Public Sector Bargaining: Problems of Governmental Decisionmaking

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PROBLEMS OF GOVERNMENTAL DECISIONMAKING

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My assigned function is to give the "keynote" for this symposium, a puzzling, if not pretentious, function. The term "keynote" is commonly used to describe the opening address of a political convention. The purpose of such a keynote is to generate enthusiasm for the election of an unnamed candidate on an undecided platform with a speech which is "full of sound and fury, signifying nothing." Hopefully, I will not perform that function. Perhaps the keynote should provide the key to unlock the doors to an understanding of public employee bargaining. But Theodore Clark's paper makes it look more like Pandora's box which has loosed a plague of political evils. My keynote function is a modest one: to provide a key to the map of public employee bargaining which is spread before us all, in order that we may reach some better understanding of what we are viewing, see the contours of the terrain, and find our way to where we want to go.

I. THE UNIQUENESS OF PUBLIC SECTOR BARGAINING

It is a threadbare truism that bargaining in the public sector is different from bargaining in the private sector, but the differences are often described in unhelpful detail, too much like the four blind men describing an elephant. Such descriptions will not help us either to make it work or to keep it under control. We ought, therefore, to describe the differences in more general and fundamental terms. To do that, we must start with the basic question: What, exactly, is unique about public sector bargaining?

There is nothing unique about public employees; they are no different from employees in the private sector. They have the same capacities, the same needs, and the same values; they seek the same advantages and the same gains. Many public sector employees previously have been, and with present trends perhaps even more will again become, private sector employees.

There is nothing unique about the work which public employees perform. The private sector has school teachers, nurses and social workers, as well as secretaries, bookkeepers, janitors, maintenance employees, con-

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struction workers, and rubbish collectors. There are private police, private detectives, private armed guards, and even private firefighters. Nor is the work necessarily any more critical because it is performed by public employees. Strikes by parochial school teachers create substantially the same inconvenience as strikes by public school teachers. A strike by janitors in public buildings may create fewer problems than a strike by janitors in private apartment buildings. A disruption in garbage collection may be less serious than a disruption in electric power or telephone service.

The uniqueness of public employment is not in the employees nor in the work performed; the uniqueness is in the special character of the employer. The employer is government; the ones who act on behalf of the employer are public officials; and the ones to whom those officials are answerable are citizens and voters. We have developed a whole structure of constitutional and statutory principles, and a whole culture of political practices and attitudes as to how government is to be conducted, what powers public officials are to exercise, and how they are to be made answerable for their actions. Collective bargaining by public employers must fit within the governmental structure and must function consistently with our governmental processes; the problems of the public employer accommodating its collective bargaining function to government structures and processes is what makes public sector bargaining unique.

To state the difference another way, in private sector bargaining we have never been concerned with how the employer decided on the policy to be brought to the bargaining table. We have been concerned with the union’s decisionmaking process, requiring the union to observe minimal democratic standards, but we have not been concerned with the corporation’s decisionmaking process. All that the law has required is that the employer send someone to the bargaining table who has authority to speak for and to bind the employer. Who instructs the negotiator, how his instructions are determined, and what his instructions may be is for the corporation to decide. The corporation’s decisionmaking process is of no concern in collective bargaining; it is of little concern to the law.

When the employer is government, however, the employer’s decision-making process becomes of central concern in both legal and political terms. The policies brought to the bargaining table are governmental policies. State constitutions and statutes, city charters and ordinances may prescribe procedures as to how those policies are to be decided, specify what bodies or officials shall make those decisions, and impose limitations on the decisions which can be made.

More specifically, in the private sector, the employer must send some one to the bargaining table with authority to make a binding agreement. In the public sector this may not be legally possible or politically sensible. Wages and other benefits directly affect the budget and the tax rates; but adopting budgets and levying taxes are considered, within our governmental system, fundamental legislative policies to be decided by the legislative
body, not by a negotiator at the bargaining table. Dismissal procedures may be subject to constitutional requirements which limit the procedures which can be negotiated. Promotion policies may be governed by civil service principles which are written into the city charter and cannot be eliminated by bargaining. Modifications in state pension plans cannot, in most states, be made binding by negotiators, but must be ratified by the legislature. In the public sector, agreement at the bargaining table may be only an intermediate, not a final, step in the decisionmaking process.

