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## Public Employees' Right to Strike

Marc J. Bloch\*

**I**N A SOCIETY which demands constantly increased services from its government, work stoppages in the public sector are cause for growing concern. Public employees are involved in myriad of service jobs. Yet, public employees are the largest group of employees in Ohio who lack basic labor rights.

The only Ohio law which affects public employees' rights as to voicing displeasure is Chapter 4117, Ohio Revised Code, *Strikes by Public Employees*.<sup>1</sup> This act has been historically unworkable and only exists because this State government, like so many others, has failed to come to grips with the necessity of dealing amicably with its employees.

The substance of the *Ferguson Act* is that public employees are *not* allowed to resort to strikes.<sup>2</sup>

While there is no state which allows public employees to strike, there has been, in the last 18 years, a marked increase in public work stoppages.<sup>3</sup> This means that taxpayers in the various states have lost services for which they have paid.

In the last 12 years, the unionization of public employees has been the single largest area of union expansion.<sup>4</sup>

The combination of increasing unrest with increasing organization has led to harsh struggles between the worker and the government. Ohio has had public labor disturbances, but not as serious as those New York City has experienced. This is no reason to ignore developing problems.

### The Ferguson Act

A strike under the Act is defined as:

. . . the failure to report for duty, the willful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of em-

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[It should be noted that this article does not study the area of strikes for representation which both the New York Public Employees Fair Employment Act of 1967 and the 1968 City of Lakewood (Ohio) Ordinance and the Executive Order 10988 have resolved by allowing the right of representation.]

<sup>1</sup> Ohio Rev. Code, c. 4117. §§ 4117.01 et seq. (1967).

<sup>2</sup> Ferguson Act, Ohio Rev. Code § 4117.02.

<sup>3</sup> Between 1950 and 1965 there were 109 strikes by public school teachers, and in 1968 alone, there were 30 strikes. Glass, *Work Stoppages and Teachers: History and Prospect*, 90 Mon. Lab. Rev. 44 (1968). Even more dramatic than teachers is the fact that in 1950 there were 28 work stoppages in the Government. By 1966, there were 142. 1967 Statistical Abstract. (U. S. Govt. Pr. Off.)

<sup>4</sup> Between 1955 and 1967, there has been a 300% increase in the ranks of American Federation of State, County and Municipal Workers (hereinafter AFSCME). 1967 Labor Relations Yearbook 609.

ployment for the purpose of inducing, influencing or coercing, or unlawfully influencing others from remaining in or assuming such employment. . . .<sup>5</sup>

The Act allows for grievances as long as the "expression or communication is not designed to and *does not interfere with the full, faithful and proper performance of the duties of employment.*"<sup>6</sup> (emphasis added).

The Act contains a broad definition of who is a public employee.<sup>7</sup> Strikes by such public employees are prohibited, and their supervisors are prohibited from authorizing or consenting to such action.<sup>8</sup>

The Statute is explicit and direct. No one who is a public employee may "strike." Yet, the Act took into consideration that there *will be* strikes, and allowed for reinstatement under the following conditions.

(a) His compensation shall in no event exceed that received by him immediately prior to the time of violation.

(b) His compensation shall not be increased until after the expiration of one year from such appointment or reappointment, employment or re-employment.

(c) Such person shall be on probation for a period of 2 years following such appointment or re-employment . . . during which period he shall serve without tenure and at the pleasure of the appointment officer or body.<sup>9</sup>

The penalty is harsh, but no doubt the lawmakers intended the law to serve as a warning to potential troublemakers.

A strike may not be a strike, Section 4117.01, Ohio Revised Code notwithstanding, until the notice provision of Section 4117.04 Ohio Revised Code is followed.<sup>10</sup> While the definition of a strike is the same as before, a public employee is only on strike,

. . . provided that notice that he is on strike be sent to such employees by his supervisor by mail addressed to his residence set forth in his employment record.<sup>11</sup>

Accordingly, the supervisor may choose not to notify the employee, in which case there would be no violation. In today's labor market, if all

<sup>5</sup> Ferguson Act. Ohio Rev. Code § 4117.01(a).

<sup>6</sup> *Ibid.*

<sup>7</sup> "Public Employee" means any person holding a position by appointment or employment in the government of this State, or any municipal corporation, county, township, or other political subdivision of this state, or in the public service or any public or special district, or in the service of any authority, commission or board, or in any other branch of the public service. Ferguson Act. Ohio Rev. Code 4117.01 (B).

