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Labor Law--Public Employee's Right to Strike

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the Court's total acceptance of the Commissioner's interpretation, this question might well arise in the future. If this problem is resolved and the word "requiring" is deleted from the Commissioner's interpretation, the meaning of the phrase "away from home" would become more equitable in application and more definite in meaning.

Thomas Ryan Goodwin

Labor Law—Public Employee's Right to Strike

P, a municipal board of education, obtained a temporary injunction restraining *Ds,* a public school teachers union and its president, from engaging in a strike. By statute, all public employees and employee organizations were prohibited from striking. *Ds* ignored the injunction which was made final shortly afterward. Criminal contempt charges were then brought against *Ds* for violation of the injunction. *Ds* urged that its members were not striking, but that they had instead "resigned." *Held,* guilty of contempt. It has long been a fundamental principle that a government employee may not strike. This common law phobition is now reflected in statutory form. *Ds* in asserting that a strike is not the same as the so-called "resignations" are urging a distinction without a difference; the argument is specious and sham. By engaging in a strike, *Ds* deliberately violated the statute and defied the lawful mandate of the court. *Board of Education v. Shanker,* 283 N.Y.S.2d 548 (1967).

The principal case is simply one more addition to the long line of authority which denies public employees the right to strike. As stated in the case, "From time immemorial, it has been a fundamental principle that a government employee may not strike."[1] This broad prohibition has been applied with equal vigor to federal, state, and municipal employees. By statute, federal employees are not only denied the right to strike, but they are also prohibited from knowingly becoming members of an organization that asserts the right to strike against the government.[2] Likewise, several states have codified the proscription against strikes by public employees[3] and the states

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[1] Bd. of Educ. v. Shanker, 283 N.Y.S. 2d 548 (1967).

[2] 5 U.S.C. §§ 118p-r (1964).

[3] Currently, statutory provisions against strikes by public employees are found in Fla., Hawaii, Mich., Minn., Neb., N.Y., Ohio, Pa., Tex., and Va. Anderson, *Labor Relations in the Public Service,* 12 LAB. L.J. 1069, 1071 (1961).

and municipal divisions who have no such provision need only point to the substantial body of common law to brand a strike by public employees illegal.[4] Considerable vitality still remains in the words of Calvin Coolidge spoken during the Boston police strike in 1919 when he stated: "There is no right to strike against the public at any time, at any place, for any reason. This has long been accepted by government employees, government workers and the public."[5] Yet, strikes by public employees do occur, and lately their occurrence has been with ever increasing frequency.[6] This fact, coupled with the rapidly growing number of public employees,[7] prompts considered reflection into the *theories* underlying the prohibition against such strikes.

One of the often asserted theories is the *sovereignty theory*,[8] which reasons that while the people are the ultimate repository of authority, they can act only through the sovereign state, which is the embodiment of the will of the people. Therefore, the government employee owes unquestioning loyalty and obedience to the state, for to disobey the state is to disobey the will of the people which is a revolt against the government, or tantamount to treason itself. The weakness of this theory lies in its failure to differentiate the government as a sovereign and as an employer. In its latter capacity the government merely hires people to perform services, and in the normal course of events disputes can arise which may be settled by negotiation, conciliation, or arbitration. When these methods fail, employees may resort to their ultimate weapon, the strike, in an attempt to enforce their position. To brand this common pattern in labor relations as a treasonous act by anarchists, merely because the employer is the government, requires a considerable stretch of one's imagination.

The *lack of a profit motive* in public employers furnishes the grist

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[4] Los Angeles v. Los Angeles Bldg. and Constr. Trades Council, 94 Cal. App. 2d 36, 210 P. 305 (1949); Norwalk Teacher's Ass'n v. Bd. of Educ., 138 Conn. 269, 83 A.2d 482 (1951); Miami Water Works Local No. 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194 (1946); Int'l Bhd. of Elec. Workers v. Grand River Dam Authority, 292 P. 2d 1018 (Okla. 1956).

[5] Zack, *Are Strikes of Public Employees Necessary?*, 53 A.B.A.J. 808 (1967).

[6] ZISKIND, ONE THOUSAND STRIKES OF GOVERNMENT EMPLOYEES 195-96 (1940).

[7] It is estimated that by 1970, for every five employed persons there will be one government employee; by 1980 the ratio will have increased to one out of four. Weisenfeld, *Public Employees—First or Second Class Citizens*, 16 LAB. L.J. 685, 687 (1965).