Collective bargaining by a governmental employer is different because governmental decisionmaking is different. The unique problems, and the ones of central concern, focus on how government makes its decision. The unique and interesting legal problems are created by legal limitations on governmental decisionmaking. Beyond the legal problems, however, are the far more important ones of how the governmental decisions in collective bargaining ought to be made. The problems are more in the realm of political science than of labor relations. Our central concern is not, as in the private sector, with what will facilitate bargaining and reaching agreement, but with what are appropriate processes for governmental decisionmaking.

Two cases illustrate this crucial difference between the central questions in public sector and private sector bargaining. In Madison School District v. Wisconsin Employment Relations Board,¹ a school teacher at a public meeting of the school board presented a petition urging the board not to agree to a "fair shares" provision in the agreement then being negotiated with the union. The board was charged with a prohibited labor practice for allowing the teacher to speak and for accepting the petition. In the private sector such conduct is barred because it may weaken the union's position as exclusive representative and may interfere with the bargaining process. In the public sector, we must confront the question whether citizens, teachers or otherwise, shall be allowed to make their views known to public officials on public issues. Beyond the constitutional issues of free speech and the right to petition is the judgmental question whether those making governmental decisions should be barred from hearing all views and opinions of all citizens before making decisions. The central concern is not the collective bargaining process but the governmental process.

In Detroit Police Officers v. City of Detroit,² the voters of the city wrote into the city charter the benefits payable under the police and firemen's pension plan. As a result, those benefits could be changed only by referendum. This, of course, impeded the bargaining process; but that does not end the inquiry in the public sector. The legal question is whether the collective agreement can override the results of a referendum, but the

¹. 231 N.W.2d 206 (Wis. 1975).
². 214 N.W.2d 803 (1972) 341 Mich. 44.
crucial political question is who should have the final voice in determining the city's pension obligations. When we realize that the pension plan may create a larger long term obligation than any bond issue, creating a lien of undefined size for an indeterminate period, there are strong arguments for requiring voter approval, even though that impedes bargaining. Again the question is not what will facilitate bargaining, but what is the appropriate way of making the governmental decision. If certain acts may, in some measures, impede bargaining as we have known it in the private sector, that cannot end our inquiry. Our ultimate concern is not to make collective bargaining work, but to make government work. My first and basic proposition, then, is that in public employee bargaining, the fundamental issue to which we should be addressing ourselves is how the decisions of government should be made.

II. THE POLITICAL NATURE OF PUBLIC SECTOR BARGAINING

My second and subordinate proposition is that the major decisions made in bargaining with public employees are inescapably political decisions. They are political decisions in at least three senses. First, they involve critical policy choices. The matters debated at the bargaining table and decided by the contract are not simply questions of wages, hours, vacations and pensions. Directly at issue are political questions of the size and allocation of the budget, the tax rates, the level of public services, and the long term obligations of the government. These decisions as to budgets, taxes, services, and debts are political in the second sense that, within our system of government, they are to be made by the political branches of government—by elected officials who are politically responsible to the voters. Indeed, these decisions generally are considered uniquely legislative and not subject to delegation. Finally, these decisions are political in the ultimate sense that those making the decisions will do in the political market what business men do in the economic market—maximize their gains and minimize their losses. Politically elected officials in bargaining seek to maximize votes rather than profits.

The major decisions made in public employee bargaining not only are political, but in my view must be, and ought to be, political. The size of the budget, the taxes to be levied, the purposes for which tax money is to be used, the kinds and levels of governmental services to be enjoyed, and the level of indebtedness are issues that should be decided by officials who are politically responsible to those who pay the taxes and seek the services. The notion that we can or should insulate public employee bargaining from the political process either by arbitration or with some magic formula is a delusion of reality and a denigration of democratic government.

These two propositions—that our central concerns should be the processes of governmental decisionmaking, and that the governmental decisions made in collective bargaining are political decisions—focus our inquiry on the working of our political processes when decisions concerning
terms and conditions of employment for public employees are made. Within this framework, which has a multitude of facets and difficult questions, I want to deal briefly, and in grossly oversimplified fashion, with three questions, more to focus on problem areas than to provide solutions. First, what is the alignment of political interest groups when decisions concerning terms and conditions of employment are made? Second, how does collective bargaining change the political effectiveness of the competing interest groups? Third, what are some of the special conditions which may impair the political process or significantly affect the balance of political forces?

A. The Political Alignment in Public Employment Issues

In most general terms, the demands of public employees are at the expense of the taxpayers and the users of public services. This is true whether or not there is collective bargaining. If a city's employees demand a wage increase, this can be granted only by increasing taxes or by reducing the number of employees and, in turn, the level of services. If the police demand two men in a patrol car, this can be met only by hiring more police or by reducing the number of patrol cars. The political alignment in decisions concerning terms and conditions of employment for public employees, therefore, finds on one side the public employees, who want higher wages and benefits with lesser work loads, and on the other side the taxpayers, who want lower taxes, and the users of public service, who want more and better services.

