Note, Recommendations of the Governor’s Commission to Revise the Public Employment Law of Pennsylvania: A Preliminary Assessment

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RECOMMENDATIONS OF THE GOVERNOR'S COMMISSION TO REVISE THE PUBLIC EMPLOYMENT LAW OF PENNSYLVANIA: A PRELIMINARY ASSESSMENT

INTRODUCTION

The industrial unrest of 1947 prodded the Pennsylvania Legislature into enacting the Pennsylvania Public Employee Anti-Strike Act of 1947. Today, at least eleven states in addition to Pennsylvania prohibit by legislation strikes by public employees, and most of this no-strike legislation has been passed since World War II in apparent reaction to a series of public employee strikes in the postwar period.

After two decades of frustrating experiences with these blanket no-strike laws, and "[a]s the problems of labor relations in public employment grew, several cities, notably New York and Philadelphia, developed machinery to deal with their employees." Many states and the federal government, recognizing the "altered climate for public employee relations in recent years," established commissions to examine trends and experiences, with recommendations for new, amended legislation. In June of 1968, the Governor's Commission to Revise

5. Id.
7. Governor's Commission to Revise the Public Employees Law of Pennsylvania, Report and Recommendations of the Governor's Commission to Revise the Public Employees Law of Pennsylvania, 2 BNA Govt. Employee Relations Rep., No. 251, (1968) [Hereinafter cited as Hickman Commission Report]. The Commission consisted of 12 persons under the chairmanship of Leon Hickman, retired Executive Vice President of the Aluminum Company of America. The members of the Commission were: Dr. Harold F. Alderfer, former State Deputy Superintendent of Public Instruction and retired Director of the Pennsylvania State Institute of Local Government; Hon. P. Freeman Hankins, member of the Pennsylvania Senate and ranking minority party member of the Committee on Labor and Industry; John W. Ingram, President, Pennsylvania Economy League and former State Secretary of Administration; Bernard N. Katz, Esquire, specialist in labor law; Robert H. Kleeb, Esquire, former regional attorney for the National Labor Relations Board; Hon. Edward B. Mifflin, member Pennsylvania House of Representatives and Chairman of the House Labor Relations Committee; Very Rev. N.R.H.
the Public Employment Law of Pennsylvania (The Hickman Commission) submitted its report and recommendations for changes in the public employment relations posture Pennsylvania has maintained since the Pennsylvania Public Employee Anti-Strike Act was passed in 1947.

When one considers the steady growth of public employment over the past decades, the projected growth of employment in the public sector in the future, and the growth rate of public employee unionism, it is fair to say that these changes will most certainly lead to an increased number of labor disputes in the public sector in the future. Consequently, these facts would seem to attest to the need to (1) review the current Pennsylvania law concerning public employment relations, and (2) outline and assess the recommendations of the Hickman Commission.

I. THE PRESENT LAW

Organizational and Representation Rights

Public employees in Pennsylvania are not governed by the Pennsylvania Labor Relations Act, for this act exclusively applies to employees engaged in "industrial disputes." Nor do public employees have any other statutory right to join a labor organization. However, the Pennsylvania Supreme Court has held that the 1947 Anti-Strike Act does not prohibit public employees from joining a labor organization, and consequently such membership is permissible. In addition, there is presently no statutory machinery for determination of appropriate

Moor, Dean, Trinity Episcopal Church, retired, and Chairman, Pittsburgh Labor Management Council; Emil E. Narrick, Esquire, Assistant General Counsel, United Steel Workers of America, and Chairman, Allegheny County Planning Commission; Max Rosenn, Esquire, former State Secretary of Welfare; Dr. William G. Willis, Vice President Temple University, and former Director of the University of Pittsburgh Institute of Local Government; Hon. John K. Tabor (non-voting), State Secretary of Labor and Industry.

bargaining units, exclusive union representation, union security or dues check-off for public employees. Consequently, organization of the public employment sector in Pennsylvania has been a most difficult and confusing process, beset with many labor disputes culminating in work stoppages.\textsuperscript{16}

