Loyola University Chicago Law Journal

Volume 4
Issue 2 *Summer 1973*

Article 3

1973

A Public Employee Labor Act in Illinois? - Clear Need with No Clear Solution

Roger J. Kiley Jr.
Attorney, Private Practice, Chicago, IL

A Public Employee Labor Act in Illinois? Clear Need With No Clear Solution

Roger J. Kiley, Jr.*

Unlike New York City and other large urban centers, Chicago is a city in which the labor crisis is clearly the rare exception rather than the rule. However, the increasing numbers of public employee labor crises are threatening to spoil the City's hard earned reputation for labor peace.

In the past few months alone there have been at least four major public employee labor disputes. First, the City's policemen demanded to be recognized and insisted that the City negotiate a labor contract with them. To bring public attention to their demands, they engaged in an excessive ticket-writing campaign. Switching tactics because of the adverse attention provoked by that campaign, the policemen then engaged in a ticket-writing slowdown. At the same time, the various police organizations held well-publicized mass protest meetings throughout the City. Those in attendance screamed dissatisfaction with their complete lack of collective representation and the lack of employment "rights" which they hoped would follow from that representation.

While that crisis was short lived and passed without the public really feeling any serious effects,[1] it was followed almost immediately by a labor dispute at the Cook County Hospital. There, the public employees—nurses, by carrying out a threatened work stoppage, albeit of limited duration—forced concessions in the form of various changes in working conditions from the hospital administration.

---

* Mr. Kiley, a member of the Illinois bar, received his J.D. from Loyola University. He is in private practice in Chicago.

1. The excessive ticket-writing campaign lasted only a day and one-half. The effect of that effort was offset by the "liberal dismissal of charges" policy adopted by the Traffic Court Judges for traffic tickets written during the blitz period and by the ticket-writing "slow-down" which followed, for a day and one-half, on the heels of the blitz.

Then came the problems of the City's Board of Education. This year's collective bargaining negotiations with the Chicago Teachers' Union began in the customary crisis atmosphere. Hardly a month passed before the inevitable impasse was reached and both sides raced for the headlines. The Board insisted that there was no money for teacher salary hikes, much less for maintaining current operating expenses; the Union cited administrative "fat" as being sufficient to fund both a salary increase and "educational" demands of lower class size, and refused to modify its threatened strike. The Board's position was compelled by its severe budgetary dilemma;[2] the Union's, by the mandate from more than ninety percent (90%) of its teacher-members who voted in favor of a strike.[3]

Neither side moved toward compromise until the strike began. Even then, it took two weeks, during which the City's entire school system was shut down, for the differences finally to be resolved.

Within weeks of the end of the teachers' strike, the employees of the City's mass transit system voted to strike unless the Transit Board paid their incremental raises.[4] As Chicago braced for a shutdown of its entire public transportation system, the state legislature's efforts to provide a much needed subsidy became bogged down in parliamentary maneuverings.[5] After a couple of weeks of intensive bargaining, the House and Senate passed an emergency subsidy bill only to have it vetoed by the Governor two days later. But the legislature moved fast to override the veto, and the scheduled fare increases and service reductions were immediately cancelled.

---

2. Throughout the preceding year, the Board had, at various times, announced money saving steps which it said had to be taken to maintain operations through December, 1972. These steps included a shortened school year and reduction of personnel, among others. Thus the dilemma was not one of recent vintage but rather represented an accumulation of the money crises and short term solutions of the past couple of years.

3. The "yes" vote of 90% of its members was a record for the Teachers' Union. But what is significant is that this record of supporting votes was accomplished in the circumstance where the Union's last salary proposal made just prior to the strike and rejected by the Board was a salary raise of 2½%.

Another very significant aspect of this year's teachers' strike was that for the first time, the other public employee unions employed by the Board of Education agreed to honor the picket lines of the striking teachers. In the past, the striking teachers enjoyed little if any support from their co-worker-unionists.

4. The strike vote was a reaction to the announcement of the Chicago Transit Authority's Board that because of its severe budgetary problems, it could not pay its operating expenses, including the incremental raises.

5. Actually, the maneuverings were more political than parliamentary. The rules of procedure, however, were used by the Republican Speaker of the House to forestall a number of mass transportation subsidy bills of which he personally disapproved. Finally, a House compromise was reached which provided an operating subsidy to June, 1973.

