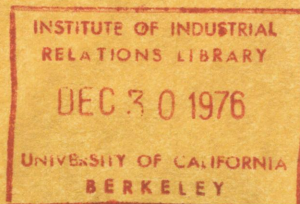


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COLLECTIVE BARGAINING AND CIVIL SERVICE
IN PUBLIC EMPLOYMENT:
CONFLICT AND ACCOMMODATION

IIR

(Training manual)



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COLLECTIVE BARGAINING AND CIVIL SERVICE IN PUBLIC EMPLOYMENT:
CONFLICT AND ACCOMMODATION.

Prepared under the Supervision of
Paul Prasow, Research Associate and
Senior Lecturer in Industrial Relations

California University. (Los Angeles)
INSTITUTE OF INDUSTRIAL RELATIONS, UCLA

Frederic Meyers, Director

Daniel J.B. Mitchell, Associate Director

Contributors

Susan G. Astarita
George W. Bohlander
Blair Levin
Elaine R. Rosen
Marlene Shaughnessy
Harry T. Swanson

Editor,

Felicitas Hinman,

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Marlene Shaughnessy	Assistant Researcher
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Blair Levin	Assistant Writer
Harry Swanson	Research Assistant

FOREWORD

The Institute of Industrial Relations is happy to present this, the fifth in a series of training packages completed under the terms of a contract between the State of California and the University of California, Los Angeles. With funds provided to the State by the Federal Government, the State asked the Institutes at UCLA and Berkeley to assist in the training of state and local public managers and employees in the conduct of labor relations. A major portion of our role is to prepare and provide training materials.

Public employees and the public in general have perceived the merit principle, and indeed the merit system, as synonymous to public employment. The system has been perceived as a fortress against arbitrary, discriminatory, or capricious public management.

As public employees started to participate in the meet-and-confer process with designated public management representatives, they found that the latter closed out areas of negotiations on such matters as classification and reclassification since these matters were within the legal province of the civil service commission or board. By so doing, the litany of management's rights is, in effect, extended at the bargaining table and is the core issue of contention in the scope of bargaining, discussed at length in this manual.

While this problem has created frustrations at the bargaining table for both sides, it is a safe assumption, based on the fund of information available, some gathered from practitioners themselves, that the public employee wants the best from both systems.

This manual attempts to cover various aspects of a complex issue and hopefully will bring insights to practitioners as to how the two systems can accommodate. Will the merit or civil service system shed personnel functions that go beyond basic hiring, recruiting or promotion functions which are at the heart of the merit principle? One should bear in mind that even in these areas the unilateral power of civil service may be modified or diluted to conform to a national policy of equal employment opportunity and affirmative action.

It is our hope that this manual will be useful to practitioners who must deal with the conflicts between collective bargaining and the merit system and who, in the final analysis, will furnish the answer to the question: Can both systems co-exist?

August, 1976

Frederic Meyers
Director

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INTRODUCTION: CONFLICTS AND IMPLICATIONS

The existence of two competing and overlapping systems for resolving personnel issues is one of the most important features distinguishing employment relations in the public sector from those in the private sector. There is no counterpart to civil service in private employment.

Most public jurisdictions have until recently relied upon the merit system for guidance in the appointment, promotion and retention of employees, and have used a civil service commission to administer personnel policies. Over time civil service has taken on additional personnel functions such as wage and salary administration and employee appeals procedures. Today the growth of collective bargaining in the public sector has posed a major challenge to the structure and role of the traditional civil service system. This training module addresses itself to some of the major problem areas which occur when collective bargaining and the merit system appear to have concurrent jurisdiction over the same issues.

The material in this module is prepared through the collaborative effort of a number of members of the research staff, Institute of Industrial Relations, University of California, to assist public employee representatives, public personnel managers and government officials. Materials may be used as a guide for staff members who have major responsibility for training, implementing and administering

both civil service regulations and some provisions of negotiated written agreements. For instructional purposes, the major categories of the training module are separated in a tabbed format. The narrative portions of each Tab are followed by a carefully selected set of appendices which document and illustrate the concepts and principles covered in the essay. A selected annotated bibliography prepared for this training manual by Ms. Marlene Shaughnessy will be found in the last section.

Tab A contains basic concepts and definitions. Among other terms, the merit system is distinguished from the merit principle.