<sup>8</sup> Ferguson Act. Ohio Rev. Code § 4117.02.

<sup>9</sup> *Ibid.* § 4117.03.

<sup>10</sup> *Markowski v. Backstrom*, 10 Ohio Misc. 139, 145, 39 Ohio Op. 2d 247 (1967). The first motion for temporary injunction was denied since § 4117.04 notice provision was not properly complied with.

<sup>11</sup> Ferguson Act. Ohio Rev. Code 4117.04.

members of a sanitation unit took two days off, a city would have a hard time finding twenty-five to fifty new men. It would certainly be easier to let the fellows have the days off than to invoke the Act and chance not having any employees at all.

If the supervisor does invoke the Act, employees are allowed to file, within ten days, written requests for a hearing. After this period, the officer in charge must commence hearing the appeals.<sup>12</sup>

It can be expected that members of the local union would file the needed requests and thus force the government to conduct expensive and time-consuming hearings for the individuals.

Unless the employee is reinstated as explained above, he will be terminated if he violates Section 4117.01 to Section 4117.05, inclusive.<sup>13</sup>

The Ferguson Act has not served as the deterrent that its planners envisaged, though it would be false to say that it has not prevented some strikes.

Law which no longer fits the "needs" of government and its people is archaic, and should be replaced by laws which are more in keeping with the realities of the times.

### The Taylor Act

New York, after a series of public employees disputes in 1947, enacted the *Condin-Wadlin Act*, which was quite similar to the *Ferguson Act* in context.

However, by 1966, the Act was fast proving to be unworkable. Its demise was sounded in 1965 when two New York City strikes crippled the city and the state. To help search for a better solution, Governor Rockefeller appointed a top-level panel, whose recommendations were followed in enacting the Public Employees Fair Employment Act of 1967.<sup>14</sup>

Unfortunately, the *Taylor Act* has not been as successful as anticipated. Nevertheless, this Act represents a step in the right direction and is certainly more realistic than the present Ohio Law.

The Taylor Act is a positive governmental venture intended to "promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government."<sup>15</sup>

What this Act strives to accomplish is to provide general guide lines for conduct, and to help administer these rules it has created a public

<sup>12</sup> *Ibid.*

<sup>13</sup> *Id.* § 4117.05.

<sup>14</sup> Taylor Act. N.Y. Civil Service Law §§ 200 et seq.

<sup>15</sup> Taylor Act. N.Y. Civil Service Law § 200.

employment relations board.<sup>16</sup> The Taylor Act has prevented one serious problem, in that it recognizes the rights of employees to bargain collectively.

It is not necessary for this paper to go into detail as to the structure of the Act. However, there are striking differences between the Ohio and New York Acts which should be noted.

Section 209 of the Act calls for the resolution of disputes in the course of collective negotiations.<sup>17</sup> Negotiations are impliedly required between the parties before the budget submission date of the employer agency. If the parties are not able to reach an accord sixty days prior to the submission date, then one of two things may happen. Either the parties will follow their own problem-solving procedures, or "in the absence or failure" of their procedures, the parties then may request the board, or the board on its own volition, will render assistance in attempting to resolve the dispute.<sup>18</sup>

The Public Employees Relations Board may render assistance in the following ways:

1. Mediation.<sup>19</sup>
2. The Board shall appoint a three-man fact finding board, which may make its findings public.<sup>20</sup>
3. The Board may make recommendations to the parties if the above fails.<sup>21</sup>
4. Finally, the agency and the employees must submit the recommendations to the legislature for final settlement.<sup>22</sup>

The Taylor Act keeps the broad anti-strike provisions of the Condin-Wadlin Act,<sup>23</sup> but the employees can now be fined up to \$250.00 a day and/or up to 30 days in jail.<sup>24</sup>

The Act's unique approach to stop strikes is to deny the right of check-off to the Union, for a period of up to 18 months when the Union deliberately goes on strike.<sup>25</sup>

Section 212 of the Act provides that each municipality may set up its own public employee act as long as the basic tenets of the State law have been followed.<sup>26</sup>

<sup>16</sup> *Ibid.* § 205.

<sup>17</sup> *Id.* § 209.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* § 209.3(a).

<sup>20</sup> *Id.* § 209.3(b-c).

<sup>21</sup> *Id.* § 209.3(d).