This clash of interests can be extremely sharp. Because wages normally make up 65 to 70 percent of a city's current budget, a general wage increase will increase significantly the tax burden. Where the city's primary revenue source is the property tax, any increase is plainly visible in the mill rate and keenly felt in the annual tax bill. Reductions in services may be less visible and may affect only selected groups, but they still generate significant opposition.

In the political contest, public employees are greatly outnumbered by taxpayers and users of public services. Public employees may compensate for this by the intensity of their interest and political activity, their greater cohesiveness, and their easier access to the machinery of government. Even at best, however, they may be no match for organized taxpayers, parents, or community groups and others demanding public services. Whatever may be the balance of political power, and there may be sharp disagreement both as to what it is and what it should be, the basic alignment is the public employees on one side and the taxpayers and users of public service on the other side. Therefore, our inquiries ought to be directed not only to the question of the proper balance, but also to how various factors may affect that balance. Only after such inquiries can we decide sensibly how to construct and manage a public employee bargaining system.
B. The Effect of Collective Bargaining on the Political Balance

Collective bargaining creates a special process for making decisions concerning terms and conditions of employment. That process significantly increases the effectiveness of the public employees' voice in those decisions in several ways. First, the principle of exclusive representation gives public employees a unified and authoritative voice. The majority union becomes the sole spokesman for the employees, and an agreement with it settles the terms and conditions for all employees in the unit. The ability to speak with a single voice and to provide a binding settlement gives added force and political weight to that voice in the public forum.

Second, the bargaining process gives public employees special access to the political process. They are not limited to speeches at public meetings, petitions, circulars or personal presentations, as other interest groups are. The union, representing all employees in bargaining, can compel responsible officials to sit down at the bargaining table, confront them face to face, engage in discussion, respond to arguments, state positions, provide reasons and supply information. The process of interchange continues through countless meetings of interminable hours until either agreement is reached or all possibilities are exhausted. This direct and intensive access to responsible officials, with its structured process of persuasion, gives the union an especially effective voice in the decisionmaking.

Third, because bargaining normally comes before the budget is adopted, public employees may obtain prior consideration of their interests, with collective agreements worked out before other sets of decisions are made. Once the agreement is made, the ability to consider other interests becomes limited. Even tentative agreements made at the bargaining table by negotiators who do not have the power to bind cannot be rejected without political costs. The agreement carries a political force of its own, giving it a measure of priority over competing claims.

Fourth, if bargaining is conducted behind close doors, as is customary in the private sector, the union's voice gains added effectiveness. The public official is confronted with the union's demands and arguments without direct exposure to the competing demands and arguments. The pressures of hard bargaining through extended sessions push toward acceptance of the union's demands at the expense of other interests which are unable to make their weight felt because they do not know what is being decided at the bargaining table. Once an agreement, even a merely tentative one, is reached at the bargaining table, the opposing interests are placed at a substantial political disadvantage. The issue becomes whether the agreement should be repudiated, rather than what agreement should be made in the first place.

Fifth, the union by obtaining bargaining rights can build an organizational structure and develop resources to be used in political forums other than bargaining. Practically, though not legally, it becomes the voice of the employees on all political issues. More importantly, it may pro-
vide the organizational base, if not the financial means, for electing those who support their bargaining demands and defeating those who oppose them.

I would emphasize that the political effectiveness of public employees and their organizations does not necessarily depend upon collective bargaining. Organizations of policemen and firemen were politically powerful in many cities long before they obtained bargaining rights. Teachers’ organizations were able to obtain salary increases, reduced classes, and many other benefits even when they shunned the words “bargaining” and “negotiations.” These organizations were able to bring effective pressure to bear through the ordinary political channels available to other interest groups.

Collective bargaining, however, does provide a special process available only to public employees, and equally available to all classes of public employees. It significantly increases the political effectiveness of public employees in determining their terms and conditions of employment, particularly relative to other competing political interest groups. This does not mean that collective bargaining gives public employees dominant political power or enables them to obtain more than their fair share. Arrayed against public employees are the massive interest groups of taxpayers and the users of public services. Nearly every voter is threatened in one or even both capacities by union demands which must increase either the size of the budget or the share allocated to labor costs or both. Those interest groups are not only massive, but are capable of effective political organization, as anyone who has confronted taxpayers’ leagues, parents’ organizations, property owners’ associations, or chambers of commerce well knows. In my view, one of the principal justifications for public employee bargaining is that most public employees need this special process to give them an ability to counteract the overriding political strength of other voters who constantly press for lower taxes and increased services.