\textit{Collective Bargaining and The Collective Bargaining Agreement}\textsuperscript{17}

Public employees in Pennsylvania have no right to compel their public employers to bargain in good faith. At least they have no right to compel good faith collective bargaining in the traditional sense of sitting down with employer representatives and negotiating an employment contract. The Supreme Court of Pennsylvania stated in \textit{Pittsburgh City Fire Fighters v. Barr}\textsuperscript{18} that,

\begin{quote}
The situation of the municipal employee, however, is far different. While governmental units recognize unions \ldots as bargaining agents of the municipal workers, they do not sit down and enter into collective bargaining agreements \ldots Indeed, absent statutory authorization, a governmental unit does not have the power to bind itself to its employees by the terms of a contract.\textsuperscript{19}
\end{quote}

To compensate somewhat for the absence of collective bargaining in public employment, the court has broadly construed the words "grievance or controversy" in Section 1 of the Anti-Strike Act\textsuperscript{20} to include

not merely the day to day complaints which normally are settled by the grievance procedure in the industrial context. Rather, in the governmental situation, these

\textsuperscript{16} The confrontation between the Pittsburgh Board of Public Education and the Pittsburgh Federation of Teachers in the Spring of 1968 is a good example of the frustration and ultimate loss of manhours due to striking which has resulted due to the nonavailability of statutory procedures in the area of organizational and representation rights for public employees. \textit{See} 2 BNA GOVT. EMPLOYEE RELATIONS REP., No. 232 at E-1 (1968); 2 BNA GOVT. EMPLOYEE RELATION REP., No. 234 at F-1 (1968).

\textsuperscript{17} The following discussion of the rights of public employees in the area of collective bargaining and collective bargaining agreements does not apply to policemen and firemen who are now covered by act 111, enacted June 24, 1968 (S.B. 1343, L. 1968) requiring good faith collective bargaining between policemen and firemen and their public employer, providing for arbitration, and requiring compliance with collective bargaining agreements and findings of arbitrators.

\textsuperscript{18} Pittsburgh City Fire Fighters Local No. 1 v. Barr, 408 Pa. 325, 184 A.2d 588 (1962).


\textsuperscript{20} Act of June 30, 1947, P.L. 1183 § 1, \textit{as amended}. PA. STAT. ANN. tit. 43 § 215.1 \textit{et seq.} (1964). The relevant provisions of § 215.1 are as follows:

\begin{quote}
In order to avoid or minimize any possible controversies by making available full and adequate governmental facilities for the adjustment of grievances, the governmental agency involved, at the request of the public employees, shall, within fifteen (15) days of such request, set up a panel of three members. \ldots
\end{quote}
grievances also concern the main elements of an employment relationship—wages, hours, working conditions, etc.—matters which in the industrial situation are determined in the collective bargaining agreement.21

Consequently, while no traditional collective bargaining is required between the parties, the disputes, traditionally considered proper subjects of collective bargaining in the private sector, are included under a broadly defined interpretation of "grievance or controversy" and are therefore proper subjects for tripartite "arbitration" under Section 1 of the Pennsylvania Anti-Strike Act. Either party to a disagreement may request that a tripartite panel be created and may by an action of mandamus compel the other party to appoint a panel member to participate in the grievance machinery.22 The philosophy of the present law is that

Through the airing of the respective positions of the parties and the attendant coverage by the news media, . . . [the parties] are afforded ample opportunity to place their position before the public and muster public sentiment on their side. . . . [T]hrough such a process parties often are able to arrive at a mutual understanding of their respective positions, thereby making the final negotiation more fruitful.23

Several difficulties have been encountered under Section 1 of the Anti-Strike Act. The panel recommendations are only advisory and are not binding upon either party.24 Since the parties negotiate from an unequal position initially, given the inability of the public employees to strike legally, many have felt that the right of access to the grievance machinery is an illusory right at best.25 The issue of dues check-off is not a "grievance or controversy" under the 1947 act and therefore is not a proper subject for reconciliation through the statutory machinery.26 Consequently there is presently no statutory procedure for the reconciliation of negotiation impasses on this subject. The grievance machinery of Section 1 of the 1947 Act has been held to be inappropriate for the reconciliation of representation disputes, and there is "serious doubt" whether a public employer may recognize or bargain exclusively

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22. Id. at 334, 184 A.2d at 593.
23. Id. at 332-33, 184 A.2d at 592.
with a public employee representative. Given the inadequacy of the present law in the areas of union security, dues check-off and impasse reconciliation mechanisms, one can readily see why Pennsylvania needs a renovation of its public employment law.

