Labor Relations Law in the Public Sector Cases and Materials

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BOOK REVIEW

Labor Relations Law in the Public Sector: Cases and Materials.

The field of public employment labor relations has had an explosive impact in this country in recent years. The number of public employees is growing rapidly, both numerically and in relation to the rest of the work force; public employee unions are without question the fastest growing unions in the United States. Once rare, strikes by public employees are now commonplace.

Government employees once were content to accept the terms and conditions of employment unilaterally established by their governmental employers, and they bargained either not at all or on an individual basis with such employers. This is no longer the case. Public employees in most parts of the country are now demanding, and in some cases receiving, legislation granting many of the organizational, bargaining, and related rights which private sector employees have enjoyed since the passage of the Wagner Act in 1935. "[P]ublic sector 'unionization' and collective bargaining represent the most important development in 'labor relations' since the post-Wagner Act period of the 1930's and 1940's."

Prior to the 1930's, labor law was covered only in the form of a few cases incidental to courses in torts, criminal law, or equity. It did not begin to emerge as a separate course until after passage of the Wagner Act. By the early 1970's, the casebooks had mushroomed into huge volumes encompassing the Taft-Hartley Act of 1947, the Landrum-Griffin Act of 1959, equal employment laws, etc.

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1 Comprehensive statistics on these and related questions are set forth in the book under review. Pp. 33-35.
2 For detailed strike statistics, see pp. 655-59.
4 P. vii.
5 The first known casebook on labor law appears to have been prepared for use in the Harvard Law School. F. SAYRE, CASES ON LABOR LAW (1922).
and the numerous administrative and court decisions emanating from these provisions. The standard labor law text also included small discussions and segments devoted to the public sector. For years, public sector labor law has been regarded as experimental and diffuse.  

The number of court decisions in the public employment relations field is increasing rapidly, however. Twenty years ago, court decisions concerning this subject arose only occasionally, and usually involved prohibitions against strikes. Today, the digests are filled with hundreds of cases involving sophisticated interpretations of complex state labor laws, as well as numerous crude judicial attempts to regulate the area where legislators have failed to act. The statutory and case law governing public sector labor relations has developed in a crazy-quilt, haphazard, and awkward manner, primarily in the legislatures and courts of the fifty states. Various proposals have been introduced in Congress to involve the federal government in the regulation of state and local employee relations by granting organizational, bargaining, and at least limited strike rights to all state and local employees.  

Clearly, public sector labor law has grown to the extent that it is now worthy of treatment separate from that which has traditionally been given to private sector labor law. This treatment is provided by Russell A. Smith, Harry T. Edwards, and R. Theodore Clark, Jr., in Labor Relations Law in the Public Sector: Cases and Materials. The authors of this book are very well qualified to deal with the increasingly complex statutory and case law developments in 

9 The authors of the book under review state that 
[i]n contrast with the preemptive “federalization” in the private sector, the most important body of public sector labor relations law is state and local. Thus, there are wide variations, resting on differing judgmental evaluations and determinations of public policy. Indeed, the states have proven to be “laboratories” for socio-political experimentation in the development of the law in this area. 
P. vii. To some this uneven experimentation appears to be an advantage. See, e.g., Advisory Comm. on Intergovernmental Relations, Labor Management Policies for State and Local Government 113 (1960). To others it has meant that most public employees have enjoyed fewer basic organizational and bargaining rights than private sector employees. Public employee unions argue that their members are being used unjustifiably as the “white rats” which suffer from the experimentation in these laboratories. Address by Jerry Wurf, President of the American Federation of State, County, and Municipal Employees, Coalition of American Public Employees and American Arbitration Association Symposium on Equity and the Public Employee, March 25, 1974. 


11 Aside from the book under review, there has been only one other book on this subject designed for law school use. D. Wollett & D. Sears, Collective Bargaining in Public Employment (1971).
public sector labor law. Russell A. Smith is a distinguished scholar, law professor, and noted labor arbitrator; Harry T. Edwards is a law professor noted for his expertise in public sector labor relations; and R. Theodore Clark, Jr., is a Chicago attorney who has practiced and written in the field.12

In reviewing a textbook it is necessary to consider both its value as a scholarly contribution and its value as a teaching and learning instrument. The two values are not always synonymous, and often one of the two is sacrificed to place greater emphasis upon the other.

