1976

Public Sector Collective Bargaining: An Emerging Reality

Ronald C. Brown

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VIRGINIA attorneys who find themselves involved in cases dealing with public sector collective bargaining soon learn that the legal issues are often interwoven with many non-legal, emotion-laden political issues. This article attempts to sort out the two and present an overview examination of the background and current legal status of existing or potential public sector bargaining relationships in the Commonwealth, and provide suggestions as to the role an attorney might play in those relationships.

The appearance of public sector unionism in Virginia is not a passing local phenomenon but rather part of a national trend which presently finds over half of the federal employees and nearly 30 percent of state and local employees under union contract. In fact public employee union membership is exploding at a rate 600 times that of its private sector counterpart and defacto, extra-legal bargaining relationships abound even absent authorizing legislation.

Reasons for this growth can be traced historically to management and pay practices; but suffice it to say that regardless of the original reasons for union development, it has today to a large measure become a self-generating and self-sustaining process as the unions have assumed the role of championing the various needs of employees as they arise. And, in view of the present state of our economy which combines inflation with an over-abundant supply of workers there is every reason to predict that public employees will be demanding more compensation and that public employers, in view of a ready supply of labor, need not necessarily be responsive. Thus, the ingredients are present for increased union militancy; and, in view of the Virginia Assembly’s decision not to control the situation by creating a statutory framework within which existing bargaining relationships could be supervised, it becomes important to examine the legal status of bargaining relationships which may or do exist in Virginia even absent authorizing legislation.

The Non-Legal Context

To adequately discuss the legal status of such relationships it is useful to assess the existing non-legal context within which the legal arguments are often entangled. The most emotional issue that inevitably becomes part of a discussion about public sector unionism is that of strikes by government employees. Many people equate strikes with the existence of public employee unions. The statistics do reveal an apparent correlation between the existence of enabling legislation for public sector bargaining and the growth of public employee union membership, and, to a degree, an increased number of public employee strikes. Yet according to Labor Department figures, strikes by government employees resulted in approximately .03 percent of total work time lost versus a figure ten times as high (.32 percent) in the private sector. Of course public employee strikes are more highly visible than private sector strikes and cause greater public inconvenience (if not incapacity) and therefore are prohibited in all but a few states.1 Strikes continue however in states with and without bargaining legislation notwithstanding these statutory prohibitions, which has caused some states to experiment with alternatives to the strike prohibition.

Public opinion polls indicate that a clear majority of the public favors the right of public employees to belong to unions and to bargain and by a closer margin support their right to strike.2 In Virginia, a recent

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2 A poll taken in August, 1974 by Calvin Kytel Associates showed 76 percent of the public supported the right of public employees to organize and bargain. In September, 1975 a Harris poll revealed that 50 percent supported organizational rights of public employees while 29 percent opposed it. Interestingly, 50 percent supported their right to strike while 41 percent opposed it. Washington Post, Thursday, September 4, 1975 p. A3 col. 1.


Legislative Efforts

The trend towards legitimizing public sector bargaining is illustrated by the fact that nearly forty states have passed some type of enabling legislation for bargaining by some of its public employees. Notwithstanding this relatively recent increased development of state statutory schemes, many groups are promoting federal legislation to cover state and local government employees, claiming that for the most part state statutes are providing too little, too late, for too few of its employees. The two federal bills that have been before Congress would cover public employees either by amending the National Labor Relations Act to remove its present exclusion of public employers or by creating a new agency under a very far-reaching, comprehensive law which among other provisions provides for union shops and bargaining by supervisors. Since the legislation raises issues on the appropriate relationship between the federal and state governments, sponsors of the bills are presently awaiting the outcome of an analogous case before the U.S. Supreme Court which should further define the constitutional restraints of federal regulation of state labor relations.

For the most part only employee organizations have worked for passage of a public sector labor relations law in Virginia. Early attempts were made by organizations representing teachers, police, and firefighters, respectively, to lobby for special legislation that would apply to them. Failing in these attempts, they first formed a Virginia coalition of public employee organizations in the early 1970s which lobbied for omnibus bargaining legislation and later affiliated with the more powerful national Coalition of American Public Employees (CAPE) to work for the same end. In 1976, the Assembly will have considered two public sector labor relations bills, one of which would legitimize bargaining relationships and the other which would establish a statutory framework within which meet-and-confer bargaining could take place. Even

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4 Brown, Public Sector Collective Bargaining: Perspective and Legislative Opportunities, 15 Wm. and Mary L. Rev. 57 (1973).