**The Strike Question**

In Pennsylvania, public employees are unconditionally prohibited from striking. Any public employee who strikes automatically abandons his employment and may not hold his job except if reappointed or reemployed. He may be reappointed or reemployed under the present law only upon the following conditions: (a) his compensation shall not exceed that received by him immediately prior to his violation, (b) he may not have his compensation increased until after three years from the date of his reappointment or reemployment, and (c) he shall be on probation for five years following his reappointment or reemployment.

For teachers and civil service employees and others who have tenure by statute, condition (c) has the effect of suspending tenure for the period of the probation. The practical effect of these harsh discharge penalties (which are exactly the same three conditions that were imposed under the ill-famed and now-repealed Condon-Wadlin Act of New York) is that employees, especially those whose skills are in short supply, will not seek reappointment or reemployment. A school board faced with the resignation of one-third of their faculty, for instance, will either not enforce the statute against strong unions or will seek amnesty legislation excluding certain classes of public employees from the statutory penalties.

II. **THE HICKMAN COMMISSION REPORT**

**Conclusions and Recommendations**

After conferring with officials of Wisconsin and Michigan and the City of New York concerning the administration of their laws regulating public employee bargaining, and after holding public hearings and conferring with representatives of sixty-three agencies representing a

29. Id. §§ 215.2-3
30. Id. § 215.4.
broad spectrum of both public employees and employers, the Commission recommended the following:

1. *The Public Employee Act of 1947 should be repealed and replaced by an entirely new Public Employee Law*\(^3\)

The Commission outlined three basic weaknesses of the law. The 1947 act does not require collective bargaining, and this has led to an almost complete breakdown of communication when the public employer has not chosen to recognize a right of its employees to bargain collectively. (This weakness the Commission felt was the greatest cause of public employment strikes.) The forbidding of all strikes by public employees was unreasonable and unenforceable, especially when coupled with an ineffective collective bargaining mechanism. The harsh mandatory penalties of the 1947 act are self-defeating since to drive a public employee of considerable experience and skill to work elsewhere is, in the last analysis, to do the community a great disservice.

2. *The new act should cover all public employees*\(^3\)

The Commission felt that only if the new law covers all public bodies and their employees, could “consistent application of basic employment policies” be insured to everyone in the public service. It was suggested however that privately incorporated agencies receiving financial support from the state should not be included under the proposed new law.

3. *The new law should recognize the right of all public employees to bargain collectively*\(^3\)

The Commission contended that the new law should give public employees the right of organization and representation by an agent chosen through elections supervised by the Pennsylvania Labor Relations Board. Their hearings indicated that the recognition of this right, coupled with statutory procedures by which it can be brought into being, would do more to resolve disputes than anything else that could be done.

To safeguard against abuse by either party, the Commission suggested that the appropriateness of the bargaining unit should be determined by the Pennsylvania Labor Relations Board pursuant to statutory guidelines.\(^3\)

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34. *Id.* at E-1, E-2.
35. *Id.* at E-2.
36. *Id.*
Contending that permitting a union shop would be inappropriate in public employment, the Commission suggested a compromise in the area of union security. The Commission recommended that it would be permissible for a contract to be made with an employer for an agency shop, and that statutory provisions should be provided to prevent fees paid to the union by nonmembers from being used for other purposes unrelated to collective bargaining, such as political contributions.