I

Scholarship Value

The fine scholarship of the book is its greatest asset. Without question, it is the most comprehensive treatment of public employment labor law yet in print. Even though public sector labor law is but a small part of the entire labor law field, the number of pages of text and materials is greater than the number of pages of five of the six existing labor law text books.13 Although the sheer bulk of the book may reduce its teaching use and effectiveness, the authors literally have left uncited almost no statute, case, or pertinent commentary in their efforts to provide an exhaustive coverage of the field. The statutory appendix is also lengthy and extraordinarily comprehensive in comparison with the usual such appendix.14

The organization of the book is not unlike the organization of standard texts covering private sector labor law. The initial chapter

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12 Russell A. Smith, is Professor of Law, Emeritus, University of Michigan; Harry T. Edwards is Professor of Law, University of Michigan; and R. Theodore Clark is a partner in a Chicago, Illinois, law firm.


14 P. viii. The statutory appendix contains 155 pages of statutory and related materials, including matter on state laws, New York City provisions, and various federal enactments dealing with public and private employees.

The authors also commit themselves to the unenviable but necessary task of providing annual supplements to the textbook.
provides an excellent overview of public employee organizations and points out many of the differences between the private and public sectors. But the heart of the book for most teachers will be Chapters 2-7, pertaining to rights of organization, bargaining, strikes and concerted activity, union security, and impasse resolution. These are the important policy areas which currently are in tremendous flux throughout the entire country. New cases will emerge, but many of the basic conflicts shown in the selected cases will persist. Basic policy conflicts are demonstrated in such areas as employee coverage, bargaining units, the obligation to bargain, scope of bargaining, union security, strikes, mediation, fact finding, and compulsory arbitration. Materials are included which demonstrate the older theories of government sovereignty, as well as newer legislation which grants to public employees many rights enjoyed by private sector employees.

For the most part, the materials are dominated by the laws and court decisions of those states having what the authors and other experts refer to as "comprehensive statutes." A comprehensive statute normally is considered to be one which provides election and representation machinery, employee rights provisions—including mandatory bargaining or at least meet-and-confer rights—, unfair labor practice provisions, impasse resolution procedures, reasonably complete employee coverage, including state and local employees, and a neutral administrative agency to administer the law.

The first state legislation was adopted fifteen years ago in Wisconsin. A few other states, like Michigan, New York, Connecticut, Hawaii, and Pennsylvania, have since adopted comprehensive legislation. But a large majority of the states have not. The failure to act in a comprehensive manner is not limited to a particular region or to rural states. Significant gaps exist in almost every area of the country. This failure is found in large industrial northern states—i.e., Ohio and Illinois—, many western states, and all of the southern states except Florida. Recognition strikes are still common in these areas. In the private sector and in those states which provide representation machinery in the public sector, recognition strikes have been almost eliminated.

15 This reviewer currently is undertaking a study of the adequacy of state regulation of public sector labor relations, pursuant to a University of Tennessee Research Grant. A more complete discussion of this issue, including detailed citation of pertinent authority, will be included in the final product of that research. However, some of the comments made in this and other paragraphs are based on information acquired while working under this grant. The assistance of the University of Tennessee in making this grant available is gratefully acknowledged.
The prospect for change in most states with no legislation does not appear to be great. Those states with labor relations climates conducive to such legislation have already acted. The states that have not acted are those where there is likely to be entrenched resistance.\textsuperscript{16}

Although it is understandable that the book concentrates on those states that have enacted comprehensive legislation, a reader unfamiliar with the field might well be left with the impression that most public employees are covered by adequate labor relations machinery. In fact, only about a dozen states have the kind of comprehensive legislation defined above. About three-fourths of the states have significant legislative omissions and limitations regarding employee rights, employee coverage, and the like. Many states still operate under no legislation or under judicial decrees that have placed an absolute prohibition on bargaining activities for such general reasons as "public policy."\textsuperscript{17}

Some of the selections in the book demonstrate fundamental problems relating to the role and attitudes of state courts in regulating labor relations in the public sector. In many of the cases the attitude toward collective bargaining is at best one of tolerance and at worst one of outright hostility and obstruction. The attitude of hostility is demonstrated by the following statement, typical of court decisions prohibiting collective bargaining:

The courts have said that as a general rule collective bargaining has no place in government service. The employer is the whole people. This is a government of law, not men. For the courts to hold otherwise than as I have just explained would be to sanction control of governmental functions not by laws but by men. Such policy, if followed to its logical conclusion, would inevitably lead to chaos.\textsuperscript{18}

Where comprehensive legislation is in effect, some state courts remain unwilling to recognize the broad purposes of the new laws as a means of resolving and balancing the conflicting interests between government and its employees. The authors' case selection demonstrates the narrow construction that many courts are giving to state laws concerning the duty to bargain, the scope of bargaining, and strike rights.\textsuperscript{19}


\textsuperscript{17} See, e.g., International Longshoremen's Ass'n v. Georgia Ports Auth., 217 Ga. 712, 718, 124 S.E.2d 733, 737, cert. denied, 370 U.S. 922 (1962).