This plethora of public employee labor crises is not peculiar to Chicago. It extends to most of the larger cities and suburbs of Illinois;[6] indeed, it is a common experience throughout the country.[7] But the fact that Chicago, after having earned over many years the reputation as a peaceful labor City, is experiencing a significantly increasing number of these crises is just one more clear signal of the critical need for a comprehensive public employee labor act in Illinois.[8]

The critical need for such legislation is as apparent as the Illinois legislature's failure to respond to it.[9] But to say that the legislature has failed to respond to this critical need is not to say that the need lends itself to an easy or simplistic legislative solution; quite the contrary. In fact, the nature of the core issue which must be resolved in any legislative solution makes the early passage of a workable public employee labor act in Illinois a very remote possibility.

At the heart of this pessimism is the question of the public employee's right to strike.[10] Although there are myriad legal,[11] economic,[12]

6. In 1966, there were 400,000 public employees in Illinois; in 1971, there were at least 600,000. In 1966, there were 11 public employee strikes in Illinois; two years later, there were 22. *See generally* GOVERNOR'S ADVISORY COMMISSION ON LABOR-MANAGEMENT POLICY FOR PUBLIC EMPLOYEES, REPORT AND RECOMMENDATIONS 2, March, 1967; U.S. BUREAU OF LABOR STATISTICS, DEPARTMENT OF LABOR BULL. No. 368, WORK STOPPAGES IN GOVERNMENT, 1958-68 (1970).

7. In 1968, there were approximately 12 million public employees in the United States excluding teachers. Of these 9.3 million were state and local employees. *See* DEPARTMENT OF LABOR, BLS MONTHLY LABOR REVIEW, July, 1970.

8. Shaw and Clark, *The Need For Public Employee Labor Legislation in Illinois*, 59 ILL. BAR. J. 628 (1971); *See generally* Derber, *Labor-Management Policy For Public Employees in Illinois: The Experience of the Governor's Commission, 1966-67*, 21 IND. AND LAB. REL. REV. 541 (1968).

9. *See generally* Clark, *Public Employee Labor Legislation: A Study of the Unsuccessful Attempt to Enact a Public Employee Bargaining Statute in Illinois*, 20 LAB. L.J. 164 (1969).

10. *See* Lev, *Strikes By Government Employees: Problems and Solutions*, 57 A.B.A.J. 771 (1971).

11. The question of the right to strike is, of course, the big stumbling block. But that is not to say that there are no other thorny legal issues to be resolved. Among others, there are the difficult questions in what specific areas may a public body legally bargain, what are the criteria for determining appropriate bargaining units; whether unfair labor practices ought to be prohibited and if so, what kinds; who or what will administer the Act; and whether there should be binding arbitration of grievances involving interpretations of collective bargaining agreements and if so, whether there should be a limitation on the power of the arbitrator to grant relief or limited appeals from arbitration awards.

12. There exists the important question of whether wage controls should be imposed upon the public employees to equalize the substantial disadvantage suffered by the public employer who is operating under an inflationary barrier in the form of tax ceilings and by the taxpayer who is made to bear the burden of decreased service because of high economic concessions made by public employers. Consider a public school board, for example. It is taxing at its statutory ceiling, it can go no higher. Yet it is faced with a Teachers' Union which demands, minimally, a cost of living increase of, say 5%. If it concedes the increase, the Board will have to cut back services to the public in order to fund the increase. If it does not, the Union will strike, cutting off all services to the public.

and political factors[13] involved in the failure of the legislature to act, the issue of the right to strike is at the core of the inaction. It is clearly the single most important issue and is that, above all others, which has prevented, and in all likelihood will continue to prevent, the accommodation of competing interests which is a necessary condition to a legislative response to this public crisis.

This sensitive and difficult issue, which stands in the way of public employee legislation, has basic to it diametrically opposing interests. To the public employees, the right to strike is critical. It is the fear of the strike, or the strike itself, which is the very essence of collective bargaining. If at the end of the bargaining process, the only alternative for the employees is to accept the employer's last offer, then, indeed, what has taken place is something other than bargaining. Both sides must have something to lose if "bargaining" is to occur. And this is true whether that employer is a private corporation or public body. Without the strike power, the employee group really has little meaningful leverage at the negotiating table. Without leverage, the employee group will extract little in the way of benefits for its members, and the extraction of benefits is the life blood of unions. Thus, public employees insist on the "absolute" that any public employee labor act in Illinois must express the employee's clear right to strike.

But there exists a "counter-absolute" which adds the insolvable dimension to the issue of the public employee's right to strike. Because the public employer is, in almost every case, serving the vital needs of the public,[14] the public interest makes strikes by public employees intolerable. Therefore, sound public policy,[15] and in certain instances,

13. Some suggest that the only reason the legislature has not passed a public employee labor act to date is because of the opposition of the Chicago Democrats to it. And that opposition is alleged to be purely political, i.e., collective bargaining will destroy the "Chicago Machine" patronage effort. An examination of the issues involved and history of these legislative efforts to resolve the issues expose that suggestion as wishful thinking but hardly founded in fact. *Supra* notes 8 and 9.