<sup>22</sup> *Id.* § 209.3(c).

<sup>23</sup> *Id.* § 210.

<sup>24</sup> McHugh, *New York's Experiment in Public Employees' Fair Employment Act*, 32 *Albany L. Rev.* 163 (1967).

<sup>25</sup> Taylor Act, N.Y. Civil Service Law § 210.3(f).

<sup>26</sup> Taylor Act, Section 212. See also Collins, *Labor Relations in the Public and Non-profit Employment Sector*, 20 *Annual Conference on Labor* 255 (1967).

Probably the greatest weakness in the Taylor Act is the lack of crisis machinery. Thus when public employees strike there is no procedure that can be turned to except the Court, or as an alternative, a special mediator who may be brought in to help.

It is obvious that employees will not always agree with management policies, and if there is no meaningful grievance procedure, or if the procedure has not worked, employees will strike. Any law which deals with public employment must have methods to keep both sides talking.

### The Lakewood Ordinance

On November 6, 1968, the City of Lakewood, Ohio, passed an ordinance covering the rights of organization. This ordinance also gives the municipal employees the right to bargain collectively with the City.

The main purpose of the ordinance is to promote participation in the making of the yearly departmental budgets. In the event that an impasse is reached, the employee organization and the City each may appoint a fact finder. The two fact finders, or the American Arbitration Association, may designate the third fact finder. The opinion of the fact finders is not final; if the two parties fail to reach an accord, it is up to the "City Council to make a final decision."<sup>27</sup> Further, Section 5 of the ordinance outlaws the use of strikes.<sup>28</sup>

The *Lakewood Act* is akin to the Taylor Act, and is thus opposed to the present Ohio Act in that it takes a positive approach to labor-government peace. However, these two modern laws do not go far enough. What is needed is a State labor relations board whose purpose is not only promoting the observance of the labor acts, but also labor peace in the public sector.

### Arguments Against the Right to Strike

There are four basic arguments voiced by those in favor of not allowing public employees to have the right to strike.

1. There is no profit motive in state government.<sup>29</sup>
2. The public employees are agents of the government and they are invested with a fiduciary responsibility not to violate that trust.<sup>30</sup>
3. Strikes by public employees will lead to harmful consequences, such as loss of police and/or fire protection.<sup>31</sup>

<sup>27</sup> Lakewood, Ohio—Codified Ordinances § 157.04 (1968).

<sup>28</sup> *Id.* § 157.05.

<sup>29</sup> *Norwalk Teachers Assoc. v. BOE of City of Norwalk*, 138 Conn. 269, 83 A.2d 482 (1951); see also *City of Pawtucket v. Pawtucket Teachers Alliance*, 87 R. I. 364, 141 A.2d 624 (1958).

<sup>30</sup> *Id.* at 272.

<sup>31</sup> *City of Manchester v. Manchester Teachers Guild*, 100 N. H. 507, 131 A.2d 59 (1957), *rehearing denied*. No state law forbids strikes by public employees; but the court found that under the common law, the right to strike did not exist.

4. The State is the sovereign, and the sovereign cannot be struck.<sup>32</sup>

Government is set up to serve the needs of the people. In this capacity, it also polices the health, welfare and safety of the citizens. The argument is that government lacks the necessary profit motive. All citizens are shareholders, and the only way increases can be made in salaries is at the ballot box. Bargaining and striking for higher wages places a tremendous burden on the public the employees are to serve.<sup>33</sup>

The agency argument of the government is that as employees of the State, public employees are, as a "condition" of employment, duty-bound not to strike the state and are responsible to keep the machinery of government running smoothly and efficiently. Striking would be to deny "the authority of the government, and would contravene the public welfare."<sup>34</sup>

From time immemorial, it has been a fundamental principle that a government employee may not strike. In this sensitive area, neither labor—the public employee—nor management—the governmental agency in their mutual independence can afford the indulgence of arbitrary self-interest at the expense of the public.<sup>35</sup>

An often-heard complaint of those who oppose the right to strike in public employment, is that by allowing the public employees these rights, it would lead to disruptions of the services which we have come to depend upon the government to supply.<sup>36</sup>

There are areas of government where it is agreed that interruption in services could cause irreparable harm. These areas are in law enforcement and fire prevention. And even the public employees unions agree that it would be dangerous to allow these individuals to have the absolute right to strike.