4. *The new law should require good faith bargaining*  
Recognizing that permitting collective bargaining over wages, hours, and conditions of employment is only a partial solution, the Commission recommended that good faith bargaining by both parties be required. The Commission felt that an impasse could not be declared until, at a minimum, the parties have bargained, requested assistance from the State Mediation Service and submitted the dispute to a fact-finding board, or, in the case of firemen and policemen, submitted the dispute to binding arbitration.

5. *The right to strike should be recognized but should be strictly limited*  
The Commission recommended that the Commonwealth recognize the right to strike by public employees if two conditions are met. First,

No one should have a right to strike until all collective bargaining procedures have been exhausted. If there is a strike before all collective bargaining procedures are exhausted, no other showing should be needed to cause the appropriate court to enjoin the strike.

Secondly, the Commission stated:

Likewise there can be no right of public employees to strike if the health, safety or welfare of the public is endangered. . . . Consequently, the legislation we recommend will provide that if a strike is threatened or occurs after collective bargaining has been exhausted, it can begin or continue only so long as public health, safety or welfare are not in danger.

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38. An agency shop is a union security device whereby membership in the employee union is not a condition of employment, but non-member employees in the bargaining unit are required to pay to the bargaining agent a fee as reimbursement to the employee organization for its services as bargaining representative for the entire group.  
40. Id.  
41. Id. at E-3.
The Commission emphasized that the courts should be empowered to enjoin a public employee strike once the public health, safety or welfare is endangered. It also emphasized that the court should be armed with an arsenal of enforcement penalties. No single penalty should be mandatory to enforce the court injunction (as is mandatory dismissal under the present law). Rather the court should be able to impose a penalty upon striking employees or employee organizations that would be most appropriate and reasonable under all the circumstances. The Commission's view is that severe penalties should be made available for the violation of an injunction, basically taking the form of fines or imprisonment or both against striking employees and/or their organizations.

Where the collective bargaining mechanisms have been fully exhausted and an impasse exists, and public health, safety or welfare is not endangered, the Commission feels it is inequitable and unwise to prohibit strikes.

6. The new law should contain a general amnesty clause, waiving penalties under the 1947 act

As has been stated, the Commission recommended a repeal of the 1947 act. In addition, the proposed legislation should include, the Commission felt, an authority in all governmental bodies to suspend or waive all or part of the mandatory penalties of the 1947 act heretofore imposed. It is felt that the 1947 provisions are proving to be self-defeating, particularly with respect to teachers who are in short supply. To the extent that they, and any others with skills in short supply, do not need to seek reappointment under the repressive penalties of the 1947 act, the public employers may be seriously crippled unless authority is given to waive or suspend, in their discretion, the 1947 act's mandatory penalties.

Preliminary Assessment of the Hickman Commission's Recommendations

1. Underlying premise of the Commission's recommendations

To assess the recommendations of the Hickman Commission, one must first evaluate the attitudes which generated the Commission's recommendations. Clearly, if one believes that militant tactics have absolutely no place in the functions of any organization of government employees, or if one believes that the process of collective bargaining, even limited collective bargaining over designated subjects, cannot be transplanted into the public service, then one cannot begin to accept the Hickman Commission's conclusions.
Manifestly, the complete denial of the benefits of collective bargaining to public employees is totally unrealistic today. Though, admittedly, different standards and techniques of collective bargaining are necessary for at least some public employees, nevertheless, public employees can and should be given greater rights in determining the conditions under which they work. The anachronistic concept of sovereignty can no longer deny public employees the greater rights of economic self-determination they deserve. As James H. J. Tate, President of the National League of Cities and Mayor of Philadelphia, stated, there is "an evil irony in the sovereign viewpoint which insists that those who dare interrupt even the smallest routines of public service in pursuit of parity as first class citizens, are criminal."  

The Hickman Commission, understanding the lessons of the postwar period, joined the growing ranks of enlightened administrators and premised their recommendations on the increased right of public employees to engage in collective bargaining. This is not really a revolutionary concept. The federal government recognized this right for all federal employees in 1962 in Executive Order No. 10988. A few states, notably New York, Wisconsin, and Michigan, have recognized the right of public employees to bargain collectively. As has been noted above, even the "grievance and controversy" test in Pennsylvania's present public employee grievance machinery has been expanded by the courts to include disputes over wages and conditions of employment—disputes which are proper subjects for collective bargaining in the private sector.

