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Book Review of The Unions and the Cities: Studies of Unionism in Government

Ronald C. Brown

BOOK REVIEW

THE UNIONS AND THE CITIES: STUDIES OF UNIONISM IN GOVERNMENT. BY HARRY H. WELLINGTON AND RALPH K. WINTER, JR. Washington, D.C.: The Brookings Institute. 1971. Pp. xiii, 226. $7.95.

Is government just another industry? The authors, Wellington and Winter, Jr., argue emphatically not, and thereupon launch into a carefully documented argument of the bankruptcy of thinking by those who would automatically transplant the mechanisms of industrial collective bargaining, including the strike weapon, into the public sector. To permit such an operation would give the public employee union, which already has very real political clout, the ability to distort and threaten the survival of the normal American political process. The strike weapon would amount to a knockout punch which would cause the redistribution of political power in a community in such a way as to permit unions to divert forcefully public funds to themselves instead of permitting distribution through the normal political process to those public services that most required it.

Although the subject matter discussed by the authors has been widely written on, most frequently such writings have been confined to consideration of only isolated, prickly legal problems involved in collective bargaining in the public sector. Too often these legal analyses are obfuscated by immersing them in a murky swill of emotional arguments only peripherally related to the merits or demerits of the issues. Professors Wellington and Winter, Jr. admirably resist that temptation, deftly cutting through to the essence of each legal issue, and with obvious understanding and expertise place them in the context of political and economic reality. This gives rich dimension to their work which thereby extends to the reader a book with valuable insights beyond normal legal materials.

The authors faithfully compile the present status of public employee labor law, forecast the probable directions of developing law with judgments on its propriety, and in those cases where the authors sense that the drift or present status of the law is improper, they resourcefully document the laws' deficiencies and propose alternative approaches. The thorough presentation of their analysis gives credence to their admonition that individual assessment, rather than wholesale infusion of private sector labor law into the public sector, is the most advisable approach.

Clearly, public employee unionism among employees of state and local governments has increased dramatically in the past decade and, as the authors accurately observe, it is a phenomenon that it is here to stay. Thus, to respond fairly to the demands of public employee unions without compromising the legitimate interests of taxpayers and recipients of public services, it is necessary that the legal system be developed through careful and thoughtful analysis of the alternative approaches to the problems of labor relations in the public sector. The authors have provided that analysis. They observe initially that in its present stage of development, experimentation and flexibility by local governments should be encouraged while the rigidity and uniformity of state or federal legislation should be discouraged. This would provide the potential for future legislation which would combine the best of all labor legislation, private and public.

Professors Wellington and Winter, Jr. begin their book by developing their basic thesis that there are sound reasons for concluding that government is not just another industry. Foremost of these reasons is the unreliability of transplanting the private sector labor legislation's operating assumption that the employer's superior bargaining power should be equalized. That power in a given city may already be equal or tipped in favor of public employee unions due to the very nature of the public employer who, unlike the private employer, is not subject to market restraints but is subject to political restraints. Government decisions are properly political decisions and economic considerations, although paramount to the private employer, are but one criterion among many for the public employer. Market restraints in the private sector are such that increased benefits will cause higher prices for the employer's product which in turn, in a system of tradeoffs, causes possible unemployment of some employees. No such market restraint exists in the public sector except in theory since discharging teachers, sanitation workers, or policemen as a result of granting higher benefits raises very real political pressures from within the affected government department and from an inconvenienced public. Government employers too frequently yield to constituents by a grant of increased benefits to employees and then either bury the increases in the "bowels of an incomprehensible municipal budget," [1] seek new funds, or reduce other services by reallocating the city's treasury. Thus, normal market restraints are often supplanted by political restraints regardless of economic or social impact.

1. H. WELLINGTON & R. WINTER, JR., THE UNIONS AND THE CITIES 195 (1971).

Add to this political power of public employee unions the private sector strike weapon and they may have, argue the authors, a disproportionate quantum of power sufficient to distort the normal political process. Their power may be so effective a means of redistributing income that they will have "an institutionalized means of obtaining and maintaining a subsidy for union members." [2] Overstated? Perhaps, but the authors steadfastly defend its validity at the municipal government level and use it as their main support for counseling careful examination of private sector concepts that are being brought into the public sector.