All of the above arguments are really involved in the single concept of sovereignty. The government represents the people; the government must remain inviolate. To allow strikes against government is to eventually allow anarchy and rebellion. Thus a strike against the government is a strike against all of the people.<sup>37</sup>

### Arguments For the Right to Strike

Proprietary functions of government are those functions that the government does which could be done as well (or better) by private industry. It has strongly been argued, that since there are counterparts

<sup>32</sup> *Cleveland v. Div. 268, Amalgamated Assn. of Street, Electrical, Railway and Motor Coach Employees*, 85 Ohio App. 153 (1949).

<sup>33</sup> *Supra*, note 31.

<sup>34</sup> *Supra*, Note 31, at 272; see also *BOE of Community Limited School District v. Redding*, 32 Ill. 2d 567, 207 N.E. 2d 427 (1965).

<sup>35</sup> *BOE of City of New York v. Shanker*, 54 Misc. 2d 941, 283 N.Y.S. 2d 548 (1967).

<sup>36</sup> *Supra*, note 31.

<sup>37</sup> *Supra*, note 34.

of these employees in the private sector who are allowed to strike, the public employees should also have the right to strike.

There are a series of cases which hold accordingly, but these cases are, unfortunately, distinguishable.<sup>38</sup> Most courts today would still go along with the ruling of Hodson, J., in *City of Seattle v. Street Ry. Employees*.

I think it would be a very dangerous precedent for a court to come up with a decision that public employees of a transit system have the right to strike: because if they have, then the electric utility can strike . . . if the electric utility can strike, the water department can strike . . .<sup>39</sup>

The rule seems to be that even though the functions performed are proprietary in nature, as long as the government carries out the function, it is protected from strikes.<sup>40</sup>

In *Port of Seattle v. International Longshoremen & Workers Union*, the Court rejected the union's theory that in proprietary functions the right to strike is paramount, and found that as long as a municipality is acting in the nature of the capacity of the state, it is protected from strikes.<sup>41</sup>

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<sup>38</sup> *BOE of City of Minneapolis v. Public School Employees Union, Local 63, AFL-CIO*, 233 Minn. 144, 45 N.W. 2d 797 (1951). Action to enjoin a threatened strike. The Court refused to grant the injunction. Court found that under the existing law, the Union was allowed to strike. But in the following year, the Minnesota statute was amended to include the class exempted in 1951. See *Minneapolis Federation of Teachers Local 59 v. Obermeyer*, 275 Minn. 347, 147 N.W. 2d 359 (1966).

Probably the most cited case in favor of the Union's position is *Local 266, International Brotherhood of Electrical Workers v. Salt River Project Agricultural Improvement and Power District*, 75 Ariz. 30, 275 P. 2d 393 (1954). The district was found to be a public employer. However, it is not a public employer under the normal concept of public employment. It was comprised of a series of land owners who have the right to contract to the district. The Court held that this was purely a proprietary function and, therefore, there was a right to strike.

Six years later, in *Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen*, 355 P. 2d 905 (Cal. 1960), the Court upheld the right of unions to strike. It was interpreted that under the legislation passed which gave the parties the right to bargain collectively, there was inferentially, the right to strike.

<sup>39</sup> *City of Seattle v. Street Ry. Employees*, 39 L.R.R.M. 2602 (1956). Hodson, J. then went on to show that it would only be a short step for police and firemen to want the same rights that had been accorded to the proprietary functions of the city.

<sup>40</sup> *Miami Waterworks Local No. 654 v. Miami*, 157 Fla. 445, 451. 26 S.2d 194, 198 (1946).

While strikes are recognized by the statute to be lawful under some circumstances, it would seem that a strike against the city would amount, in effect, to a strike against the government itself,—a situation difficult to reconcile with all notions of government.

See also, *City of Los Angeles v. Los Angeles Building and Construction Trade Council*, 94 Cal. App. 2d 36, 210 P. 2d 305 (1949), rehearing denied. In answer to Defendants Government proprietary function argument, the court stated, "The distinction was developed by Court for application chiefly in cases involving tort liability of municipal corporations. So that injustice would not result from technicalities."

<sup>41</sup> 52 Wash. 2d 317, 324 P. 2d 1099 (1958).



The "agency theory" of opponents of the right to strike seems to state that merely because one is employed by the government, a stronger sense of duty is owed to the employer.<sup>42</sup> Does this mean that a city's employee, who may not make as much as his private counterpart, should be more dutiful?