The merit principle is a fundamental policy which requires that public employees be recruited, selected, and promoted on the basis of merit, giving equal opportunity for all applicants and employees, without regard to political influence or affiliation.

The merit system involves an expanded jurisdiction and administration of the merit principle. The merit principle as defined above is generally considered appropriate in its application to the public sector. Current controversy usually centers around the merit system; a comprehensive personnel administration whose responsibilities and coverage have extended far beyond simply enforcing the merit principle.

An essay on the evolution of the merit system traces its history beginning with the Pendleton Act of 1883, which delineates the policies and structure upon which the U.S. Civil Service system is based and

continuing with a discussion of the development of similar systems in local and state government.

Tab B contains an analysis of the development of employee organization and collective bargaining in the public sector. The section focuses on the major reasons for the rapid growth of these phenomena in recent years. Population growth, increased social consciousness, competitive labor market pressures, President Kennedy's Task Force Report and Executive Order 10988 of 1962, declining membership in private sector unions, impact of inflation, the ferment of the sixties, the inexperience of public management and public unions, and the impact of the U.S. Supreme Court decisions--all these factors have had a direct impact on the growth of organizations and collective bargaining in the public sector.

Two contrasting viewpoints are generally presented in a comparison of employment relations in the public and private sectors: (1) that there is little difference between the two sectors and they should follow the same policies and procedures and (2) that there are major significant differences between the public and private sectors which preclude the use of the private sector model without substantial modifications and innovations.

Tab C centers on the "scope of bargaining" controversy. This essay presents various theories on the possible compatibility of the traditional merit system with the newly emerging collective bargaining

institution, and considers the methods which various states have used to reconcile conflicts which arise when civil service and collective bargaining compete for decision-making in public personnel administration. The differences between the public and private sectors models which relate to the scope of bargaining question are also discussed. Finally, there is a brief recapitulation of the areas of actual or potential conflict.

Tab D focuses on the theory of management reserved rights and reviews the management prerogative clauses contained in California statutes and local ordinances. Possible alternatives for accommodation between collective bargaining and personnel systems in California are presented, ranging from (a) continuing the present accommodation under the Meyers-Miliias-Brown Act, which recognizes present merit and civil service systems to (b) the evolutionary approach similar to that of Connecticut, where the collective agreements prevail over conflicting laws, regulations and civil service, only when there is approval by the appropriate legislative body.

Tab E discusses the "dual" grievance or employee appeals procedure. A grievance procedure under a negotiated agreement, involves specific steps taken by an employee organization which may terminate in a form of grievance resolution such as arbitration. The appeals procedure under the merit system provides the individual employee with the right to take certain steps in seeking amicable resolution

of his grievance, usually an appeal to a Civil Service Commission or Personnel Board for a final decision. Although there are similarities between the procedures specified under a negotiated agreement and civil service procedure, the former tends to provide the employee, through his/her organization, with greater influence over the rules and procedures governing settlement of "rights" in grievance disputes.

Tab F focuses on the issue of organizational security and discusses the various forms of such security provisions. The matter is crucial because under an organizational security provision such as "agency shop", an employee who fails to pay the required service fee may be terminated for reasons other than merit.

Paul Prasow

*A separate instructor's guide has been prepared and is available for purchase from the Institute of Industrial Relations, UCLA for \$1.50 per copy. This guide should prove invaluable to those engaged in training programs involving this module. The lesson plan is structured so as to correspond to the essential elements contained in each Tab.

A

TAB A

THE CIVIL SERVICE: AN HISTORICAL PERSPECTIVE

The Civil Service/Merit System--Definition, Distinctions, Coverage

In attempting to define the substance and conceptual framework of a merit system, an important distinction must be made between a merit system and the merit principle.