Building on the premise that meaningful distinctions exist between the nature of private and public employers, the authors authoritatively trace legal developments in public sector labor law. They note that many approaches and concepts patterned after the National Labor Relations Act have been usefully adopted by public employers including the rights of employees to organize and bargain, obtain exclusive recognition, and the legitimate utilization of union security provisions in negotiated agreements. The point is made, however, that many of these approaches were selected not as the result of rational choice but rather due to fortuitous circumstances. Thus, the authors argue, that although they are useful, many of them should have been *adapted* not *adopted* from the private sector. For example, perhaps minority union imput on non-budgetary discussions outvalues the usual legal requirement that the employer listen exclusively to the majority spokesmen on matters within the scope of bargaining. Likewise, collective bargaining could be facilitated if elections were limited, as in Wisconsin, to fixed periods prior to budget submission dates, thus ensuring appropriate consideration of union requests.

Professors Wellington and Winter, Jr. give detailed consideration to the difficult issues of who is the public employer at the municipal level, what is the appropriate bargaining unit, and how inclusive should the scope of bargaining be? It is in these areas especially that the authors feel special rules need to be fashioned. On the issue of who is the public employer, they observe that governmental bodies very likely have different goals, are responsive to different pressures, and thus view their interests on any labor issue differently. Unfortunately, all too often government authority overlaps, is diffused, and its exact location is uncertain. This Kafka-like uncertainty frequently leads unions intentionally or inadvertently to bypass regular superiors, such as a mayor, in favor of a sympathetic authority, such as a city council, in order to obtain higher

2. *Id.* at 26.

benefits. This political phenomenon, to say the least, does not promote stable labor relations. For the disbelievers, Wellington and Winter, Jr. give numerous documented illustrations of such maneuvers and the lack of centralized, determinable government authority. One very vivid illustration involved Wayne County, Michigan where three governmental bodies pirouetted upon the issue of who was the real public employer. A reviewing court was moved to describe this amorphous structure of government as "a riddle wrapped in a mystery inside an enigma." [3] The authors at this point deliver the reader to daylight by providing illustrations of several public employers who have successfully organized their component parts into "one pair of pants," thereby becoming a cohesive and effective negotiating structure which minimized the opportunity for opportunistic unions to bypass normal bargaining channels.

Another problem is determining an appropriate bargaining unit in such a way as to minimize fragmented units which by sheer number necessarily divert municipal leaders from other urgent problems while imposing substantial bargaining costs on the public employer. Traditional ad hoc determinations often based upon the extent of union organization and union description are viewed as undesirable by the authors. They instead suggest that the unit should be the *most* appropriate unit rather than the private sector's instruction of *an* appropriate unit. Additionally, they call for a presumption against separate functional or occupational units within departments (except for certain types of professional employees), looking instead to structures of management heirarchy.

A related problem deals with whether supervisors are properly to be represented in either an employee unit or by a union which also represents the employees. In a not so hypothetical illustration the authors depict the potential weakness of a management employee where one week he must supervise his employee-steward while the next week he is being represented by that same employee before higher management. To avoid this possible conflict, supervisors must scrupulously be excluded from union association with non-supervisory employees.

One of the most challenging legal issues in the public sector is the scope of bargaining question. Often public employees such as teachers, social workers, and policemen, concerned with the mission of their jobs, seek to include controversial non-economic matters within the scope of bargainable issues. Bargaining over subjects like school decentralization, po-

3. *Id.* at 126.

lice review boards, etc., is likely to place considerable stress on negotiating public employers. Should a union be successful in having such subject matters included within the legal scope of bargaining, the authors again contend that this would institutionalize the union's potential for exercising disproportionate power over the political decision-making process. To minimize that potential it is proposed that public employers adopt strong management rights clauses, legislate bargaining over economic matters with consultation only over policy matters, or have state appointed study commissions suggest legislatively proscribed subjects of bargaining for various types of public employees.