Even collective bargaining without the availability of the strike often leaves public employees in a vulnerable political position. I have seen too many cases of taxpayers who, having received wage and salary increases themselves, and daily paying more for every good and service they buy, adamantly insist that their public employees continue to render the same service at the same wage. The repeated refrain at bargaining tables by those representing the public employer, particularly during the last three years, has been: “We must hold the line. The taxpayers will not stand for an increase.” Nor have these been empty claims, as the wreckage of defeated tax and bond referenda testify. Anyone who still believes that public employee unions can ride roughshod over opposing interest groups should examine the results of the recent voting, on both candidates and referenda, in San Francisco.

My central point here, however, is not that collective bargaining gives public employees too much or too little political effectiveness. That is a
debate for another day. My purpose here is only to map out in the boldest relief the competing political forces which operate when decisions are made as to the terms and conditions of public employment, and to point out how collective bargaining affects the relative effectiveness of those competing political groups.

C. Some Special Problems of Political Process

Collective bargaining by public employees creates unfamiliar problems of political process which at times place unusual stress on that process. Our ability to construct and manage a system of public employee bargaining depends largely on our identifying and understanding those problems, five of which are briefly sketched below.

First is the problem of the smoke-filled room—the problem created by the parties' insistence that bargaining be carried on behind closed doors. It may be that in the private sector secret bargaining facilitates reaching agreement. However, the bargaining is often less secret in fact than in form. Moreover, though secrecy may facilitate agreement at the bargaining table, it may frustrate ratification by the members. But in the public sector, agreements made in smoke-filled rooms are necessarily suspect. In principle, it is inappropriate to have public decisions affecting taxes, budgets and public services made by unions and public officials behind closed doors, so that the public has no knowledge of what is going on until presented with an agreement.

Such secrecy, by precluding any political reaction by other interest groups while the agreement is being worked out at the bargaining table, creates debilitating consequences. When the tentative agreement is presented, the public does not know what the issues were at the bargaining table, what facts were presented, or what considerations entered into what compromises. One consequence is public apathy and a sense of hopelessness in making any critical judgment of the agreement, with the result of blind acceptance of questionable agreements. At the same time there is generated public distrust, with a willingness to blame the financial ills of the city on its collective agreements. The distrust, in turn, leads later to repudiation by the taxpayers of even the most modest agreements; ultimately, it creates resistance at the bargaining table to reasonable union demands. The smoke-filled room manifestly frustrates the democratic process and ultimately impedes the bargaining process. I am suggesting not that public employee bargaining be conducted in a goldfish bowl, but only that the smoke-filled room be opened occasionally to let in a little light and fresh air, and to let out public knowledge of the issues, the positions of the parties, and the progress toward agreement.

The second problem I would like to sketch is the problem of the hand-wringing politician—the public official who claims he is unable to withstand the pressures generated by the union for unreasonable demands. If he believes the union's demands are unreasonable, he should be marshalling
the opposing political forces—the taxpayers and the users of public services who have massive political potential—instead of wringing his hands. The voters often do not realize the ultimate consequences of a union demand and so do not react. If the police demand a 12 percent increase, the cost may not seem substantial, but granting this demand may require equivalent increases for all other public employees. By making taxpayers aware that what might seem like a minor cost increase will set off a chain reaction resulting in a 3 mill tax increase, a political leader can build a more than adequate political counterforce to offset the union's pressure. Similarly, demands for increases by employees in public works can be translated into terms understandable to voters, such as less snow removal, more potholes in the streets, unkempt parks, and unlighted streets. A political leader who is unable to make that translation and who informs the voters that he feels compelled to surrender to excessive union demands should be allowed to wring his hands a final time on election night.

The third problem is what I call the political buck-passer—the political official who buys a settlement with the union by passing the financial burden on to future budgets and future taxes. The paradigm example is the increase in pension benefits which is not fully funded out of the current budget, so that taxpayers are not aware of the costs of settlement which they must bear in future years. A more visible, and therefore less effective, form of buck-passing is the two- or three-year contract with the rear-end load, or even the one-year contract made before election which requires no increased taxes until after election. In these cases, the employees appreciate fully the value of the benefits, but the taxpayers do not feel the cost until it is too late to respond politically, for those who made the settlement may have promoted themselves to higher office or retired to private life.