It is difficult to imagine that the governmental employee is more or less loyal and trustworthy than his private counterpart. Strikes by private employees are not considered *ipso facto* harmful to the employer, but strikes by public employees are.<sup>43</sup>

In the third argument of the opponents of the right to strike, there is merit which in some cases is subscribed to by the employee organizations.

Can it be denied that private industry and its employees are frequently engaged in services which also deeply affect the public, health, safety and welfare.<sup>44</sup>

All those who work for the government are not involved in health and safety jobs. Some are involved in jobs that the government runs in competition with private industry. Even the government must seriously question the intelligence of some of its employees who work for them in these areas, when they could, in private industry, receive higher wages, have equal or better security, and also possess the right to strike.

The argument of sovereignty which compels the obeisance of the serf to the lord who rules by divine right, is deeply rooted in medieval mythology. It certainly does not have place in a complex industrial civilization.<sup>45</sup> Thus the government which asserts that "I am the people," will invite the reply from the workers, "Who do you think we are?"<sup>46</sup>

It is clear that ten million government employees will not accept an employment relationship built on the proposition that their employers exercise a "sovereignty" which makes it *lese majeste* to file a grievance, and equates disagreement—or organized disagreement—with disloyalty.<sup>47</sup>

The sovereignty argument was originally proposed in a political context. While strikes often have political overtones, their basic motivation is economic. A strike thus cannot be equated with anarchy, but rather with an expression of a grievance.<sup>48</sup>

<sup>42</sup> Moberly, *The Strike and Its Alternatives in Public Employment*, 1966 Wis. L. Rev. 549, at 555, 556 n. 40. See also *BOE v. Redding*, *supra*, note 36, and *Norwalk Teachers v. Norwalk*, *supra*, note 31.

<sup>43</sup> *Supra*, note 36.

<sup>44</sup> Wolk, *Public Employee Strikes—A Survey of the Condon-Wadlin Act*, 13 N.Y.L.F. 69 (1966/67).

<sup>45</sup> Wirtz, *Public Employment and Public Policy; Readings on Collective Negotiations and Public Education*, 5 (1967).

<sup>46</sup> *Ibid.*

<sup>47</sup> *Id.* at 7.

<sup>48</sup> Nesvig, *The New Dimensions of the Strike Question*, 28 Pub. Ad. Rev. 26 (1967).

As has started in New York State, the State must forego its privileged posture and work towards industrial peace.

### The State of Ohio

The State of Ohio has followed the majority state rule by taking a harsh view of relations with its employees. In 1947 dues check-off was held to contravene Section 1321.32 of the Revised Code.<sup>49</sup> Twenty years later, the Ohio Attorney General opined that the Ohio State University may not negotiate or enter into contracts with a Union over such items as wages, working conditions, hours, or other conditions of employment. The Attorney General further stated that the union may not be recognized as the bargaining representative for the purpose of discussing contract terms for such employees.<sup>50</sup>

In the *City of Cleveland v. Division 268, Amalgamated Association of Street, Electrical Railway and Motor Coach Employees, et al*,<sup>51</sup> the union struck the city and refused to work after a mutually acceptable umpire returned an adverse ruling. The trial court found that a strike by public employees was a "rebellion against government" which could destroy government.<sup>52</sup>

The Court then ruled that it is recognized that public employees do not have the same bargaining rights as private employees.<sup>53</sup> It was assumed that to receive the security offered by the government, one had to accept restraints in employment.

There have been a number of work stoppages in Ohio, but most disputes never reach argument in the Court. Usually a restraining order is issued and the workers go back to work. Later usually the employee demands are met and the dispute is settled.<sup>54</sup> However, some cases are not allowed to be settled quietly and are thus brought out in the open to be reviewed publicly. *Markowski v. Backstrom*<sup>55</sup> is such a case. Certain employees of the City of Toledo were absent from work for two days. They returned after they were promised wage increases. Plaintiff then brought an action to enjoin the defendant City Manager from paying any wage increase. The original petition was denied by the Court. Under Section 4117.04 (O.R.C.) the employer had to notify the employees that they were considered out on strike.<sup>56</sup> The City Manager failed to notify the employees and thus there was no "strike."

<sup>49</sup> Hagerman v. Dayton, 147 Ohio St. 313 (1947).

<sup>50</sup> Atty. Gen. Opin. No. 67-083 (1967).