14. Bargaining in the public sector involves not only the question of vital public services but also the very substantial question of economics. The public employer operates within budgetary constraints imposed by law. Since public bodies spend taxpayers' monies, there are generally strict tax ceilings which, to be raised, need legislative authority. (This authority is granted less and less frequently, and rightly so.) Moreover, most public bodies are already taxing at their maximum rate. Therefore, economic concessions made to the employee groups are now funded by cutbacks in service. So whether the public employees strike or not, the public generally faces a cutback in vital services, it's merely a question of degree.

The argument can thus be made that employee groups should be allowed to bargain for changes in working conditions which *do not have economic implications* but that salary and other economic benefits should be controlled by statute and should not be bargainable items.

15. Board of Education v. Redding, 32 Ill.2d 567, 207 N.E.2d 427 (1965); *see* Bloedorn, *The Strike and The Public Sector*, 20 LAB. L.J. 151 (1969). *But see* County of Peoria v. Benedict, 47 Ill.2d 166, 265 N.E.2d 141 (1970).

even constitutional principles,[16] compel the inclusion of a "no strike" clause in any public employee labor act.

The Illinois legislature has failed to resolve these two antagonistic positions principally because it has been unable to devise an *alternative* to the strike which, in terms of employee bargaining leverage, is substantially equivalent to the strike. Proposals substituting various forms of mediation, fact-finding, cooling-off periods and compulsory arbitration in place of the right to strike have all failed to gain the support of employee groups. This is because of the basic feeling among these groups that the proposed substitutes would not extract from the public employers the kinds of salary and other benefits extracted by the "brooding omnipresence" of the strike weapon.[17] Unless these employee groups are convinced that withdrawal of their most elementary and instinctive negotiating tool will not result in any noticeable loss of bargaining leverage, they will very likely continue to oppose legislation containing a "no strike" clause.

Just as efforts to replace the strike power failed, proposals granting a limited strike power likewise have been unable to gain the necessary support for passage.[18] These limited strike power proposals consisted

16. At least in public education at all levels, strikes are illegal as being contrary to *constitutionally* expressed public policy. *Redding, supra* note 15; Article X, Section 1 of the Illinois Constitution of 1970.

17. "Mediation" refers generally to the efforts of a "skilled" neutral to assist the negotiating parties to reach agreement. "Fact-finding" refers generally to the same skilled neutral who hears proposals made by both parties and evidence and arguments as to their selective merit, and who then makes recommendations to the parties with respect to their proposals in an effort to bring them closer together. "Compulsory arbitration" refers to the same skilled neutral who hears proposals, evidence and arguments but who then determines the issues unresolved and essentially writes the contract.

Both mediation and fact-finding are, as a practical matter, only preliminary and, although successful in many cases, are still not qualitative substitutes to the strike weapon in terms of bargaining leverage, at least not in the union's view.

Compulsory arbitration has many bad features which militate strongly against its usefulness. Generally, both employer and employee reject it. *See* Hildebrand, *The Public Sector,* FRONTIERS OF COLLECTIVE BARGAINING 125, 152-53 (J. Dunlop and N. Chamberloan eds. 1967); *See generally* Loewenberg, *Compulsory Arbitration for Police and Fire Fighters in Pennsylvania in 1968*, 23 IND. AND LAB. REL. REV. 367 (1970); Stern, *The Wisconsin Public Employee Fact-Finding Procedure*, 20 IND. AND LAB. REL. REV. 3 (1966). One variation of the usual form of compulsory arbitration which would dilute some of its bad features is to eliminate the power of the arbitrator to compromise, i.e., require that once the arbitration begins, the arbitrator must accept *in toto* either the proposals of the union or of the employer on each specific unresolved issue. This would not, however, eliminate the unfortunate economic implications of compulsory arbitration. The problem still remains of the possibility of an arbitrator imposing an economic package upon a governmental body which would put it out of business or substantially hamper its capacity to service the public. While an arbitrator may be able to resolve issues, he can't give the public employer additional taxing powers.