Closely associated with the problem of an enlarging scope of bargainable issues is the trend toward increased use of binding arbitration provisions in grievance procedures. Wellington and Winter, Jr. caution that unless the legislation and contract provisions carefully limit the arbitrator, the scope may be enlarged through contract interpretations. Grievance procedures must also be compared with existing Civil Service laws which may provide an unnecessary parallel appeal procedure.

Professors Wellington and Winter, Jr., by providing two chapters on strikes, place strong emphasis on the importance of fashioning a solution to this problem in the public sector. The authors begin with the premise that if conditions are bad enough, employees will always strike notwithstanding strike prohibitions and penalties. Therefore, most energies should be spent on devising legislative methods of encouraging collective bargaining short of strikes so as to promote the chances of fair settlement. One such method popularly used is fact finding. The authors observe, however, that this is not always a panacea or a quest for the truth, but is often merely an assessment of political forces, thus not providing a very certain alternative to meaningful collective bargaining. The authors, therefore, in anticipation of some impasses leading to strikes seek to define that elusive "workable solution" to public employee strikes.

Wellington and Winter, Jr., criticizing the "essentiality of services" test as being imprecise, further refine that test allowing strikes by employees if a mere *inconvenience* is created but not if an *emergency* endangering the health and safety of the community is created. Thus, employees performing an essential service conceivably could strike until it was determined by an appropriate agency that an emergency situation existed. Also, under this plan, firemen and policemen would be denied the strike since the authors view any work stoppage by them as creating an immediate emergency. As an alternative to the strike, their rights

would be determined by arbitration. Wellington and Winter, Jr. quickly point out that the granting of such strike power clearly makes the cities very vulnerable to union power. They therefore suggest methods that cities may employ to reduce that vulnerability. These include providing contingency plans for substituted services in the event of a labor disruption and also working out an arrangement with the unions or by statute to permit partial operation of services where employees would perform only those functions essential to health and safety, with residual inconveniences ideally maintaining sufficient pressure on the government to induce a settlement. Another proposal to diminish the cities' vulnerability is to alter the political process, for example, by diminishing public pressure on the employer through publication of salaries of striking public employees (the idea being apparently that salaries are so high community pressure will be on strikers to return to work). The final proposal is to give the public employer the power to tax so that revenues can easily be raised to meet higher benefits given in collectively-bargained agreements.

Professors Wellington and Winter, Jr. in this book boldly and often with much imagination provide innovative, practical proposals for resolving difficult issues, adding substance to their position that experimentation is presently a viable and rational method to find the best system for balancing the interests of the public, the unions, and the cities. The proposals that are paraded past the reader from the chamber of experimentation are certainly comprehensive in the sense that few approaches are left unmentioned. Some approaches such as third party bargaining[4] used in San Francisco where the Chamber of Commerce is a de facto party to the bargaining would clearly be unacceptable to most unions while others such as the "one or the other" arbitration approach,[5] where reasonable offers are encouraged by empowering the arbitrator to find only for one party or the other based exclusively on their offer, is a very interesting proposal, albeit in most situations, unworkable. A particularly innovative and desirable suggestion by the authors is the "choice of procedure" statute whereby the state administering agency selectively chooses from among a number of post-impasse procedures (including fact finding, mediation, and binding arbitration) that which is best tailored to the particular dispute.[6] This has the advantage of building

4. *Id.* at 151.
5. *Id.* at 180.
6. *Id.* at 185.

uncertainty into the post-impasse stage, thus making it difficult for the parties to estimate the consequences of failing to agree.

The book contains a catalogue of such innovative approaches and although the authors caution that their suggestions may not always stop strikes or promote smooth functioning collective bargaining, the hope of meeting these goals is enhanced by rational decision-making based on a thorough knowledge of available alternatives. Whether or not the reader agrees with the authors' assessment that public employee unions have a disproportionate capacity for power which could adversely affect the normal political decision-making process, most readers of this book will agree that it is a measurable contribution to a better understanding of this newly developing area of the law. And one suspects that many readers will be persuaded that, as the authors maintain—"government is not just another industry."

RONALD C. BROWN*

* Associate Professor of Law, College of William and Mary.