<sup>51</sup> *Supra*, note 34.

<sup>52</sup> *Supra*, note 34, at 174.

<sup>53</sup> *Supra*, note 34, at 174.

<sup>54</sup> See, Annot. 131 A.L.R.2d 1142.

<sup>55</sup> *Supra*, note 10. For similar problem, see also, *In re Weinstein*, 61 L.R.R.M. 2323 (1966).

<sup>56</sup> Ferguson Act. § 4117.04.

However, the employees did not receive the wage increase and struck again from December 27th through the 29th, 1966. Defendant, as city manager, filed a restraining order which was granted. The city then, pursuant to Section 4117.04 Revised Code, notified 350 of the employees on strike that they were out on an illegal strike and in violation of Chapter 4117 of the Ohio Revised Code.

But on the preceding December 16th of that year, a general wage increase had been granted by the city council. Plaintiff amended his petition subsequent to the second walk-out and resubmitted it, seeking to enjoin Backstrom, the city manager, from paying wage increases to the workers who had gone out on strike. The Court held that the employees were duly notified and were out on strike. The Court does state what would happen if the agency refused to issue proper notice. While it is merely conjectural, a writ of mandamus is suggested by the Court.<sup>57</sup>

In the course of the problem, the Labor-Management Citizens Committee, a local industrial peace organization, met and proposed to the city to withdraw any action against the employees. They further recommended that all wage increases be paid, but that those increases which were due the employees charged with violation of the Act be placed in escrow until a final determination of their status be had.<sup>58</sup> The City Council of Toledo acted favorably upon the recommendation of the Committee, and passed the recommendation into an ordinance as an emergency measure. The City Manager then mailed to the notified parties a letter telling them to disregard the notices for the present time.<sup>59</sup> The matter was to lie in limbo. At that time, the second petition was actually filed.

It should be noted that Toledo is a large industrial city and it was no doubt felt that in order to keep general labor peace, it would be wise to let the disturbance quiet down. The court, however, did not agree with the provisions of the ordinance, and found it in contravention of the Ferguson Act.

. . . The defendants herein may not in their capacities as elected and appointed officials, scuttle their obligation to protect the interest of their employers, the taxpayers of the City of Toledo.<sup>60</sup>

In a rare bit of judicial candor, Connors, J., raised a specter which has haunted this area for some time.

For reasons best known to themselves, the defendant . . . and the civilian employees similarly situated with him, have not at any time during these proceedings raised the issue of constitutionality of Section 4117.01 through 4117.05 Revised Code . . .<sup>61</sup>

<sup>57</sup> *Supra*, note 10 at 145.

<sup>58</sup> *Ibid.* at 149.

<sup>59</sup> *Id.* at 149-150.

<sup>60</sup> *Id.* at 151.

<sup>61</sup> *Id.* at 144.

This case may actually stand for very little except to delineate a policy that has been known. But it is a case which challenges the established system. What normally would happen is that the law would have been circumvented. However, here it unfortunately was enforced.

In *Board of Education of Martins Ferry City Schools District v. Ohio Education Association, et al.*,<sup>62</sup> teachers under contract went out on strike. Because of this action, the plaintiff school board had to shut down its schools. A temporary restraining order was sought and granted.

The Ohio Education Association moved to dismiss on two arguments. First by arguing that the facts as stated did not allege cause for granting of the order and secondly, that the restraining order would violate the free speech amendment of the Ohio and the United States Constitutions.<sup>63</sup>

Prior to this matter, the teachers had been out on strike. The Board of Education authorized pay increases, but before they were paid, the opinion of the Attorney General of Ohio was sought regarding any personal liability which the individual board members might incur by paying the increase granted. The Court held that such actions were proper in light of the circumstances surrounding the events.<sup>64</sup>

Matz, J. quotes Artl, J. in *City of Cleveland v. Division, supra* favorably, and seemingly concurs with the holding that strikes by public employees amount to "rebellion and anarchy."<sup>65</sup> The Court thus found that from the facts it could be stated that a restraining order should issue and further that there was no constitutional question raised since the right of free speech and press is not "absolute or an unqualified right."<sup>66</sup>

It appears that Ohio still prefers the solutions be made by a compromise in private sessions, where often both parties are at a disadvantage. It is obvious that the law is usually not enforced because of the sensitive burden it places upon the employer as well as the employee, when both are operating in the "public eye."