Eliminating political buck-passing entirely is impossible, but legal restrictions could be put on pension plans to require that current financing reflect current costs, and that future costs be realistically estimated and be approved in the same manner as that required for long term bonded indebtedness. Perhaps we also should put legal limits on contract duration, so that the political officials responsible for negotiations can be held politically responsible for their agreements.

The fourth problem is the problem of strange political bedfellows, a problem that is probably less prevalent in collective bargaining than in other political decisions, but which in many respects is more troubling. The normal political alignment, as I have pointed out, joins the taxpayers and the users of public services in opposition to the demands of public employees. But this is not always the case. If teachers demand a reduction in class size to lighten their teaching load, their demand may be supported by the parents who see smaller classes as providing better schools. Parents also may see higher teacher salaries, tuition payment benefits, and many other teacher demands as improving the quality of
education for their children. Although the parents are taxpayers, they do not pay the full cost, for non-parents, parents with children no longer in school, businesses and industries must pay a share of the increased taxes. The result is that the parents, as users of the service and as taxpayers, become political bedfellows with the teachers' bargaining representative, leaving the remaining taxpayers vulnerable to their combined pressure.

This problem of political misalignment may take an even more troublesome form. When union demands impose increased costs, the political response may be not to increase taxes or to reduce services generally, but to obtain the necessary funds by selectively cutting services of politically impotent groups. Thus, wage increases may be granted by cutting welfare benefits, letting playgrounds deteriorate, closing public hospitals, or reducing garbage pick-ups in ghetto areas. The union is kept happy, the opposition of taxpayers is neutralized, and most users of public services are unaffected. The opposition is limited largely to groups whose political voice at the polls is less effective than the union's voice at the bargaining table.

Finally, I want to call attention to what may be the most difficult problem of all, the problem of anesthetized taxpayers—that is, taxpayers who are unaware of the pain of paying taxes. In local political units where most voters are homeowners and where the primary source of revenue is the property tax, every increase in taxes is felt keenly and generates strong political reaction. But in cities where many voters rent housing rather than own homes, tax increases will not generate as much reaction, for most renters are quite unaware of property tax increases, which are buried in rent increases. Even the best efforts of the landlord to persuade renters that their higher rent is due to higher taxes will seldom succeed. Although renters are in fact taxpayers, they do not react as taxpayers. As a consequence, they do not provide a reservoir of political resistance to union demands. In large cities where renters may constitute a majority of the voters, the dominant pressure may be for increased services and increased wages, regardless of the increased taxes. To the extent that reliance is placed on sales taxes or payroll taxes, the taxpayer may be roused from his slumber, but taxpayers are probably less sensitive to these than to property taxes.

I have no adequate answers for the last two problems—the problem of strange political bedfellows and the problem of anesthetized taxpayers. These exist quite apart from collective bargaining. The politics of budgetmaking is customarily one of promiscuous bedfellowship, and anesthetized taxpayers demand services with indifference as to costs, regardless of unions. The added pressures of collective bargaining have simply aggravated these problems and called them again to our attention.

These shifts in political alignments and the failure of taxpayers to react to increased labor costs create disparities in bargaining power and may
lead, in some situations, to high labor costs. A partial, though admittedly unsatisfying, answer is that we accept comparable conditions in the private sector with scarcely a quibble. Although some industries, such as the textile industry in the South, unions cannot bargain effectively and can barely survive, in other industries, such as local haulage, employers may be unable to resist union demands. In the private sector we have employers and unions purportedly bargaining against each other but actually combining to pass off high labor costs to the consuming public. There is one signal difference: in the private sector the consumers who pay have no possibility of voting out of office those who negotiated the agreements. If we examined private sector bargaining as critically as we do public sector bargaining, we might conclude that it has as many, or more, troublesome problems than public sector bargaining.

III. Conclusion

My purpose here is not to judge whether public sector bargaining is a bane or a boon. Nor is it to argue that collective bargaining gives public employees too little or too much political effectiveness. My primary concern at the moment is that we ask the right questions, for that must precede finding the proper answers. The significant questions in public employee bargaining are questions of governmental decisionmaking: By what process shall these important policy decisions be made, and by whom? The answers will not be found by comparing bargaining in the public sector with bargaining in the private sector, nor by asking simply what will facilitate bargaining. They will be found only by examining critically the impact of bargaining on the political process and asking what will improve that process within the premises of democratic government. The five problems I have sketched are intended only as samples of the difficulties which we must recognize and try to meet as problems of political process. There are others of the same order, which we must confront if we are to construct and manage a system of collective bargaining appropriate to governmental decisionmaking.