18. There were also proposals which excluded certain categories of public employees from the "no strike" clause. The categories were varied but the thrust of them all was to distinguish among those employees providing "non-essential" as distinguished

mainly of bills which required as a condition precedent to the exercise of the right to strike, variations of mediation, fact-finding or cooling-off periods. They failed mainly because of the prevailing attitude in the legislature against legitimatizing deprivations of vital public services through public employee strikes, along with the attitude that in a large number of cases, the proposed forms of mediation, fact-finding and cooling-off periods would not resolve bargaining impasses. Thus, the public would be exposed to an unacceptable risk of such deprivations of public services.

While the Illinois legislature has been wrestling on the thorns of the "strike-no strike" issue, still unable to devise (or divine) a passable legislative solution to the critical need for a comprehensive public employee labor act, the courts of the state have unhesitatingly stepped into the gap to "write" public employee labor law to the extent necessary to resolve the limited issues presented by the specific facts of public labor crises before them.[19] Although this court-made public employee labor law has been made necessary by legislative inaction,[20] it is clearly no substitute for a legislative solution and may be aggravating the public employee labor crisis by solidifying even more the positions of the diametrically opposing forces.

---

from "essential" services or those providing "non-vital" as opposed to "vital" or those providing services which did not involve the "public health and safety." The right to strike then depended upon the category into which a particular group of employees was placed.

These compromise efforts failed doubtless because of the immense difficulty of making "category" determinations and because of the need to avoid tedious litigation of that complicated issue in the context of an impasse or strike where expedited procedures are indispensable. *See generally* REPORT AND RECOMMENDATIONS OF THE 20TH CENTURY FUND TASK FORCE LABOR DISPUTES IN PUBLIC EMPLOYMENT 24-26 (1970).

19. Courts have ruled that public employers lawfully may collectively bargain with a representative selected by a majority of its employees and enter into a written collective bargaining agreement with that representative, Chicago Division of Illinois Education Association v. Board of Education of City of Chicago, 76 Ill. App.2d 456, 222 N.E.2d 243 (1966); and that public employees have a first amendment right to join and form a union, McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968); but that a public employer is not required to bargain collectively with its employees even if almost all of its employees express a preference to be represented by a particular union, Chicago High School Principals Association v. Board of Education City of Chicago, 5 Ill. App.3d 672, 284 N.E.2d 14 (1972); Indianapolis Education Association v. Lewallen, 72 L.R.R.M. 2071 (7th Cir. 1969). Courts have also ruled that certain matters may not legally be the subject of the binding arbitration process even though the parties may have agreed otherwise. Board of Education v. Rockford Educational Association, 3 Ill. App.3d 1090, 280 N.E.2d 286 (1972); Memorandum Ruling, Judge Nathan M. Cohen, Board of Trustees of Junior College District No. 508 v. Cook County College Teachers Union, Local 1600, 71 CH124, Circuit Court of Cook County (September 14, 1972).

20. The complex problems of regulating public employee labor relations are numerous and many arise daily. Common law is completely inadequate to develop a comprehensive public employee labor act. The courts have not yet, for example, ruled on the most elementary question of how the appropriate bargaining units are to be determined, what machinery is to be used for conducting elections, or what are areas or matters about which a public employer may lawfully collectively bargain or may submit to binding arbitration as part of a grievance procedure.

This is not to reflect unfavorably upon the Illinois judiciary. The courts are reacting responsibly and in the public interest when controversies vitally affecting the public are brought before them for resolution. But the nature of the judicial process is such that the courts are unable to answer questions not raised by the facts before them and, thus, are unable to devise comprehensive public employee labor legislation. And the more the courts are required, because of the failure of the legislature, to write public employee labor law in Illinois on a case by case approach, the less likely a legislative solution becomes. Consider, for example, the court-made resolution of the issue which unmistakeably is standing in the way of a legislative solution, the right to strike. What has prevented the legislature from acting for twenty years is no obstacle at all to the courts. The issue of the public employee right to strike has been almost uniformly resolved against the employee.[21] The courts, in enunciating what has become a basic principle of law in Illinois, do not become stalemated by questions of loss of employee bargaining leverage or of the *quid pro quo* for the withdrawal of that basic weapon from the employee unions. Rather, they merely find that the strike is unlawful as against public policy and enjoin it.[22]

The employees are then faced with the alternatives of complying with the court order and returning to the bargaining table with no bargaining leverage or of continuing the strike in spite of the injunction. For many reasons, public employee groups have repeatedly chosen the alternative of ignoring the injunction despite the risk that its leaders may, because of that choice, face stiff prison terms for contempt. It is this choice, which is rapidly becoming the rule rather than the

21. *Supra* note 15. The Supreme Court, in *Benedict*, decided, without comment, that an injunction against a strike by employees of a public hospital was inappropriately issued. The Court cited its decision in Peters v. South Chicago Community Hospital, 44 Ill.2d 22, 253 N.E.2d 375 (1969), as support for its ruling. It has been suggested that the Court's ruling in *Benedict* makes legal strikes by all public employees except teachers. Shaw and Clark, *The Need for Public Employee Legislation in Illinois*, 59 Ill. Bar. J. 628 (1971). However, Appellate Court decisions since *Benedict* have not so construed that decision. Fletcher v. Civil Service Commission, 6 Ill. App.3d 593, 786 N.E.2d 130 (1972).

