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In 1969, the New York State Legislature, apparently irritated by several large-scale public employee strikes in New York City, required[1] the city council to amend the city's collective bargaining statutes so as to be "substantially equivalent" with the "finality" provisions of the state public employee bargaining law, the Taylor Act.[2] Prior to January 1972, the city's bargaining laws contained no formal provision for finality in public labor disputes.[3] Pursuant to this statutory mandate, the city council included formal finality in its bargaining mechanism.

In light of the Taylor Act experience and the overwhelming success of the existing city provisions, this action by the state legislature was ill-advised and inappropriate. However, the New York City Council, to its credit, devised a statutory scheme which, at worst, minimized the disadvantages of binding final-

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1. The Public Employee's Fair Employment Act, N.Y. CIV. SERV. LAW § 212(11) (McKinney Supp. 1969). The New York State Senate, in its Rules Committee Report, noted that:

> [t]he legislation is aimed at providing greater deterrents against strikes and disruption of vital public services by public employees. . . . [S]ome unions have eagerly accepted the Taylor Law's privileges while rejecting its responsibilities.

N.Y. SESS. LAWS 2366 (McKinney 1969).

The five major strikes in New York City over the past four years were the 1968 transit strike, the 1968 sanitation walk-out, the teachers' strike in 1968, the 1970 police wildcat strike, and the 1971 AFSCME strike. Not one of these strikes had anything to do with the disputes-settlement machinery in the city or state laws. Further, not one of these strikes would have been affected by the existence of finality provisions.

2. The Public Employees' Fair Employment Act, N.Y. CIV. SERV. LAW. *See* Koretz, *Labor Relations Law*, 20 SYRACUSE L. REV. 258 (1969); Kheel, *The Taylor Law: A Critical Examination of Its Virtues and Defects*, 20 SYRACUSE L. REV. 181 (1969). In approving the bill, Governor Rockefeller stated that:

> This legislation ushers in a new age of public employee relations in New York State. [The Act] proclaims the rights of government employees, yet recognizes the special obligations borne by those who provide the vital services of government.

3. New York City Collective Bargaining Law, ADMINISTRATIVE CODE, ch. 54 (Williams Supp. 1965).

ity by providing for an impartial mechanism as the final step in place of the public employer in that role.

It is the purpose of this article to illustrate the significant difference between these two formulations of the finality concept in public bargaining disputes. Since New York City accounts for half of the state's population, their separate experiences with respect to finality that have existed to date and the additional experience that will emerge as a result of the recent amendments to the city's collective bargaining law may prove highly instructive.

The State

In formulating the Taylor Act, the state legislature rejected bilateral bargaining between employer and employee. Instead, a "collective negotiations" procedure was substituted.[4] The use of the term "collective negotiations" and the nature of the finality provisions show that the drafters of the Taylor Act did not intend to establish a viable method of bargaining for public employees. Their intention was, rather, "to supply the participation of public employees in the determination of some of their conditions of employment."[5] One noted commentator has maintained that this process grants employees merely the right to consultation in labor disputes, amounting to a "unilateral determination" by the public employer when agreement cannot be reached.[6]

The success of any bargaining procedure requires that those who are affected believe that it is an equitable method for resolving their disputes.[7] This is achieved in the private sector by the intervention of the government, a neutral party, in the form of the National Labor Relations Board.[8] In New York, however, the state legislature was faced with the dilemma of achieving a restriction of negotiating rights while seeking public approval and acceptance of the Act. The solution was found in the concept of finality.

Put briefly, the Taylor Act provides that, after "collective negotiations" and a fact-finder's recommendation that there can be no agreement, the "legislative body of the government involved" is empowered to determine the final employment condition terms.[9] The ultimate decision in public employment conflicts is placed in a branch of the employer—the state legislature, city council, or local

4. Taylor Law, N.Y. CIV. SERV. LAW § 209.

5. FINAL REPORT, STATE OF N.Y. GOVERNOR'S COMMITTEE ON PUBLIC RELATIONS 11 (March 31, 1966).

6. T. KHEEL, REPORT TO SPEAKER ANTHONY J. TRAVIA ON THE TAYLOR LAW 3 (Feb. 21, 1968).

7. HANT, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE (1961); SPERO, GOVERNMENT AS EMPLOYER (1948).

8. National Labor Relations Act, 29 U.S.C. § 153 (1935).

9. Taylor Law, N.Y. CIV. SERV. LAW § 209(3)(e).

school board. In other words, after inconclusive consultations, a unilateral determination of rights is made. Asserting that this procedure is distinctly more advantageous to the public employee than the previous policy of absolute state dictation of employment terms, advocates of the Taylor Act are quick to point to the many agreements reached under its provisions as an indicia of its success. However, no serious observer can view the dispute resolution techniques of the Act as anything but a total negation of the concept of collective bargaining. Three recent cases illustrate the Act's predominant tendency to favor the public employer.