Participation in the determination of wages, hours and working conditions cannot be distinguished from the accepted concept that each individual has the right to determine his own future. Sovereignty concepts have yielded in the area of sovereign tort immunity. Sovereignty of property rights has yielded considerably to civil rights and individual rights. That the public sector should enjoy some of the rights of economic self-determination now enjoyed by the private sector, therefore, is but another step in the current "assault on the citadel of sovereignty". To the extent that responsible legislation can bring peace to the public sector, it is fundamental that such legislation be premised on the proposition that public employees must be given greater rights in determining the conditions under which they work. The Hickman

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44. Tate, supra note 41, at 529.
Commission therefore, by premising its recommendations on this proposition, began at the only logical, moral, and reasonable place it could. It assumed that public employees must have increased rights to bargain collectively with their public employers.

2. The strike issue

Once public policy has declared that public employees should have increased rights to engage in collective bargaining, the issue of the right to strike already has begun to be answered, where no effective impasse mechanisms exist as an alternative to the illegal strike. The right to collective bargaining without the right to strike makes the collective bargaining right illusory, for the right to engage in collective bargaining assumes by tradition the right to fight to support one's demands. Therefore, if one accepts the premise that public employees should have greater rights in determining the conditions under which they work, and if one accepts the fundamental proposition that, for this right not to be illusory, it must be coupled with the right to fight in support of one's demands, then the conclusion necessarily follows that public employees must be given an increased right to strike. There cannot be meaningful collective bargaining between economically unequal parties.

The issue then becomes, how shall the conflict between the right to strike and the right of the public be resolved? As with most things, the answer lies in compromise. Clearly, it has been demonstrated that blanket anti-strike legislation is self-defeating. But the unavailability of the striking health official to check an epidemic is intolerable. The Commission believed that its strike proposal constituted an equitable compromise, offering the greatest benefit to all parties. There are two very disturbing problems though, that would seem to overshadow the efficacy of the Commission's proposal concerning this issue. When does the health, safety and welfare of the public become endangered to the point that a strike should be disallowed, and why appoint the courts to decide this question? The Commission offers some guidance. It recommends that the injunction decision be made by evaluating the strike in two time frames. First, what is the situation at the time the strike is called? Second, if a strike does not initially endanger the public health, safety and welfare, how long can it continue until the danger point is reached? By making the "unless or until" test an integral part of the proposed legislation, the Commission has attempted to offer guidelines whereby public employees are treated not as a monolith but rather are treated as a function of their effect on the public health, safety and welfare. But by offering this as the Commission's guidance on the
subject, the Commission has unfortunately begged the real issues, as
shall be demonstrated.

It is disturbing indeed that the Commission felt satisfied to gamble the
public employee's right to strike on language as ambiguous as health,
safety and welfare. Is the public employee really gaining anything of
value when his rights balance on judicial interpretation of these
"standards"? Does health mean physical health or can it also mean the
community's general well-being, its economic health? Whose safety is
contemplated to be protected? What safety is the Commission concerned
about? Is not the safety of the taxpayers' investment in the municipal
golf course endangered, when the gardener in the public park strikes?
Shall his strike be enjoined as a threat to the public safety? What is
public welfare? One can well imagine that almost the slightest public
inconvenience could be interpreted as working against the public welfare.
Even the federal government took the position that only threats to health
and safety need be considered to protect the nation from national
emergency strikes under Section 208 of the Labor Management
Relations Act.46

The Commission has offered no better standard than health, safety
and welfare and has not given guidance as to what its understanding of
these vague terms is. Without a better standard than health, safety and
welfare, the courts will be forced to set social policy by their
interpretation of the "standard"; the public employee may well find he
has in fact gained little, and perhaps most importantly, the public sector
will not have peace!