22. In some cases, courts do more than issue an injunction against the strike. While ordering the strike stopped, some have made an effort to provide, simultaneously, an alternative to the strike to mimimize the union's loss of leverage due to the injunction. For example, in Board of Trustees of Junior College District No. 508 v. Cook County College Teachers Union, Local 1600, 71CH124, Circuit Court of Cook County, the public employer sought an injunction against its striking junior college teachers. The Court, Judge Nathan M. Cohen presiding, stopped the strike but required the parties to negotiate in open court so that the Court and the public would see that good faith bargaining continued in spite of the loss by the employees of the strike weapon. The prestige of the Court and the pressure of the "open" negotiations resulted in a negotiated agreement and the process did not disclose any weakness in the union's bargaining position due to its loss of strike power.

exception, which really aggravates the public employee labor crisis. Of course, the public flaunting of mass violations of court orders does not promote public confidence in the judiciary. But the real aggravation, in terms of making a legislative solution even more difficult, comes from the impact these mass violations of injunctions have had upon the bargaining impasses involved. In an area like Chicago, where there is strong pro-labor sentiment and thus hardly any chance that the public employer will assume a tactic designed to break the union, the "illegal" strike continues until economic and other benefits are finally extracted from the public employer. And only then are the vital public services restored to the Chicago residents. In less urbanized areas, where the pro-union sentiment is not so strong, some unions are actually broken as a result of the public body firing striking employees or taking other actions designed to dilute the union's support.

In both the cities and the outlying areas, the employee unions find proof of the critical need to retain the strike power. Without the strike power in the cities, the unions say, the benefits extracted would not have been forthcoming. Similarly, in the smaller towns and rural areas, mass firings would not have occurred because the employees would have been participating in a legal strike.

But the advocates of the "no strike" clause also find support for their position in the experience in the cities and outlying areas of mass violations of injunctions against public employee strikes. They refer to substantial public inconvenience and harm which result or could result from the mass withholding of vital public services; they cite examples of government units brought to complete standstills; and they point to the government unit, which is already at its tax ceiling, conceding economic benefits in order to restore vital services now, thereby making future impasses doubly difficult to resolve, and cutting back services to the public to fund those concessions. This, they say, must be avoided with a wholesale strike prohibition and with machinery to enforce it.

The crisis is thus aggravated. Each end of the strike-no strike dichotomy becomes more firmly convinced of the merits of its position making departures from or compromises of it less likely. The complicated nature of the public employee crisis in Illinois becomes crystallized. It is one which demands legislative resolution but which is seemingly incapable at present to be legislatively resolved; one which, in the absence of legislation, necessitates judicial intervention but which is made even less capable of legislative resolution with each ju-

dicial intervention; and one which, left unsolved much longer, threatens the very order of our cities.

And the future? Clearly, the legislature must act, and quickly, to resolve the impasse which is preventing passage of a public employee labor act in Illinois. The key is the resolution of the issue of the employee's right to strike. That issue will not be resolved with a wholesale strike prohibition. The answer may, therefore, be found in some form of limited grant of strike power. To prevent the withholding of vital public services, the exercise of the strike power must be limited to cases not involving the public health, safety or welfare. In those cases in which the strike power cannot be exercised, a modified form of compulsory arbitration, one which precludes compromise by the arbitrator and which forces the parties to make their best offer before impasse, may be sufficient to offset any loss of bargaining leverage to the unions. Where the strike power can be exercised, and in cases in which the public employer is operating under a price control in the form of a tax ceiling, imposition of modified wage controls upon the employee groups ought to be considered to protect the taxpaying public from economic concessions made against the public interest. And to encourage union support of this compromise, a union shop[23] should be made mandatory.

Whether these or other proposals ultimately are part of the resolution of the legislative impasse is, of course, not important. What is important is that the impasse be resolved. The question is whether it will be resolved while it makes a difference. At present, its resolution seems unlikely.

23. This will increase the political power of the unions and just as importantly the union coffers, both of which should make difficult any decision of unions to oppose the compromise.