[8] Comment, *Right of Public Employees to Strike*, 16 DE PAUL L. REV. 151, 153-54 (1966).

for the second theory which denies the right to strike.[9] The argument runs that since there is no profit motive in government, there is no conflict between the employer and the employees for a greater share of the profits such as is found in private industry. Therefore, there is no reason for government employees to have the use of any weapon to enforce claims for a greater share of the profits. But, this argument is unconvincing when one realizes that the lack of profit motive is compensated for by constant pressure for governmental economy as well as for expanded services. Also, government officials, motivated by a desire for advancement or the added personal prestige which results from outstanding agency records often behave much the same as private employers.

The third popular theory denying public employees the right to strike reasons that public officers cannot surrender the authority confided in them, because this *authority is public property.*[10] From the outset, one is wary of this notion for it implies that giving employees the right to strike should be equated to granting their every whim. But, even if accession by public employers did follow a strike by public employees, it is difficult to envision how the mere granting of a ten cent per hour wage increase or the shortening of a working day by fifteen minutes constitutes the surrender of a public officer's authority. Acceding to the reasonable demands of one's subordinate is not equivalent to the compromise of the superior's prerogatives.

Although upon close examination the popular theories prohibiting strikes by public employees appear to be groundless and illogical, they are repeated like sublime incantations with the true and practical reasons for such prohibitions being left out of most judicial opinions.

Several states now have statutes prohibiting strikes by public employees and prescribing severe penalties for violations. But, recent study indicates that enactment of such statutes has not had a substantial effect in preventing strikes. In fact, in New York, the average number of public employee strikes increased after passage of the no-strike law.[11] The ineffectiveness of the anti-strike legislation springs from a variety of reasons. First, public officials may hesitate to invoke the penalties for fear of political repercussions.[12] Even if

[9] *Id.* at 155.

[10] Nutter v. City of Santa Monica, 74 Cal. App. 2d 292, 298, 168 P.2d 741, 745 (1946).

[11] Krislov, *Work Stoppages of Government Employees*, 1942-59, 1 Q. REV. OF ECON. & BUS. 87 (1961).

[12] Moberly, *The Strike and Its Alternatives in Public Employment*, 1966 WIS. L. REV. 549, 551 (1966).

a statute gives the administrator no discretion as to its application, it may be disregarded, or it may be applied in a perfunctory manner.[13] The problem may even be sidestepped by refusing to denominate cessation of work by an organized group of employees a strike.[14] But reluctance to enforce the statutes springs chiefly from the realization that the immediate problem facing a strike-bound community is not punishment of the offenders but restoration of the government services. If automatic discharge is included among the penalties, enforcement of the anti-strike law may be practically impossible because of the difficulty of replacing a large group of skilled employees.[15] Therefore, the enactment of state statutes which prohibit strikes by *all* public employees is not the answer. For in most cases, these statutes have proved ineffective in preventing work stoppages by public employees.[16]

A bona fide objection to strikes by public employees stems from the catastrophe that would be caused by cessation in certain essential services—notably fire and police protection. "The spectacle of this catastrophe is made to justify denial of the right to strike in the entire public service."[17] But, the state's interest in preventing work stoppages is not the same in all areas of public service. To clearly illustrate this, one need only compare the effect of a strike by the employees of a city municipal golf course to the effect of a strike by city policemen. Public health and safety are not involved in the former.[18] Likewise, a strike by private employees engaged in work vital to the national defense would probably be more dangerous to the public than a dispute among the employees of a public school system.[19] It is equally incongruous to permit a utility worker for a

[13] Note, *Labor Relations in the Public Service,* 75 HARV. L. REV. 391, 396-97 (1961).

[14] *Id.* at 397.

[15] *Id.*

[16] West Virginia has no statute which prohibits strikes by public employees. But, two opinions of the West Virginia Attorney General clearly state that the rights of collective bargaining, closed shop, and strike do not exist with employees of government at the state, county, or municipal level in West Virginia. However, all public employees can join any association or labor organization and cannot be discriminated against because of this membership. 49 OPS. W. VA. ATT'Y GEN. 448, 452 (1962), 51 OPS. W. VA. ATT'Y GEN. ——. As volume 51 is not yet in print, the page number is unavailable. However, when volume 51 is published, the opinion will be found therein in a letter directed to James M. Sprouse, Feb. 23, 1966.

