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COLLECTIVE BARGAINING

IN

AMERICAN GOVERNMENT

Report of the
Western Assembly
May 11-14, 1972
Highlands Inn
Carmel, California.

Sponsored by
The Institute of Industrial Relations, UCLA
and
The American Assembly,
Columbia University.

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PREFACE

WESTERN ASSEMBLY ON COLLECTIVE BARGAINING IN AMERICAN GOVERNMENT

On May 11, 1972, a group of some eighty persons from the Western states and Washington, D.C. representing unions, the branches of government (federal, state, county, local), business, communications, the legal, and academic professions met at Highlands Inn, Carmel, California, for the WESTERN ASSEMBLY ON COLLECTIVE BARGAINING IN AMERICAN GOVERNMENT. For three days, the participants discussed in depth the problems of collective bargaining in the public service. On May 14, in plenary session, they reviewed and approved a final report of findings and recommendations, which appears in the following pages.

The Assembly, jointly sponsored by the Institute of Industrial Relations (University of California, Los Angeles) and the American Assembly (Columbia University), was under the direction of Benjamin Aaron, Professor of Law and Director of the Institute. During the Assembly, formal addresses were given by Sam Zagoria, Director of the Labor-Management Relations Service, Professor Charles C. Killingsworth, Michigan State University, and Donald B. Straus, President of the Research Institute, American Arbitration Association. Background papers for this Assembly were edited by Mr. Zagoria and have been published in book form by Prentice-Hall (Public Workers and Public Unions).

The final report and recommendations represent the general agreement of the participants at the Assembly, but it should not be assumed that any of them subscribed to everything in the document. A variety of approaches to assist in solving problems in the field of collective bargaining in government were discussed and explored. Among the most significant of the recommendations of the group were:

1. The endorsement of the principle of collective bargaining for employees at all levels of government, including the requirement that government employers be required to bargain collectively with organizations selected by the majority of employees.

2. The scope of collective bargaining in the public sector should be defined by legislation to include wages, hours, and other terms and conditions of employment.

3. All federal, state, and local employees (except for members of the armed services) should have the right to strike in order to make genuine collective bargaining possible.

Other major consensus recommendations covered the areas of minority relations and collective bargaining, union security, and wage setting procedures and budget and revenue procedures.

It is expected that, especially in the Western states, these recommendations will be influential in setting important guidelines for public policy on this vital issue.

Report of the Western Assembly
on
Collective Bargaining in American Government

At the close of their discussions the participants in the Western Assembly on Collective Bargaining in American Government, at Highlands Inn, Carmel, California, 11-14 May 1972, reviewed as a group the following statement. The statement represents general agreement; however, no one was asked to sign it. Furthermore, it should not be assumed that every participant subscribes to every comment or recommendation.

Collective bargaining at all levels of government--federal, state, county and municipal--is no longer a mere possibility, to be hailed or deplored; it is a fact. The most important single development in labor relations in the United States in the past decade has been the rapid growth of employee organization in the public sector. From 1960 to 1968 the number of government employees who belonged to unions or associations increased from a little over 1 million to 2.2 million.

Development of collective bargaining in the public sector, though pervasive, has been uneven. Labor relations between the Federal Government and its employees are regulated by an Executive Order. Twenty-one states have enacted fairly comprehensive statutes; 15 states have passed separate laws dealing specially with teachers; and 10 have done the same in respect of firemen, policemen, or both. There is a sharp divergency, however, in the underlying policies of these various state laws. Some embody the so-called "meet-and-confer" principle, which assumes fundamental differences between the public and private sectors, among them a need for greater protection of management rights in the former. Others adopt the principle of collective bargaining as it has developed in the private sector. Recent trends unmistakably favor the latter approach.

There has also been a substantial increase in the number of ordinances regulating the relations between counties, cities, and municipalities and their employees. These ordinances manifest the same diversity found in the various state laws.

With the rapid growth of organization among government employees and the proliferation of legislation applicable to them have come a number of problems that call for solutions based upon consciously adopted policies. Some--but by no means all--of the most pressing of these problems have been explored by this Western Assembly and are the subject of the comments and recommendations set forth below.

1. Rights of Government Employees to Organize

Government employees at all levels should have the same rights as employees in the private sector to form or join organizations without reprisals of any kind. This constitutional freedom of association necessarily embraces the right to refrain from joining any organization of employees.

