission should not appoint a mediator unless it has been shown to the Commission’s satisfaction, that the parties have made a good faith effort to negotiate on their own.

(b) Upon the request of either the appropriate bargaining representative of the employees or the appropriate representative of the public employer, or within the discretion of the Commission in the absence of a request, the Commission should appoint a fact finding panel to make findings of fact and non-binding recommendations for the settlement of the dispute.

(1) The panel should consist of a representative of the union, a representative of the public employer, and a neutral third member, experienced in the settlement of public labor disputes, chosen by agreement of the parties.

(2) The panel should be given the power to subpoena witnesses and experts in public labor disputes, to conduct hearings and collect evidence.

(3) The panel should be required to file a report of its findings and recommendations with the Commission. The report should also be made public, preferably in newspapers of general circulation throughout the state.
(4) The Commission should not appoint a fact finding panel unless it has been shown to the Commission’s satisfaction, that the parties have made a good faith effort to negotiate on their own.

(c) The Commission should permit mediation and fact finding to take place simultaneously if, in its discretion, a settlement can be reached and a strike avoided only by using both.

(d) The Commission should have the authority to compel an unwilling party to attend mediation and fact finding hearings.

(5) For policemen and firemen, whose uninterrupted services are absolutely essential, a system of compulsory arbitration could be alternatively available with fact finding. The Commission could serve as the arbitration panel and the subjects which may be negotiated and the standards by which it must operate must be carefully specified by the legislature.

LEONARD GILBERT ESPINOSA