\textsuperscript{18} Dade County v. Amalgamated Ass'n of Street Electric Railway & Motor Coach Employees, 157 So. 2d 176, 182 (Fla. 1963).

\textsuperscript{19} See pp. 720, 751-53. The authors reiterate comments made by one of them in an
Chapter 7, which deals with dispute settlement, is the best in the book. Perhaps because of the authors' wide experiences in dispute settlement, they cover the dispute settlement process as well as the statutory and case law concerning mediation, fact-finding, and arbitration. They also include discussion of the Canadian "arbitrate or strike" legislation which permits a union to choose between these two procedures for resolution of a dispute.\(^{20}\)

The chapter on enforcement of the collective bargaining agreement, Chapter 8, is a standard treatment similar in organizational and substantive format to treatments of this subject in the private sector, with due regard to the peculiarities of public employment. The final chapter, dealing with the political and civil rights of public employees, concentrates on constitutional issues, restrictions on political activities, and civil rights legislation. The constitutional discussion raises challenging and thought-provoking questions concerning freedom and liberty in our society. The topics include loyalty oaths, the freedoms of association and expression, procedural due process, and the right to petition. To some extent these topics are covered in other courses, such as constitutional law, equal employment law, and even labor law, but the authors suitably place them into the context of the public employment relationship.

II

VALUE AS A TEACHING AND LEARNING INSTRUMENT

The preceding comments were directed toward the content and organization of the book from the standpoint of its scholarship. Because of its exhaustive coverage and good organization, the book is a major achievement in the field. But the next important question to consider is whether the book is as valuable as a teaching and learning instrument. Here, the book may be subject to greater criticism, for the following reasons: (1) its volume alone could hinder the learning process; (2) it includes very few problems for the instructor to use as teaching aids; (3) it frequently concentrates on the legal framework to the exclusion of many other items of teaching interest, including questions of process, professional re-

earlier article as to the tenuous bases of court findings with respect to the damaging effect of public employee strikes, and the consequent unsoundness of leaving the decision as to the tolerable limits of public employee strikes entirely to the courts. \textit{Id. See also} Edwards, \textit{The Developing Labor Relations Law in the Public Sector}, 10 DUQUESNE L. REV. 357, 376-78 (1972).

\(^{20}\) P. 866.
sponsibility, ethical considerations, and the role of the attorney representing government, unions, and employees; and (4) it does not include sufficient information concerning the treatment of public sector labor relations under foreign systems of law.

It is true that the book contains either direct quotations from, or citations to, most of the significant statutes, cases, books, and articles on the important legal topics. But the primary purpose of a casebook, in the judgment of many, should be "to construct a teaching vehicle, not a hornbook." 21 We have reached a point in legal education, and perhaps have been there for some time, where it is not enough for textbooks to expand merely for the purposes of reciting the expanded law in an area. Because of its volume, this book may be of more value to the practitioner than the student. Many of the notes raise provocative questions; but frequently the notes are useless as a teaching tool, since they simply sweep the case names and articles into an imposing pile with little direction as to their use. Too often the question raised in the note is answered there as well, thereby totally discouraging any further inquiry by the student into the mass of citation.

These features may have resulted from the authors' attempts to appeal to a wide audience. The authors note that in addition to providing a set of teaching materials for use in law schools and in other educational contexts, they also sought to provide materials "which will be of interest and value to those directly concerned on a working basis with public sector labor relations (lawyers, administrators, officials of labor organizations and public employees)." 22 Certainly the goal of appealing to attorneys and other practitioners has been substantially met as a result of the exhaustive citations in areas subject to litigation. Some portions, in fact, are of even greater utility to attorneys than to students, especially those regarding procedural and related issues, such as exhaustion of judicial or administrative remedies, res judicata of litigation in state forums, remedies, parties, and standing to sue. This reviewer grants the value of such coverage to practitioners; the value to students is much less evident.