As in the private sector, questions arise concerning the scope of the right of association, particularly in respect of such categories as bona fide supervisory personnel and plant security forces. The consensus of the Assembly is that bona fide supervisory personnel and security forces should be permitted to join employee organizations, but that they should not have the statutory right to be included in the same bargaining unit with other categories of employees in the same establishment.

The Assembly endorses the principle of collective bargaining for government employees. When the majority of such employees in an appropriate unit chooses a labor organization as its bargaining agent, the government employer should be required to bargain collectively with that organization. Both parties have a duty to bargain in good faith in an effort to conclude a collective agreement covering the employees concerned.

2. Rights of Government Employers

Freedom of expression is a constitutional right. This guarantee is meaningless if it does not protect the right to state views that are opposed by those to whom the speech is addressed. Government officials who are against the organization of their employees have the right to say so, regardless of their rank or whether elected or appointed.

There is a distinction, however, between the statement of opposition and the use of threats or the resort to interference, intimidation, or discrimination based on that opposition. Experience in the private sector indicates that this distinction is neither clear nor broad; rather, it is a narrow and shifting one that is often extremely difficult to draw. The Assembly supports the policy that no government employer should be permitted to interfere with, intimidate, or discriminate against its employees because of union activity. It believes that this policy must be shaped and developed over time on the basis of actual cases coming before appropriate administrative agencies and the courts.

3. The Need for Legislation

The slowness of many states or their political subdivisions to enact legislation adequate to deal with the rapid emergence of problems related to public-sector labor relations has resulted in proposals for a federal law that will preempt the field in the same way that the Taft-Hartley Act does so in the private sector. It is argued in support of this view that the problems involved are nation-wide and should be dealt with uniformly. Similarly, it has been proposed that state statutes be made applicable to

all government employees within their geographical boundaries. Finally, it has been proposed that the present Executive Order covering federal employees be supplanted by a comprehensive federal statute.

Opponents of a federal law preempting the entire field argue that in the public sector, unlike the private, the states do constitute, in Justice Holmes' familiar phrase, "insulated chambers" for "the making of social experiments that an important part of the community desires." They also point out that a number of states have already enacted public employee collective bargaining statutes that are more innovative than any law likely to be adopted by the Congress. Similar reasons are advanced for permitting diverse approaches by the states and their political subdivisions. The argument against a collective bargaining law for federal employees has been predicated largely on a concept of governmental sovereignty that has become, for all practical purposes, defunct.

The consensus of the Assembly is that on the issue of federal versus state legislation a constructive compromise is feasible and desirable. Congress should enact into law, applicable to all states, basic minimum standards relating to the right of government employees to organize and to bargain collectively and procedures for the orderly resolution of bargaining impasses and the settlement of grievances. No specific or exclusive procedures should be written into such standards. States that meet those minimum standards should be free to adopt any additional statutory policies or procedures desired by their citizens. The same guiding principle should apply to the relations between the states and their political subdivisions.

The Assembly endorses the proposal that Congress enact a law regulating the relations between the Federal Government and its employees.

4. The Merit Principle, Seniority, and the Rights of Minorities

There is a pervasive confusion over the meaning of the terms "merit principle" and "merit system." The former embodies the requirement that employees be recruited, selected, and advanced under conditions of political neutrality, equal opportunity, and competition on the basis of merit. The latter, for which "civil service system" is commonly used as an interchangeable term, has come to encompass comprehensive programs of personnel management, unilaterally initiated and administered by the government employer.

As so defined, a merit or civil service system is basically incompatible with a collective bargaining system and must in time be absorbed or replaced by the latter. There is nothing essentially inconsistent, however, between the merit principle and collective bargaining. Contrary to a common misapprehension, the concepts of seniority and merit are not antithetical. As generally applied in the private sector, seniority ensures that among employees whose skill and capacity are not significantly different, length of service shall be the controlling factor in the case of promotions, layoffs, and the like.

Although collective bargaining has proved to be an extremely versatile tool, it is inadequate for some purposes. Specifically, it is not a sufficient means of eliminating employment discrimination by age, race, ethnicity, and sex. The Assembly recognizes, therefore, that the legitimate aspirations and demands of those disadvantaged groups can be realized only if the collective bargaining process is undergirded and supplemented by statute. Accordingly, the Assembly endorses the enactment and enforcement of legislation uniformly applicable to the public as well as the private sector that requires employers actively to recruit and to use the skills of employees from these groups; to train those who have the potential but lack the necessary skills, so that they can eventually qualify for more desirable and rewarding jobs at all levels; and to refrain from imposing invidious or irrelevant requirements or using tests that have no reasonable relation to the job skills required.