Webster's New World Dictionary of the English Language defines merit system as "a system of hiring and promoting people to civil service positions on the basis of merit as determined by competitive examinations." This definition is not sufficient. The merit system is the actual implementation and administration of the merit principle, a policy or a philosophy of public employment which espouses the requirement that public employees be recruited, selected, and promoted under conditions of political neutrality, equal opportunity, and competition on the basis of merit. Similarly, a task force report which was prepared for the 1967 National Governors Conference defined the merit principle as simply the concept that public employees should be selected and retained solely on the basis of merit, while the merit system is described as a public employment procedure designed to implement the merit principle.¹

Civil service systems*, on the other hand, encompass broad and complete

*According to most experts, the terms merit system and civil service system are synonymous and are used alternately in this discussion.

programs of personnel management. And once the merit principle is adopted, it becomes part of an entire personnel system with its complex web of requirements, rules and regulations.²

The merit principle and its fundamental precepts are generally accepted as the appropriate basis for government employment. Any controversy which arises centers on the merit system; that is, the administration and enforcement of the accepted philosophy. For this reason there has been disagreement over whether the administration of the merit principle or philosophy should be somehow disengaged from its resultant system which now covers the entire field of public personnel administration.

Any description of the coverage and content of merit systems must be general to some degree because of the variations in procedure and administration among governmental units. However, all merit systems have certain essential elements in common. The Intergovernmental Personnel Act of 1970 is perhaps the most concise statement of the essential elements of a merit system. It lists six areas:

1. Recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment.
2. Providing equitable and adequate compensation.
3. Training employees, as needed, to assure high-quality performance.

4. Retaining employees on the basis of the adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected.
5. Assuring fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, national origin, sex, or religious creed.
6. Assuring that employees are protected against coercion for partisan political purposes and are prohibited from using their official authority for the purpose of interfering with or affecting the results of an election or a nomination for office.

In his book, *The Law of Civil Service*, H. Eliot Kaplan gives an expanded definition of the key elements of a merit system. He maintains that fourteen elements are essential in managing the people who perform public services. These elements are:

1. A central personnel agency with an adequate technical staff which has impartial, forceful leadership, the understanding and backing of the chief executive, and sufficient funds to do a thorough and complete personnel job.
2. A plan for classifying all positions according to duties, functions, and responsibilities, to serve as the framework for selection, compensation and an understanding of the overall administrative organization.
3. A salary plan which is fair to all, adequate to recruit and retain competent people, and which provides incentives for superior performance; with machinery for adjusting salaries in relation to the economic situation and the need for maintaining efficient services.
4. An aggressive program to attract capable people to the service, and a sound program of competitive examinations for selecting those best fitted to serve the public.

5. A probationary system as a part of the examining program and closely related to the supervisory process.
6. A recognition that training of all types is a fundamental part of the personnel management responsibility, including job instruction, inservice training, supervisory and administrative training, and executive development.
7. Uniform regulations governing working conditions, such as leaves of absence, vacations, hours of work, and compensation in case of injury.
8. A recognized plan of career development, with careful plans for placement, promotion and transfer based on training, ability, performance and the needs of the service.
9. A well defined system of discipline and separation from the service which recognizes both the necessity of maintaining high standards of competence and conduct and the right of employees to protection from bias and injustice.
10. Provision for departmental personnel programs conducted by a departmental personnel officer under the general responsibility of the department head, coinciding and coordinated with the general program of the central personnel agency.
11. Certification of payrolls by the personnel agency.
12. An adequate retirement system.
13. Prohibition against political assessments and contributions as well as undue political activity.
14. Provision for a taxpayer's action through which civic groups can bring violations of the law to public attention for correction.

Comments by the task force report of the National Governor' Conference note that elements of the merit system commonly in force are not essential to the merit principle. This observation re-emphasizes the need to remember the distinctions between system and principle. The task force

report states that items essential to the principle include such things as: impartial recruiting; an examining and selecting program; a position classification plan based on duties and responsibilities; promotions based on merit; and protection against arbitrary disciplinary action.³

The report also notes that some merit systems may include items which are not essential with respect to the intent of the merit principle. This procedure is common among systems which have comprehensive personnel programs as part of their administration of the merit principle. Such nonessential items may include the handling of grievances; employee training; salary administration; and safety and morale matters.⁴ In addition, merit systems may -- and usually do -- include semi-related or ancillary activities depending on the size, scope, and particular administrative emphasis of the system.

Under a merit system forms and procedures must be devised to deal with each major item of concern, and forms and procedures must be codified and implemented with consistency. In other words, it is not enough to state that civil service systems employ people on the basis of merit as determined by competitive examination. The examinations must be developed; procedures and schedules for examinations must be established; evaluation standards must be created. In fact, critics of the merit system claim that there is too much concern with procedures and with methods of implementation, rather than with the basic concept of merit itself.