7 The enabling legislation, H.B. 621, is sponsored in the House by Delegate Thompson and in the Senate by Senator Gartlan (S.B. 527); A meet and confer bill, H.B. 986, is sponsored by Delegate Lechner. All died in Committee.
though no state labor relations statute has yet been enacted, recent political pressures did generate legislative creation of a special Commission To Study The Rights of Public Employees. Of the several recommendations coming from this body, none of which included establishing a labor relations law, two were enacted into law. The first placed public employees within the coverage of the Right To Work Law and the second created a grievance system for public employees. Still, notwithstanding the lack of enabling legislation, public sector collective bargaining in Virginia flourishes with thousands of local government employees under collective bargaining arrangements. Since these relationships continue to grow, it is important for Virginia attorneys to understand the legal status of such a relationship.

The Virginia Position

Virginia law like most other states expressly prohibits public employee strikes. However, it is silent on the question of public sector bargaining rights, with the exception of public transit employees who have full statutory bargaining rights with impasses resolved by binding arbitration. Therefore, several legal questions remain in the Commonwealth among which include whether public employees have (1) a constitutionally protected right to organize and join unions; and (2) a constitutional right to bargain (i.e. whether a public employer has a duty to bargain); and lastly, (3) whether public employers have the authority to bargain, if they choose, on the basis of authority implied from the express statutory authority to make employment agreements.

On the issue of organizational rights, as early as 1935 the Virginia Supreme Court held that public employees could not join unions where prohibited by public employers. In 1946 the Virginia Assembly passed its right to work statute which guarantees employees the right to work regardless of union or non-union affiliation. During the same legislative session, the Senate passed Joint Resolution Number 12 which

in essence stated that it is contrary to public policy for State, county, or municipal employers to recognize or negotiate collective bargaining agreements with a labor union representing public employees and contrary to public policy for public employees to form organizations affiliated with any labor union to discuss conditions of employment or to claim the right to strike. In 1955, a lower Virginia court reaffirmed the power of a local government to promulgate rules barring fire-fighters from unionizing. It also held Virginia’s right to work law inapplicable to public employees. Thus, by 1955 the Virginia law clearly prohibited public employees from forming or joining unions.

By the end of the next 20 years however, this prohibition was completely reversed. The reversal began with cases like Atkins v. City of Charlotte arising in federal courts outside Virginia but which clearly placed a constitutional cloak of protection around public employees’ organizational rights. Virginia’s Attorney General thereafter took cognizance of the developing constitutional right to unionize and in 1969 advised public officials that such rights existed. Although State Attorney General opinions in Virginia are merely advisory to local governments, Virginia federal courts have since ruled on the issue and sustained that opinion holding that public employees have the right to associate and rules or ordinances which forbid the same are unconstitutional. Virginia courts have also held that Senate Joint Resolution Number 12 is merely a statement of policy and is without the force of law.

A second source of law which establishes the right of public employees to unionize is found in the 1973 amendment to Virginia’s right to work law which in extending coverage to public employees provided by incorporation that “nothing herein contained shall be construed to prevent or make illegal the peaceful and orderly solicitation and persuasion by union members of others to join a union.” In sum, the right of public employees in Virginia to form and join unions

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is clearly established, based both on constitutional and statutory authority.

The second major legal issue is whether public employees have a constitutional right to bargain as a concomitant to the right to organize. In other words does the public employer have a duty to bargain with its employees? Although the right to organize does carry with it a prohibition of employer discrimination against employees engaging in protected union activities, arguments that the constitutional right to organize implies a right to bargain have thus far been unsuccessful. However, the issue continues to be raised, as is illustrated by a recent ruling in a federal district court in Virginia. In overruling a motion to dismiss, the court held that a public employer’s refusal to meet with a union could have a “chilling effect” on first amendment rights and the court suggested that “the grant of approval to organize and associate without the corresponding grant of recognition may well be an empty and meaningless gesture.” The type of holding has been the exception and the overwhelming body of legal precedent on the issue at the present time clearly does not mandate collective bargaining absent enabling legislation.19

Two Virginia cases have sustained that position although the opinion of the most recent case, Teamsters Local Union No. 822 of Norfolk, Virginia v. City of Portsmouth, Virginia,20 tended to obfuscate the actual issue being decided, namely whether the constitutional right of public employees to associate included the right to bargain. Both that case and the Firefighters case held that public employees in Virginia are under no duty to bargain either because of express legislative authorization (since it is absent) nor by judicial interpretation of the constitution. The Firefighters case raised an additional issue by stating that “[W]e hasten to point out that . . . public employees . . . are not precluded from sitting down at a table with representatives of the city and discussing matters concerning the employment relationship.” The issue raised is whether a public employer may, if it chooses, meet and discuss labor relations matters with a union and if it reaches an agreement in those discussions whether it may embody them in an agreement which will be legally enforceable.