Teachers interested in using a "problem" approach might wish that the authors had spent some of their tremendous energies creating problems to be used in conjunction with the more conventional casebook materials, rather than devoting the entire work product to a compilation. At an elementary level, this would

21 W. Oberer & K. Hanslowe, supra note 13, at xii.
22 P. vii.
involve the creation of illustrative labor relations problems involving governmental units and their employees or representatives. Such problems would be followed not by the answer but by reading references which would aid in the solution of the problems presented. More advanced problems could involve student role-playing, drafting, and similar methods. Many teachers today are finding that the problem approach, when used in conjunction with more conventional material, can provide a great stimulus to class discussions and can frequently bring the students closer to the real nature of labor relations.\textsuperscript{23}

At the outset, the authors determined to “concentrate on the legal framework”\textsuperscript{24} in dealing with collective bargaining. Except for the chapter on dispute settlement, their approach tends to neglect the importance of learning the labor relations process. The law frequently provides only a skeletal framework from which the basic employer-employee relationship is established. The modern attorney representing government or governmental unions cannot feel secure simply by learning the statutes and court decisions of his state. Too often, government attorneys and others have emphasized the law to the exclusion of any consideration of the overall relationship of the parties, and without any attempt to consider the development of a constructive and harmonious approach to the problem. The government attorney cannot rely solely on real or imagined legal restraints. He must understand fully the employee relations context of his recommendations, including the institution and values of collective bargaining.

To discuss the constructive aspects of the labor attorney’s role is not to suggest that a teacher ignore problems which occur when the employer-employee relationship or the institution of collective bargaining breaks down, since lawyers must deal with such problems. But studying the legal framework alone, without also learning the context of the framework from an institutional, political, and sociological point of view, is insufficient.

The book also is devoid of any material intended to infuse a sense of professional responsibility into the lawyer engaging in public sector employment relations. Yet labor lawyers in particular are placed in situations calling for the exercise of professional responsibility and the implementation of ethical considerations. Often, an attorney may be negotiating directly with representatives

\begin{footnotes}
\item[24] P. viii.
\end{footnotes}
who are not attorneys. When lay people are involved, should the attorney apply a higher standard to ensure that they completely understand the proposals to which they are agreeing? If the other side is proceeding under an incorrect assumption, or a misunderstanding of the facts, is it the obligation of the attorney to correct misunderstandings even though he may lose an advantage at the bargaining table? These questions indicate that there is frequently a very thin line between legitimate hard bargaining and the illegitimate taking of unfair advantage of the opposition.25

Similarly, where is the line drawn between legitimate argument and unprofessional provocation? Between valid cooperation and unethical connivance? Problems of professional responsibility occur regularly when lawyers deal with organizational campaigns, collective bargaining, unfair labor practices, arbitrations, and other labor matters. The development of an ethical framework in labor relations must be a part of the labor law curriculum. The usual law school course in professional ethics spends little, if any, time on professional responsibility in the labor relations context. With a few notable exceptions, law firms do not normally include such questions in their training programs. Experience may be helpful, but too often such experience is gained as a result of engaging in unprofessional conduct and suffering the consequences thereof. A few authors have been successful in placing problems of professional responsibility in the labor relations context for student use.26 Yet a text in labor relations law is substantially incomplete without consideration of such problems.

Finally, the book could have been improved as a teaching tool by inclusion of more comparative material on the subject of public employment labor relations. Although conclusions cannot be lightly drawn from foreign experience without consideration of the entire sociological, political, and economic framework, some useful insights can be obtained by reviewing the experience of foreign countries.27 Many countries have innovated much more readily in

25 These questions are raised and answered affirmatively in a manual prepared by a Milwaukee, Wisconsin law firm for internal use of its members. Mulcahy & Wherry Service Corporation, Clarification of Standards and Guidelines for Ethical Conduct 6-7 (June 5, 1974) (on file with the author).


public employment labor relations than has the United States. Foreign material on the subject also is more readily available than it once was. The authors did refer to Canadian laws regarding impasse resolution. Similar references to other foreign experiences, where appropriate, could have sharpened the focus of the various policy questions raised throughout the book.28

**Conclusion**

Considered within the framework of traditional casebooks, *Labor Relations Law in the Public Sector: Cases and Materials* is an organized and exhaustive scholarly achievement. But a mere collation and summary of existing material—*i.e.*, statutes, cases, and article excerpts—is no longer enough in the field of labor relations. Creation of original problems for use as teaching aids and greater consideration of problems of process, professional responsibility, and related concerns are necessary ingredients for a functional and complete textbook.

Robert B. Moherly*

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28 Authors of labor law textbooks have, from time to time, enriched their books by the addition of comparative law material. See, *e.g.*, R. Mathews, *Labor Relations and the Law* (1953); H. Sherman, *Unionization and Collective Bargaining* (2d ed. 1972).

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