Another problem that Ohio faces is that the public employer feels that the employees are "well-off," and that there is little need for bargaining with them. Thirty years ago public employment was a haven for workers. Today it is often the place where otherwise unemployables seek refuge. Times have changed in public employment in the intervening years since the Ferguson Act was enacted. It is now time to change the Act.

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<sup>62</sup> 13 Ohio Misc. 308, 42 Ohio Op. 2d 383 (1967).

<sup>63</sup> *Id.* at 311.

<sup>64</sup> *Supra*, note 62 at 313.

<sup>65</sup> *Ibid.* at 313-314.

<sup>66</sup> *Id.* at 315.

### Alternatives to the Ferguson Act

Anti-strike acts have not worked in industrial cities because there has been significant local support for the public employees. Public officials are, therefore, justly reluctant to request court intervention.<sup>67</sup> Secondly, it is a principle that no law can force people to work when they do not want to.<sup>68</sup>

Finally, the penalty machinery is simply unrealistic in a tight professional labor market. Threats of discharge have no validity and the employees know that they will not be carried out. It is difficult to imagine a large city terminating all of its teachers for going out on strike. As long as the strikers can be confident that they will be re-employed at the end of the strike, there is no better strike benefit.<sup>69</sup>

Instead of helping to prevent strikes, it has been said that anti-strike laws merely exacerbate the problems and make reaching an understanding almost impossible.<sup>70</sup>

It would appear that one way to minimize the number of strikes would be to change the status of the public employee and give him an opportunity to determine his working conditions.

Only a minority of laws admit what should be obvious—that in this day employees . . . have the right to a voice in the terms of their employment.<sup>71</sup>

Private industry has moved ahead in a semi-cooperative spirit, yet the government's own employees have not been offered the same opportunity that the government requests private industry to maintain.<sup>72</sup>

George Taylor has expressed his opinion that more effective participation between employer and employee is needed in public employment. And that this participation is an "essential right" of employees in order to help determine their own conditions of employment.<sup>73</sup>

On the other hand, Taylor also feels that strikes by public employees are not compatible in the representational form of government. "The majority's rights may be properly guided by the effective participation

<sup>67</sup> *Supra*, note 45 at 551; see also, note, Labor Relations in the Public Service, 75 Harv. L. Rev. 391, 396 (1961).

<sup>68</sup> Neiryneck, Teachers Strikes—A New Militancy. 43 Notre Dame Law. 367, 381-82 (1968).

<sup>69</sup> *Supra*, note 73, at 381-82; *supra*, note 72 at 396. See also, note, Public Employee Labor Relations: Proposal for Change in Present State Legislation, 20 Vand. L. Rev. 700 (1967), and Wolk, *supra*, note 60.

<sup>70</sup> Heisel and Hallihan, Questions and Answers on Public Employee Negotiations 102 (1967).

<sup>71</sup> 64 Life Magazine 4 (1968).

<sup>72</sup> *Supra*, note 69 at 392.

<sup>73</sup> Taylor, Public Employment: Strikes or Procedures? 20 Ind. and Lab. Rel. Rev. 617 (1968).

of the minority.”<sup>74</sup> Public employees are one of the few remaining employee groups that are deprived of any participation in the bargaining process. Different problems arise in public sector bargaining than in the private sector. In the private sector, there is an economic dialogue. A bargaining in “good faith” over issues which are within the power of one side or the other to control. But in the public sector the consumer is no longer a distant third party to negotiations. Government officials cannot always “deal” on monetary matters with the workers, simply because such matters are beyond their scope.<sup>75</sup>

Another problem area is the lack of knowledge and/or practice of labor-management relations by the public employer and employee. Too often the employer is involved in the sovereignty theory and refuses to “deal” with the employees. The problem, however, is not one-sided. Unions are not used to working with governmental agencies who do not have the ultimate control over monetary and related matters.<sup>76</sup>

Those who favor the right to strike have even modified this call. It is realized that even in the most radical circles law enforcement and like groups cannot have the power to strike. Actually their political power has become so strong that they don’t need the right to strike.

But it has become more than a strong suspicion among teachers, and other like public employees, that the government’s prohibition of strikes is more a matter of convenience than necessity.<sup>77</sup>

There seems to be a psychology of privilege built up in the public employment. It is the teacher’s privilege to be employed by the school board, or it is the public utility worker’s privilege to be employed by the public and not the “competitive” private utility. This illogical reasoning is finally beginning to break down. The privilege is a two-way street. The only way to induce bright people into teaching is to make the job pay well. The only way to keep young people in the labor jobs in the government is to make these jobs more nearly competitive on an economic basis with private industry.