5. Legislative Regulation of Collective Bargaining

The question whether there should be laws limiting the subjects of collective bargaining in the public sector arises out of the traditional belief that there are significant differences between the public and the private sectors that require, among other things, a greater leeway for the exercise of unilateral managerial discretion in the former. This belief has been increasingly challenged in recent years by government employees, who claim the same right to a voice in decisions affecting their wages, hours, and working conditions as that possessed by workers in the private sector. But the problem is not that simple. In government the basic policy-making decisions are primarily the responsibility of legislative bodies, while collective bargaining is engaged in by governmental agencies whose duty it is to effectuate those policies. In the private sector, by contrast, the same parties legislate and administer the rules mutually agreed upon for their self-government. Thus, the question whether public employees should be permitted to bargain over issues of public policy, and possibly to reach mutually inconsistent results in various agencies charged with closely similar responsibilities, has no exact analogue in the private sector. Another issue common to the public sector is the negotiation of professional standards.

The consensus of the Assembly is that the scope of collective bargaining in the public sector shall be defined by legislation to include wages, hours and other terms and conditions of employment. The Assembly anticipates that, over time, these matters will be clarified or resolved largely by administrative and judicial decisions.

In some instances, federal and state legislatures will be compelled to adopt legislation that supplants or supplements collective bargaining on some issues in the public sector. Retirement benefits, for example, cannot be negotiated by a governmental entity individually with each bargaining unit of its employees; typically, a single plan is applied to all. The determination of such a plan may be based in part on the known wishes of the employees involved; but the ultimate decision is the responsibility of the appropriate legislative body.

The Assembly opposes "end runs" on bargained issues by public employee organizations to obtain from legislative bodies what they were unable to gain in collective bargaining. It also opposes similar efforts by government agencies to deprive their employees of benefits gained through collective bargaining.

6. Special Categories of Public Employees

The Assembly opposes enactment of special laws governing the bargaining rights of policemen, firemen, or teachers. In most respects there is no persuasive reason for treating these categories of employees differently from others in the public sector. The usual argument for doing so is based on the belief that policemen, firemen, and teachers should not have the right to strike. This is a separable issue that can be resolved without resorting to enactment of special laws applicable only to one or more of these employee categories.

7. The Right of Government Employees to Strike

No issue has provoked more controversy than the right of government employees to strike. Reasonable men and women can and do differ on that question; but all knowledgeable observers agree on one point: any category of employees, whether in the private or public sector and regardless of their function, will strike if they feel sufficiently aggrieved. Although strikes by government employees are outlawed by federal law and by state laws in all but three jurisdictions, the number of strikes in the public sector has increased dramatically in the past decade. Laws against strikes may inhibit but do not prevent all strikes. One method of discouraging strikes is a comprehensive system of collective bargaining that provides fair and orderly procedures for the resolution of disputes over recognition, appropriate bargaining units, and impasses over new contract terms, as well as for the settlement of grievances by procedures culminating in final and binding arbitration.

In the discussion of this question three principal points of view almost invariably emerge: some think no public employees should have the right to strike; others think all public employees should have the right to strike; and still others think all public employees except those performing "essential" public functions should have the right to strike.

The consensus of the Assembly is that all state and local employees should have the right to strike in order to make genuine collective bargaining possible. The same consensus exists in respect of federal employees, except for members of the armed services. Although some participants dissent from these conclusions, few support the proposition that no public employees should have the right to strike.

8. Multi-employer, Multi-union Bargaining in the Public Sector

Multi-employer and multi-union bargaining in the private sector is less common in the United States than in many other industrialized countries. Nevertheless, it is well established in some industries. There are obvious advantages to this form of collective bargaining in certain areas of the public sector. The Assembly believes that no legal barriers should be erected against voluntary efforts to organize collective bargaining on this basis by government employers and labor organizations. By the same token, it opposes legislation designed to compel parties to bargain in that fashion.