The merit system, nevertheless, has gained wide acceptance in this country at all levels of government. The National Civil Service League, in an extensive survey of state and local governments conducted in 1970, found that 84 percent of the cities, 83 percent of the counties, and 96 percent of the states have adopted some form of merit system.

FOOTNOTES

1. 1967 National Governors' Conference, *Report of Task Force on State and Local Government Labor Relations* (Chicago: Public Personnel Association) 1967.
2. David J. Stanley, "What Are Unions Doing to Merit Systems?" *Public Personnel Review*, April 1970, p. 109.
3. Ibid.
4. Ibid.

EVOLUTION OF THE CIVIL SERVICE/MERIT SYSTEM

The Merit Philosophy and the Emergence of the Federal Civil Service/Merit System

The concept of public service employment at the federal level based on merit has been embraced in this country since the first years of our national existence. As a philosophy, the merit principle grew out of the values of early American society including those of the Protestant Ethic. Stated simply, these values emphasize individuality as measured by one's own merit: they stress equality--that public service should be open to everyone, a separation of "personnel" work from day-to-day governmental management, objectivity, and governmental sovereignty based on appropriate procedures. (The concept of governmental sovereignty is now being called into question by the thrust and growth of public sector collective bargaining.)

Prior to 1830 the federal government had no formal merit system. Rather, the emphasis was on bureaucratic efficiency against a background of relatively few instances of political patronage. Thus an implicit merit system existed, based on "fitness of character"¹ -- a person's qualities such as family background, education, esteem, loyalty, and "appropriate geographic representation."²

In addition to the concept of job tenure which emerged early in the federal service, three other concepts developed during this period

which have, for the most part, remained in effect to the present:

(1) giving veterans preference in employment; (2) representative geographical distribution of appointees; and (3) reliance on congressional endorsement with respect to appointments.³

Beginning roughly with 1830, political parties came to play an ever increasing role in the appointment of public employees. This political patronage led to what is most commonly referred to as the "spoils system." The spoils system was in large part the result of Andrew Jackson's distrust of public officials, and his belief that any man could perform the duties required by civil service. In his view, rotation in office was the answer to existing nepotism and elitism. What developed from his original intent was a system of staggering political patronage. By the mid 1800's, the spoils system had become so all-encompassing that government activity effectively stopped for a month during a change of administration so that spoils claims might be settled.⁴

Advocates of equity and efficiency were outraged by the extensive political patronage. However, it was some years before sentiment against the spoils system was adequate to produce definitive governmental action. Perhaps the greatest catalyst to the elimination of the spoils system was the assassination of President Garfield by a frustrated office-seeker who had been passed over for an appointment. A landmark piece of legislation, the Civil Service Act of 1883, the Pendleton Act, ended the spoils system. It is the document on which civil service/merit system is based today.

The Civil Service (Pendleton) Act of 1883

The Pendleton Act (see Appendix A for the complete text) marked the acceptance of egalitarianism and equal opportunity in public service employment.⁵

The Act provides for policies and structures which have become the basis for essentially all U.S. civil service/merit systems--federal, state, and local. The Act established the U.S. Civil Service Commission and prescribed the manner in which commissioners may be appointed or removed (three in number). The Act also enumerated the duties of the commissioners as well as key policies and principles of the merit system.⁶

A major feature of the merit system is the concept of competitive examination. Thus the Pendleton Act calls for,

open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to these matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

Second, that all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.

The Act also stipulates position apportionment:

appointments to the public service aforesaid in the departments at Washington shall be apportioned among the several States and Territories and the District of Columbia upon

the basis of population as ascertained at the last preceding census. Every application for an examination shall contain, among other things, a statement, under oath, setting forth his or her actual bona fide residence at the time of making the application, as well as how long he or she has been a resident of such place.

In addition, this law called for a probationary employment period, which remains a standard practice today.

As a result of the campaign against political patronage, the principle of public employee neutrality was included in the law. Political contributions (money or services) were strictly prohibited. Also, position or office could not be used as a basis for coercion or influence. (The present policy, under the Hatch Act, of governing political activity by public employees is less restrictive than it was at the time of the Pendleton Act.)

The Civil Service Commission was granted power to establish rules and regulations for the implementation and administration of merit system policy. The Commission was also empowered to conduct investigations relating to the enforcement of that policy.