The right to strike is the ultimate right to say, “no deal” to the employer; taking away this right is tantamount to *forcing* people to work.<sup>78</sup>

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<sup>74</sup> *Ibid.*

<sup>75</sup> Wollett, *The Public Employee at the Bargaining Table: Promise or Illusion?*, 15 *Lab. L. J.* 8, 9 (1964).

<sup>76</sup> Wollett, *Bargaining Impasse: Resolution in Public Employment*, 297. *Proceedings of NYU 20th Annual Conference on Labor* (1967).

<sup>77</sup> *Supra*, note 68, at 386.

<sup>78</sup> Which brings up a question of involuntary servitude. (Quoting Theodore Kheel in an Interview by M. Seegan) M. Seegan, *Public Employees: They’re Going to Strike*, *Duns Review*, Vol. 41 (June 1968) at 51.

Without the right to strike . . . the worker is not equal in bargaining power, and collective bargaining becomes a sham where all the power is on the employer's side of the table.<sup>79</sup>

In Sweden, the great laboratory nation, the experiment of allowing teachers to have the right to strike has proved successful.<sup>80</sup> And by allowing the teachers to strike in limited situations, it has actually reduced the number of total strikes.<sup>81</sup>

The right to strike is not looked upon by those who desire it as something which can be bantered about. Rather it is viewed as the final stage in a long process of steps which is to be used only when all else proves hopeless.

### Alternatives to Striking

Private industry has, with some degree of expertise, found the way to avoid strikes. But the public sector has not offered much to induce the unions into believing that there is a reasonable alternative.<sup>82</sup>

The mere permission of strikes by non-critical classes of public employees is certainly in and of itself no answer to the public employee problem in the State of Ohio. At the outset, it should be mandatory that where governmental employees are in competition with private concerns or are performing in a proprietary capacity, there should be a close parity in wage scales.

Secondly, the state of Ohio must set up a state labor board to deal exclusively with public employee problems. Such a board should be enacted with the powers necessary to effectively promote fair labor practices between all governmental bodies and public employees. The purpose of the board would not be to usurp the power of local governmental units, but to act as an administrator of a new set of labor relations laws governing public employees.<sup>83</sup>

<sup>79</sup> National Council Church of Christ, *The Right to Strike and the General Welfare*, 12 (1967).

<sup>80</sup> Hight, *Teachers Bargaining and Strikes: Perspective from the Swedish Experience*, 15 U.C.L.A. L. Rev. 840 (1968). However, the right to strike is not absolute. Strikes are only allowed on bargaining issues. If a strike does take place, it must be organizational. An individual local cannot strike on its own. Finally, sympathy strikes are not allowed. Thus, crossing of picket lines is mandatory. See pp. 864-868.

<sup>81</sup> *Ibid.* at 876.

<sup>82</sup> However, see, *Voluntary Advisory Arbitration Rules of American Arbitration* (1968).

<sup>83</sup> *Supra*, note 45 at 8; Secretary of Labor Wirtz, suggests a four point program:

1. It should be accepted generally, and removed from controversy, that some effective forms of bilateral and representation of labor relations is inevitable, proper and desirable in public employment in this country.

2. Whatever system is developed has to be worked out jointly, by representation of all who will be affected by it.

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The labor board should further be able to instigate fact finding boards or promote mediation or voluntary arbitration.

### **Conclusion**

What Ohio must do now to stave off impending labor chaos is to help establish the proper dialogue between employees and their employers. More could be said, but before anything is done, the present law in Ohio must be revised to allow for collective bargaining and to set up feasible guide lines for dispute settlements. If the State feels that it cannot allow some employees to have the right to strike, then it must insure that if other problem solving devices are to be used, that the results will be binding upon all the parties. The people must learn that there are costs to be borne for a service society; and that if they want the services, they must be prepared to pay that price.

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3. To whatever extent development of new doctrine of public employee relationships is focused or permitted to center around the argument about whether there is "a right of public employees to strike," the developments will, at best, be delayed; at worst, defeated.

4. The basic principle should be for maximum practical participation of public employees in developing and administering their employment relation.