In 1964, New York State engaged in extended collective negotiations with District Council 82 of the American Federation of State, County, and Municipal Employees (AFSCME), the unit acting on behalf of the state correction officers. An impasse in negotiations was reached. One of the issues submitted to the statutory fact-finder was whether the officers should be reallocated to a higher pay grade. The governor, representing the state, rejected the fact-finder's favorable recommendation on this issue. Under the Taylor Act, the matter was referred to the final arbiter (here, the state legislature). Predictably, the legislature split along party lines; since the governor's party was in the majority, the fact-finder's recommendations were rejected and the governor's decision upheld. Shortly thereafter, the same majority amended the Taylor Act to exclude the issue of salary grade allocations from negotiation considerations.

This case is by no means isolated. By granting the determination of finality to a legislative body, the Taylor Act makes every labor grievance a political question. Another example highlights the state's lack of concern for the rights of its employees. In 1970 the firemen of Albany began to organize into bargaining units and met with vigorous opposition from that city's mayor, even to the extent of coercion and discrimination designed to prevent the city's employees from exercising their basic negotiation rights. Shortly after the firemen began agitating for their rights, the non-organized city policemen, with whom the firemen had long shared salary parity, were granted a substantial pay increase. Despite the mayor's hostility, the Albany firemen succeeded in organizing and began collective negotiations with the city. At the negotiation table, the mayor's chief "concession" was to allow the firemen to continue on their jobs *without an increase*. This, of course, resulted in a stalemate.

Accordingly, the issue was submitted to a fact-finder, who recommended that the firefighters be granted an increase substantially equivalent to that received by the policemen. The mayor rejected this recommendation.

Once more the stage was set for invoking the finality mechanism of the Taylor Act. The dispute would be determined by the legislative body of the government involved—the Albany Common Council. The council's decision was identical to that of the mayor—no increase for firefighters. This example

of the Taylor Law's finality provisions was so embarassing and outrageous that the state's Public Employee Relations Board (PERB)[10] intervened and attempted to carve out an extra-legal role for itself.[11] The Board summoned the parties before it for the purpose of making its own recommendations. The City of Albany, however, quickly responded by obtaining a court order declaring that PERB was without jurisdiction in the matter.[12] Since public employees are forbidden to strike in New York, the Albany firemen had no recourse but to submit to this politically motivated decision.

A more serious infringement of public employees' rights occurs when the public union is involved in a dispute with a school board. All school boards in New York are both a "government" and a "public employer" within the meaning of the Taylor Act.[13] However, unlike the usual governmental body, there is no separation of powers into executive and legislative branches; persons serving on the board act in both capacities.

In November 1971, the Yonkers School Board and the Teachers Union reached an impasse over salary negotiations; the matter was submitted to the fact-finder who determined that the union should be granted a 5.4 percent increase.[14] The board members, in their executive capacity, rejected the recommendations. The rejection was then submitted to the appropriate legislative body—*the Yonkers School Board*! Shedding their executive raiments and donning legislative robes, the board members deliberated and decided that they were compelled by the logic of the executive board to agree with that body's

10. The Public Employment Relations Board was established by the Taylor Act. It is a three-man body, appointed by the Governor, entrusted with the duty of resolving representation and negotiation difficulties in collective bargaining disputes.

11. The Public Employment Relations Board issued an order on January 13, 1971, requiring the city and the firefighters to show cause before it at a public hearing why they should not be directed to comply with the previous Board order to enter into collective negotiations and conclude a written agreement or alternatively to accept recommendations made by the fact-finding panel set up to help resolve the dispute.

12. City of Albany v. Helsbury, 65 Misc. 2d 28, 317 N.Y.S.2d 955 (Sup. Ct. Albany 1971). The city argued that it had complied with the Board's first order requiring collective negotiations and that disagreement between the parties made a written agreement impossible. It therefore argued that since the § 209 provisions of the Taylor Law for impasse resolution were exhausted, the proper party to pass judgment would be the City Council, not PERB.

The court accepted the City's position, despite argument by PERB that the language of § 205(5)(j) gave it the power "to hold such hearings and make such inquiries as it deems necessary for it properly to carry out its functions and powers." The court said this authority referred only to powers specifically granted under the law and since a continuing impasse after rejection of the fact-finding report was to be settled by the appropriate legislative body, the Board's powers were at an end.

13. Taylor Law, N.Y. CIV. SERV. LAW § 201(6)(a). "The term 'government' or 'public employer' means . . . (iii) a school district or any governmental entity operating a public school, college or university. . . ."

determination.[14]

The teachers' union, however, was not so compelled.[15] In violation of the law, they struck.[16] The strike was finally settled by hard, good-faith bargaining before an impartial mediator, not by recourse to the Taylor Act.[17]

The history of collective bargaining under the Taylor Act is a sad one, marked by political maneuvering, intimidation, and deprivation of employee rights. In marked contrast is the New York City experience.