The remaining crucial legal question is whether public employers may voluntarily enter into a negotiating relationship with a public employee union absent enabling legislation and negotiate an enforceable contract on the basis of implied authority. This question has been considered by courts outside Virginia and the traditional view has been that a public employer may not bargain with its employees absent express authorizing legislation.21 The justifications advanced to support this position are usually rooted in concepts of state sovereignty and illegal delegation of powers to public employee unions. The persuasiveness of these arguments have tended to diminish over the years in view of government employers’ implicit authority to negotiate innumerable provisions in its construction and supply contracts, by the uniform holdings under state legislation and court rulings that no agreement or even concessions to employee demands are required,22 and by the increasing body of experience built up in those states with legislation.

Current Developments

The current developing law on the implied authority of a public employer to bargain with its employees or their representative indicates that the courts have begun to reject the traditional arguments.23 For example where school boards are explicitly empowered to supervise a school system and enter into individual

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20 Civil action No. 75-184-N (E.D. Va., August 11, 1975).


23 For example, the NLRA imposes an obligation to bargain but specifically states that “such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .” 29 U.S.C. § 158(d) (1970).

contracts, courts are finding less difficulty in implying authority to enter into a master agreement. Recent
decisions such as those by the Ohio Supreme Court
have explicitly upheld this proposition and held that
the school board was unable to arbitrarily terminate
its agreement and must honor its contractual duty to
bargain in good faith. However, even in view of this
emerging trend of law, one cannot safely predict
judicial approval of such agreements, due to the tra-
tional jealousy surrounding governmental sover-
ignity.

The issue in Virginia has not been resolved. Al-
though the recent Teamsters Local Union 822 included
language alluding to the lack of authority of a
public employer to bargain absent statutory authori-
ization, a close reading of the case shows that the
holding is speaking to the issue presented by the case
—whether a public employer must bargain with a
public employee union because of the constitutional
right of public employees to organize. The answer, as
discussed, is clearly negative.

Analogous case law in Virginia can be found in
McKenzie v. Charlottesville and Albermarle Rail-
road where the Supreme Court of Appeals of Vir-
ginia held that a municipal corporation having explicit
authority to contract also therefore had implied au-
thority to negotiate an arbitration provision. A similar
result was reached in Howard v. School Board of
Alleghany County where it was held that the board
had implied authority to negotiate on matters inci-
dently related to the school board’s express powers.

In sum, the trend of case law outside the Common-
wealth of Virginia is finding increasingly that implied
authority to negotiate absent explicit legislative au-

25 Dayton Classroom Teachers Ass’n v. Dayton Board of
Educ., 41 Ohio Street 2d 127, 323 N.E. 2d 714 (1975); and see, Vinton County Local Teachers Ass’n v. Vinton County
Board of Educ. BNA’s Gov’t. Employee Rel. REP (GERR)
No. 574, at B-1 (1974) (defining good faith); North Royalton
Education Ass’n v. North Royalton Bd. of Educ., 41 Ohio

26 Supra note 20. However a case has been filed on that
issue which may soon resolve the question. Newport News
Education Ass’n v. School Board of Newport News, Case
No. 75-716 filed in Circuit Court on February 19, 1976.

27 110 Va. 70, 65 S.E. 503 (1909) Arbitration was made
available to interested parties by Va. Code Ann. § 8-503
(then § 3006) (Supp 1975).

28 203 Va. 55, 122 S.E. 2d 891 (1961); but see Wilson v.
State Highway Comm’n., 174 Va. 82, 4 S.E. 2d 746 (1939).
See also, Batchelor v. Commonwealth, 176 Va. 109, 105
S.E. 529 (1940).

30 Id. at 231, 232.
31 Opinion to Delegate Howard Carwile October 7, 1974.
32 Opinion to the Honorable Frederic Lee Ruck, County
Attorney for Fairfax County November 19, 1974.
Drafting Bargaining Agreements

Returning to the original observation that legal issues on public sector collective bargaining are often interwoven with non-legal, emotional, or political considerations, it should be re-stated that some 25 or 30 percent of the Commonwealth’s teachers and a significant number of other public employees are presently under collective bargaining agreements. While it is clear that one option available to public employers in Virginia (and being exercised in most cases) is to refuse to negotiate, it is equally clear that some employers have chosen to “meet and confer,” or engage in “professional negotiations,” or, more simply put, collectively bargain. In each situation the result is the same. The employer has chosen, for whatever reason, to deal with a particular employee-designated representative and negotiate an agreement.