9. Mediation, Fact-finding, and Compulsory Arbitration

The Assembly endorses the voluntary use of mediation, fact-finding, or arbitration as a means of resolving bargaining impasses in the public sector. It also supports the voluntary arbitration of unresolved grievances arising under existing collective agreements. The Assembly favors legislation which makes these various conflict-resolution procedures available, but opposes the compulsory requirement either that any one of them be used or that one or more of them be used in any particular sequence. Despite the claimed advantages of compulsory arbitration, especially in disputes involving firemen and policemen, the consensus of the Assembly is against it. Compulsory arbitration does not prevent strikes, and the work of firemen and policemen is considered by many to be no more vital or less easily substitutable than that of many other employees in both the private and the public sectors.

10. Agency Shop, Dues Checkoff, and Other Forms of Union Security

The Assembly endorses the principle that whether beneficiaries of a collective agreement should bear a fair share of the costs of collective bargaining should be a matter for negotiation. It opposes any legislative restriction on voluntary dues checkoff or the agency shop.

11. Outside Minority Groups and Inside "Splinter Groups"

The principle that a duly recognized or certified employee bargaining agent should have exclusive authority to represent all members of the bargaining unit in their dealings with management is firmly established in the private sector and is rapidly becoming so in the public sector. The Assembly endorses that principle.

There is an inevitable tension, however, between the principle of exclusive recognition and the obligation of federal, state, and local governments to recruit, hire, and train members of minority groups, because this duty cannot be fully met without establishing contact and frequently negotiating with organizations representing those groups. The Assembly believes that the bargaining representative of the employees should be kept informed of such discussions and, wherever possible, should participate in them. It recognizes that disputes may arise if an agreement reached with an outside group is alleged by the exclusive bargaining representative to

undermine its status as bargaining agent or to violate a collective agreement. The Assembly believes, however, that such disputes can and should be resolved by the appropriate administrative agency or the courts.

The problem of "splinter groups" within the labor organization or within the bargaining unit is entirely different. The public employer has neither the duty nor the right to intrude into the internal affairs of the bargaining agent. If a labor organization illegally discriminates against any member of the bargaining unit it represents, a remedy is available through administrative or judicial procedures.

12. Tax Revenues

In a period when the demands for more and improved public services are rapidly outstripping the financial capacity of state and local governments to supply them, the problem of developing adequate revenues for wages and benefits is becoming increasingly acute. Many state laws tightly control local taxing authority, and there is a widespread taxpayer revolt against mounting local property taxes.

The Assembly discussed a number of possible ways to deal with this problem. These include more efficient use of manpower and new technology; increased productivity through labor-management cooperation; increasing budgetary flexibility by less strict earmarking of funds; and greater resort to user charges. The consensus is, however, that these measures, even when combined, are inadequate to meet the problem. Revenues, derived from the more productive income tax, must be made available through some kind of revenue sharing. A substantial number of the conferees favor, as an interim step in the discussion of overall tax reform, a revenue-sharing plan which allocates a major portion of federal funds to local governments rather than to the states, with special consideration given to the areas of greatest need.

13. Relation between Public- and Private-Sector Wages and Fringe Benefits

The answer to the question whether wages and fringe benefits in the public sector should be less or more than those in the private sector or about the same depends upon the assumptions made about the nature of public employment generally. Some argue that public employees have greater security of employment than those in the private sector and should therefore be content with less compensation. Others deny the validity of that assumption and contend, further, that because most public employees are still denied full collective bargaining rights, including the right to strike, they should receive at least the prevailing compensation for comparable work in the private sector.

Although the Assembly reached no consensus on the question of whether wages and fringes in the public sector should be more or less than those in the private sector, it did reach a consensus that in considering the relationship between these items the concept of total compensation should be employed.

14. Coordinating Budget-Making and Tax Rate-Setting with Collective Bargaining

A common complaint of public employee unions and public employers is that budgets are planned and tax rates are set before collective bargaining negotiations are completed; with the result that the flexibility of bargaining over cost items is sharply restricted. The Assembly consensus, however, is that this problem is usually more apparent than real. The Assembly believes it is possible to reconcile the apparent incompatibility between the dynamics of the collective bargaining process and a rigid calendar for budget-making and tax rate-setting.

15. Mandatory Allocation of Public Funds for Employee Salaries and Benefits

It has been proposed by some that a fixed portion of public funds should be reserved by statute for employee salaries and benefits. The Assembly opposes this procedure, believing it to be inimical to the process of collective bargaining in the public sector.

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