The Pendleton Act, at the time of passage, stipulated that the departments of government establish a classification system. The Act also provided for giving veterans preference in public service employment and it contained an anti-nepotism clause. These policies have become firmly entrenched in the merit system.

In examining the present systems of civil service/merit, it is obvious that the Pendleton Act served as the model and foundation for the systems at all levels. Indeed, even the "rule of three" (recommendation of three candidates from which to choose one for a position), which is so pervasive throughout existing merit systems, has its roots in the Pendleton Act.

Developments following Passage of the Pendleton Act

The development of civil service at the federal level was aided by a series of amendments to the 1883 Act. For example, beginning in 1902, the Civil Service Commission urged the establishment of a plan which would standardize position titles together with uniform pay scales. A "classification" plan had been devised in 1853, but was, in effect, merely a "salary control" plan. The Keep Committee, under Theodore Roosevelt, and The Efficiency and Economy Commission, under Taft, gave added impetus to the adoption of a position classification system in order to alleviate the inequities in civil service and make the setting of salaries more equitable. The Classification Act was finally passed in 1923; however it pertained only to employees within the District of Columbia. Classification was not expanded until passage of the Ramspeck Act of 1940, when it was extended to the field service.

The Trend toward Professionalization

The trend of federal civil service development since the turn of the century has been toward refinement, structuring, and professionalization.

Until 1937, the trend reflected the scientific-management approach to efficiency (resulting from increasing technology and specialization). This era was characterized by the growth of forms, procedures and structures in which, for example, specialization, rationality, and planning, were emphasized, as well as the increased importance of training and efficiency rating.

Since the late 1930s the trend has been toward the emergence of administrative management by trained professionals, which is becoming the unifying force of all levels of government administration and the merit system.

Adoption of Civil Service Systems at the State and Local Levels

The first state civil service law went into effect in May of 1883 in the State of New York. (It is interesting to note that the law was pushed through by State Assemblyman Theodore Roosevelt, and was signed into law by Governor Grover Cleveland.) Massachusetts, in 1884, was the second state to adopt a merit system. In 1894, New York became the first state to place the merit system in its constitution.

Merit systems receive their authority from a variety of sources including constitutional, statutory, and administrative directives or policy.⁷ The majority of states have merit systems based on statutory provisions. Most commonly these are applicable exclusively to state employees, but in some cases they may include both state employees and employees at lower levels of local government.

The statute, in some situations, pertains only to certain state agencies. Many municipalities have enacted comprehensive statutes or charter provisions to establish for merit systems. The charter provision is generally implemented by local law or ordinance providing a more detailed enumeration of the nature and scope of implementation.⁸

Developments in California

California followed some six states in adopting a civil service law when it passed appropriate legislation in 1913. Actually, local ordinances preceded the state law; for example, San Francisco was the first city to establish a merit system, in 1900, followed by Los Angeles, in 1903. Counties also adopted civil service systems prior to the state law, and California now has the largest number of counties with independent merit systems of all the states. Los Angeles county was the first county west of the Mississippi to establish a merit system, in 1913.⁹

City Systems

It was probably at the city level where the need for systems for the efficient administration of policies involving the protective forces was most urgently felt. Most city civil service systems have adopted the traditional model in their structure, that is, a civil service commissioner determines policy matters and a support staff administers day-to-day personnel functions. However modifications of the administrative authority structure have been attempted, and are successful.

For example, Berkeley emphasizes the operational importance of personnel management by giving control over personnel matters to the city manager. In Santa Monica, civil service functions were vested in a personnel director appointed by the city manager with approval by the personnel board, appointed by the city council.¹⁰ Under state law, cities are permitted to establish a civil service system by ordinance. They are allowed to select either a commission or individual personnel officer to administer the plan. However, once employees of a city are protected under such a plan, the ordinance may not be withdrawn unless it is submitted to city voters in a referendum.¹¹

Over the years, smaller governmental units including cities and school districts have been encouraged to set up personnel merit programs by contracting with larger units (cities, county or state) to provide some of the more comprehensive services. An example would be the contracting out of examination functions on a cost basis, which has become an increasingly accepted trend in recent years.