If the employer has chosen this course, it is important for Virginia attorneys to understand that in the absence of legislative guidance there exists both contractual and constitutional pitfalls in the bargaining relationship. Thoughtful drafting of any agreement is required to avoid the real possibility of union-dominated first agreements. First, a contractual obligation may be created notwithstanding the uncertainty of a court finding implied authority if the parties agree to incorporate a memorandum of their understanding into individual teacher contracts. Thus legitimized, other agreed upon provisions substantive and procedural (such as a duty to bargain in good faith, etc.) may be legally enforceable. And as with any contract, in the absence of a clearly stated meaning, a court could be called in to interpret and in some cases define the meanings of such words as good faith, bargainable subjects, grievable items, and unfair conduct. Therefore, it is imperative to draft such procedural agreements with much clarity and as much specificity as is desired, should a court be called in to interpret its provisions. Additionally, some consideration will need to be given to the extent to which certain powers are reserved to the employer such as the right to hire and fire or subjects for negotiations to name just a few.

These so-called management rights clauses can prevent a multitude of later disagreements on issues of authority that inescapably arise even in jurisdictions with statutes. In effect, it is suggested that the draftsmen of bargaining agreements create their own “private statutory scheme” both in the substantive provisions and in procedural requirements that govern the bargaining relationship itself as well as any secret ballot election process used to establish and maintain that relationship.

Of course there are risks to a public employer in agreeing to abide by certain procedures in the pre-election, negotiation, and contract administration phases of bargaining. A measurable degree of flexibility is compromised by such agreement whereas absent that agreement the employer in a non-statutory state such as Virginia would be free to act more unilaterally. However, it is also true that a fairly-arrived at set of procedures provides the necessary constraints for more meaningful bargaining to take place. Additionally, the employer may gain enforceable contract rights to control non-compliance with contractual provisions (union unfair labor practices etc.) and a skillful draftsman can include appropriate remedies for non-compliance such as money damages, loss of dues check off or other privileges, or even loss of union recognition.

The second potential problem area involves constitutional restraints placed on the public employer. Even absent statutory prescription of employer misconduct, the constitution limits the employers’ ability to discriminate against employees because of their union activities. However, public employers very often fail to realize that the constitution does not bind it to action and the employer especially during the crucial pre-election period retains free speech rights and may actively provide persuasive information on the relative merits of unionism or of one union versus another or to deny the use of institutional advantages such as school mailboxes. Additionally, public employers may limit the rights of their employees to solicit on behalf of the union to certain prescribed non-working periods by establishing a valid no-solicitation rule.

Constitutional limits do exist however. For example, although the employer retains the right of free speech, the 14th Amendment Equal Protection Clause of the

(Continued on page 16)
### Evaluations of Job Being Done by Virginia State Bar in Disciplining Lawyers

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### Feelings Toward Specialization Among Lawyers

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### Collective Bargaining

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Constitution limits it from denying equal treatment to unions competing for recognition during the pre-election periods in matters such as use of school mailboxes or other facilities. Also, an employer absent statutory authority may again run afoul of the 14th Amendment if it chooses either before or after a union election to meet with only one of several employee organizations seeking an audience with the public employer. Thus, a grant of exclusive recognition by a public body promising to meet only with the union representative, absent some legislative authority, raises significant constitutional questions.

In conclusion, it is apparent to any observer of the legal problems involved in public sector collective bargaining that the legal issues raised are many and complex even in states providing a legislative framework. Questions involving the protection of employees’ free choice during the pre-election period, and questions relating to the appropriate bargaining unit, the scope of bargainable issues, the limits on employer and union unfair labor practices are in a statutory state considered within the framework of an administrative structure staffed by labor relations experts. To permit such complex questions to remain in the nebulous state as exists in Virginia invites both disrespect for the law and possible violations of the public interest when public employers and unions negotiate improper subjects or permit an inordinate dislocation of available public resources due to union pressures, all of which presently remain unregulated, and unsupervised in Virginia.

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36 Although, as discussed, the use of school mailboxes for organizational activities may be limited, once they are made available to one union it will usually be unconstitutional to deny use to another union absent authorizing legislation. See e.g., Dade County Classroom Teachers Assoc. v. Ryan, 225 So. 2d 903 (Fla. 1969); and Local 1080 of AFT v. Fla. Bd. of Regents, 355 F. Supp. 594 (N.D. Fla. 1973).

37 See e.g., City of Madison Joint School Dist. No. 8 v. W.E.R.C., ... Wis. 2d ... , 231 N.E. 2d 206 (1975); and Board of School Directors, ... Wis. 2d ... , 168 N.W. 2d 42 (1969). Additionally, with only infrequent exception courts will not find implied authority to grant exclusive recognition. See e.g., State Bd. of Regents v. United Packing House Food & Allied Workers, 175 N.W. 2d 110 (Iowa 1970) (no implied authority); and contra, Chicago Div. of Ill. Educ. Ass’n v. Board of Educ., 76 Ill. App. 2d 456, 222 N.E. 2d 243 (1966).