To the extent that the Commission's underlying premise is that the
bargaining rights of public employees should be more closely aligned
with the rights now enjoyed by labor in the private sector, it would seem
inconsistent to authorize court injunctions of public employee strikes.

As far back as 1896, legal scholars argued for the proposition that it
was not the proper role of the courts to determine if the labor union
strike is a justifiable means of achieving labor's desired ends.47 The
United States Congress attempted to cure the alleged evils of the labor
injunction by Section 20 of the Clayton Anti-Trust Act.48 Due to
legislative obscurity and a reactionary judicial approach which largely
nullified the Clayton Act, Congress enacted the Norris-LaGuardia
Act49 which forbade those labor injunctions which would prohibit

47. See Mr. Justice Holmes' famous dissent in Vegelahn v. Guntner, 167 Mass. 92, 104, 44 N.E.
1077, 1079 (1896).
peaceful collective action. Mr. Justice Frankfurter, writing for the majority in United States v. Hutchenson,\(^\text{50}\) summarized succinctly the underlying philosophy that generated the restrictions created by the Norris-LaGuardia Act. The view that the judiciary should determine the appropriateness of peaceful concerted activity, Mr. Justice Frankfurter explained, "misconceived the area of economic conflict that had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of courts."\(^\text{51}\)

Even the Labor Management Relations Act which authorizes the President to invoke the national emergency strike procedures of sections 206 through 210 of that act, does not authorize permanent injunctions against employee strikes. If the strike is not settled within 80 days, the injunction must be discharged.

Clearly, labor relations by injunction is no longer considered an acceptable final solution to labor conflicts in the private sector. To suggest that courts should assume their pre-Norris-LaGuardia role of deciding social policy in the area of public employment relations by determining the propriety of public employee strikes, would certainly seem to be inconsistent with a desire to more closely align the rights of public employees with those of employees in the private sector. Though alternatives to the court injunction in public employment may indeed be few, nevertheless, an assessment of the Hickman Commission Report would be incomplete without giving cognizance to this apparent inconsistency.

3. The duty to bargain in good faith

The Commission proposed that the public employer and public employee be required to bargain in good faith. The Commission further proposed that if the public employee representatives did not bargain in good faith the public employees represented would forfeit any right to strike. The Commission took no position on the important issue of what sanctions should be imposed upon the public employer if he should fail to bargain in good faith. It is arguable that the issuance of any strike injunction should be conditioned on a showing by the public employer of compliance with his duty to bargain in good faith. In addition to this void, it appears that the Commission has failed to include any machinery for the ultimate resolution of disputes that cannot be settled by bargaining, mediation and fact finding. What if a strike occurs and is enjoined as against the public interest? How shall the parties ultimately

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\(^{50}\) 312 U.S. 219 (1941).

\(^{51}\) Id. at 231.
resolve the dispute? Clearly the problem will not simply go away and the Commission offers no guidance in its report to even suggest an answer.

The Commission never took a precise position on the issue of who would administer the "duty to bargain" provision of its recommendations. It stated that the Pennsylvania Labor Relations Board should appoint fact-finding boards if necessary, but it is very important to an assessment of the report to understand who has the right to enforce the statutory duty to bargain in good faith. Can the Labor Relations Board hear employer or employee charges of bad faith bargaining or must the situation culminate in a strike and an injunction be sought before evidence of bad faith bargaining can be formally presented—and then only to a court?

It is arguable that the enforcement machinery established under this new law affecting public employees should be administered, as should the entire law, by a separate public employee labor relations board. The special problems of tenure, wage scales prescribed by statute, pension programs prescribed by statute, curriculum decisions for teachers and the like, require that administrators bring to the labor board special expertise in public employment problems. Therefore, the Commission selected to administer the law should have wide experience in dealing with the public sector.

The Commission report has not resolved the issues of (1) enforcement machinery to insure good faith bargaining, (2) sanctions against public employers who do not bargain in good faith, (3) the special expertise needed in the area of public employment, or (4) machinery for the ultimate resolution of disputes. These issues must be resolved if significant progress is to be made in the area of public employment in Pennsylvania.

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