The City

It was generally recognized when the Taylor Act was passed in 1967 that its provisions simply were not appropriate to the New York City public labor scene. Vigorous employee unions were firmly established in the city; many of these organizations had had searing experiences with third-party mechanisms appointed by the mayor.[18]

As a result, ad hoc tri-partite discussions were held and an equitable procedure agreed upon for selecting a seven-man Board of Collective Bargaining.[19] As specified in the Administrative Code, the mayor and the Municipal Labor Committee, acting for the unions, appoint two representatives each; these four individuals, in turn, agree upon the three other members. This impartial, consensual approach to dispute bargaining was also evident in the procedures for appointing fact-finders and arbitration panels. Further, salaries and expenses of the impartial members were shared equally by the city and by the Municipal Labor Committee. Thus, equitable procedures were insured for each step in the representation and bargaining process.

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14. N.Y. Times, Dec. 26, 1971, at 47, col. 6 (city ed.).

15. N.Y. Times, Dec. 30, 1971, at 32, col. 6 (city ed.). Besides the salary dispute, the other major issue involved a limitation on maximum class size on which the teachers claimed they would not compromise.

16. N.Y. Times, Jan. 4, 1972, at 1, col. 3. Despite a temporary restraining order granted to the school board by State Supreme Court Judge George Belsheim, Jr., the teachers union struck. Both sides agreed the strike was 90 percent effective, as only 168 of 1,859 teachers crossed the lines. Later the school board obtained an injunction which the teachers also ignored. "Eugene Fox, the Yonkers Corporation Counsel, said the city would then seek to bring contempt proceedings against the teachers as soon as possible. The board will seek to invoke the other penalty outlined by the Taylor Law, including a fine of two days salary for each day of the strike." However, no such action was ever taken.

17. N.Y. Times, Jan. 14, 1972, at 35, col. 1, continued at 39, col. 1.

18. New York City Mayor Robert F. Wagner, in Exec. Order No. 49 (1958), established the City's affirmative policy of encouraging city employees to join unions and to engage in collective bargaining. However, the 1965 Welfare Department employees' strike focused the attention of the city and its employees on the inadequacies inherent in the existing mayoral-controlled system.

19. NEW YORK CITY MEMORANDUM OF THE TRIPARTITE PANEL TO IMPROVE MUNICIPAL COLLECTIVE BARGAINING PROCEDURES (1966).

This example of cooperation proved to be a highly viable system of bargaining. In its four years of operation, 49 stalemated disputes were referred to a fact-finder. In each case, the city accepted the fact-finder's recommendation; in all but a few situations, the union also accepted. As for the few fact-finding reports that were rejected by the unions, the city stood fast and the union, after reconsideration, acquiesced to the fact-finder. A study of this record leads to the conclusion that the New York City Collective Bargaining Law, based on the consent and acceptance of the city and the unions, represented a highly effective de facto finality mechanism.

In light of this exemplary record, it would seem that the governor and the state legislature should have been pleased to allow the city to continue under its enlightened procedures. But enamored by the Taylor formula of unilateral finality, the legislature insisted that the city adopt a system "substantially equivalent" to the Taylor provisions.[20]

While the New York City Council does not have a record of venality comparable to the Common Council of Albany, its actions are certainly as politically motivated as those of the state legislature. Recognizing this and the shameful history of the Taylor Act, there was widespread agreement in New York City that an in toto adoption of the Act's finality provisions would be disastrous.

Accordingly, an alternative method of finality was sought and found. While this mechanism avoids the undesirable political and unilateral provisions of the Taylor Act, it suffers from its formal recognition of finality. In short, when an impasse occurs in the bargaining negotiations, a fact-finder, acceptable to both sides, is appointed by the Board of Collective Bargaining to make recommendations for the resolution of the dispute. If either party rejects the recommendations, the matter is submitted to the tri-partite Board for final determination. On paper, this mechanism differs in only one respect: it introduces finality into the Board's decision. While there is not as yet any data concerning the success of the new law, any system of binding arbitration is usually found undesirable by labor. New York City public labor unions, if they had been given a choice, would have preferred the existing and highly effective de facto finality to this new procedure.

Nonetheless, this new mechanism is superior to the Taylor formula of legislative determination. To have allowed the final determination of labor disputes to be made by the New York City Council would have been irresponsible and ill-advised.

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20. The Public Employees' Fair Employment Law, N.Y. CIV. SERV. LAW § 212(2) (McKinney Supp. 1969).

Conclusion

The future of collective bargaining in New York City is bright. As the unions and city government gain experience, an ever larger percentage of disputes will be settled by hard bargaining without recourse to the impasse mechanism. Further, since the impartiality of the fact-finding procedures has been accepted and remains unimpaired, most stalemated disputes will be settled. In those relatively few cases where the recommendations are rejected, the Board of Collective Bargaining can be expected to uphold the fact-finder.

These new procedures may not affect the number of public employee strikes in New York City. Strikes cannot be prevented by this or any other mechanism in a free society. But the New York City law does provide labor and management with a neutral forum in which to fairly and equitably resolve their differences. The interests of both sides are protected, with neither subordinated to the other. Public employees are no longer relegated to the status of second class citizens merely because they work for the state. The New York state legislature can and should learn a valuable lesson in public employee relations from New York City.