[17] Baldwin, *Have Public Employees the Right to Strike? — Yes,* 30 NAT'L MUN. REV. 515 (1941).

[18] Rains, *Collective Bargaining in Public Employment,* 8 LAB. L.J. 548, 550 (1957).

[19] Anderson, *Disputes Affecting Government Employees,* 10 LAB. L.J. 707, 708 (1959).

private employer the right to strike and imperil the welfare and safety of the public whereas the same man working for a government-operated utility would not have the right to strike.[20] The list of anomalies that could be pointed out would be endless.

The logical solution to the many ludicrous situations that exist is the classification of different areas of public employment into categories which establish or deny the right to strike according to the *nature* of the employment. A test which could be used in the nature and gravity of the consequences resulting from a strike by that area of employment. Because of the serious consequences following a strike by policemen, firemen, hospital workers, and others similarily situated, these workers should be placed in a category which would absolutely be denied the right to strike.[21] To compensate the employees in these vital areas for not having the right to strike, compulsory arbitration could be substituted. This would be analogous to agreements in the private employment area where compulsory arbitration serves as the *quid pro quo* for a non-strike clause.

Although the public employee can point to no decision, save one,[22] or legislative enactment which campions his right to strike, there is a growing body of sentiment evidenced by executive orders which make some attempt to equate his lot with that of the private employee. The federal employee's greatest victory came with a presidential executive order in 1962.[23] This order directed federal agencies to grant qualifying employee organizations recognition.[24] Likewise, municipal ordinances and executive orders by governors and mayors have protected the right of state and municipal employees to join labor organizations.[25] These beginnings, however slight, do represent a trend to afford public employees *some* of the rights which have been long enjoyed by private employees.

Ironically, in an opinion in which the Attorney General of West

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[20] Rains, *supra* note 18, at 549.

[21] Comment, *Right of Public Employees to Strike,* 16 DE PAUL L. REV. 151, 164 (1967).

[22] Metropolitan Transit Authority v. Bhd. of R.R. Trainmen, 8 Cal. Rptr. 1, 355 P. 2d 905, (1960).

[23] Exec. Order No. 10988, 3 C.F.R. 521 (1962), 5 U.S.C. § 631N. (1964). For an analysis of this executive order see Barr, *Executive Order 10988: An Experiment in Employee-Management Cooperation in the Federal Service,* 52 GEO. L.J. 420 (1964).

[24] The term *employee organizations* was broadly defined within the order, but it specifically excluded any organization "which asserts the right to strike against the government of the United States or any agency thereof."

[25] Anderson, *Labor Relations in the Public Service,* 12 LAB. L.J. 1069, 1076 (1961).

Virginia specifically denied public employees the right to strike, a summary of their plight is found. The attorney general pointed out that public employees have struggled from early times to improve their working conditions, wages, and hours of labor with history recording the fact that public employers at every turn in the early days attempted to thwart their efforts. Only the necessity of maintaining a labor supply, public opinion, and the concessions won by private employees forced the public employer to grant more favorable employment conditions.[26]

True, some concessions have been won by public employees, but the rate of their victories has been painfully slow. To a large extent, their progress remains blocked by the board common law rule which prohibits *all* public employees from engaging in a strike. The rule still stands despite numerous court tests. Even the theories for the rule, illogical though they may be, continue to survive with tenacity. The states which have dealt with the problem of public employee strikes have merely codified the common law prohibition. The deterrent effect of such statutes has been negligible. All urgings to adopt a common sense approach by denying the right to strike to only those public employees engaged in services vital to the community's health and safety have gone unheeded. A rule of law which denies the right to strike to all public employees is no more equitable than a criminal law statute which calls for the same punishment irrespective of the crime. But, only when this is realized can the public employee hope to gain any of the rights which have long been protected and enjoyed by the private worker.

Peter Thomas Denny

Parental Immunity—Its Application and Future

P, an unemancipated infant, brought an action by his next friend and mother seeking to recover from *D,* his father, damages for personal injuries sustained in an automobile accident. Evidence surrounding the mishap was conflicting and disputed. The jury however evidently believed *P's* version. *P* testified that he was driving since his father was intoxicated. *D* had been asleep in the front seat of the car but was subsequently awakened by a bump in the road.

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[26] 49 OPS. W. VA. ATT'Y GEN. 448, 449 (1962).