County Systems

Establishment of county merit systems also date back to the early part of this century. As noted, Los Angeles County adopted civil service structures into its charter in 1913. The Los Angeles charter amendment covers all classified service employees except elected officials, some employees of the district attorney, the sheriff, the assessor, and in public school teachers.¹² Other counties following Los Angeles' lead were Alameda (1927), San Diego (1937), and Sacramento (1939).

Many other counties have adopted merit systems since 1940, for in 1939 the State Legislature passed legislation allowing any county to adopt a civil service/merit system for any or all of its county employees. Under this law a county ordinance providing for such a system must be submitted to the voters (of the county) before becoming effective. The law provides that, upon approval, a board of supervisors may appoint a five-member civil service commission to implement the plan. (The county may also contract with other agencies for the provision of necessary services.) As Winston Crouch has said, "provisions governing dismissal, suspension, and demotion of county employees are set forth in the state enabling act and become operative within the county upon adoption of the civil service ordinance."¹³ (Retirement provisions are covered by the County Employees Retirement Act of 1937).

The State System

The most significant merit system is the state civil service system, initiated in 1913 when the California Legislature created a civil service commission and established statutory provisions governing rules and procedures. The three-member commission (appointed by the governor and removable from office by a two-thirds vote of each house) remained in effect until 1921 and, after unsuccessful efforts of reorganization, was reinstated in 1927.

By placing administrative appointments under control of the commission, the 1913 law effectively ended most instances of political patronage and chaotic conditions in public employment. However, some departments of state government remained exempt from coverage of the law. In addition, the depression of the 1930s brought on further changes. During that period public employment, for obvious reasons, had great appeal. As a result, a number of persons who had obtained temporary civil service jobs without taking the required examinations stayed on in public service on a permanent basis.¹⁴

There was a general reaction against this trend as well as against the independent salary-setting policies of certain government agencies,¹⁵ which found expression in the landmark 1934 amendment to Article XXIV of the California Constitution. The 1934 amendment with some minor modifications is the source and basis of the present California civil service/merit system.

The 1934 Amendment

The amendment established a five-member Personnel Board. Section 2 of Article XXIV provides:

"(a) There shall be a State Personnel Board of five members appointed by the Governor with the advice and consent of the Senate. The first terms of office shall expire on January 15, 1937; January 15, 1939, January 15, 1941; January 15, 1943; and January 15, 1945. Each subsequent appointee shall hold office for 10 years from the expiration of the term of his predecessor and until his successor is appointed and qualified, except that an appointment to a

vacancy occurring before the expiration of a term shall be but for the remainder of that term. A member may be removed by a vote of two-thirds of the members elected to each house of the Legislature.

"(b) The board shall annually elect one of its members president.

"(c) The board shall appoint and fix the compensation of an executive officer who shall be a member of the state civil service but not a member of the board.

"Said executive officer shall perform and discharge all of the powers, duties, purposes, functions and jurisdiction hereunder or which hereafter by law may be vested in the board except that the adoption of rules and regulations, the creation and adjustment of classifications and grades, and dismissals, demotions, suspensions and other punitive action for or in the state civil service shall be and remain the duty of the board and a vote of a majority of the members of said board shall be required to make any action with respect thereto effective."

The tenure structure inherent in this provision is designed to protect the civil service from the corrupting influence of politics.

The most important provision of the 1934 amendment was Section 1, which mandated the appointment of civil service employees based on merit and was the guideline for actions and the establishment of regulations by the State Personnel Board:

"Permanent appointments and promotion in the State civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination."

This brief statement of intent, then, formalized the adoption of the merit as a stated policy.

The State Personnel Board was vested with its powers of enforcement and administration in Section 3:

"Said board shall administer and enforce, and is vested with all of the powers, duties, purposes, functions, and jurisdiction which are now or hereafter may be vested in any other state officer or agency under, Chapter 590 of the California Statutes of 1913 as amended or any and all other laws relating to the state civil service as said laws may now exist or may hereafter be enacted, amended or repealed by the Legislature."

Although the state merit system was intended to, and does, cover the large majority of state employees, the 1934 revision did not completely eliminate the practice of personal appointments. The governor continued to appoint department heads and a few other major officials (i.e., insurance commissioner). Recognizing the need and expediency of exempting certain employees and officials from system-wide coverage (thus removing them from the State Personnel Board's jurisdiction) the amendment specified those individuals who are to be exempted from coverage. (See appendix in this section for an original version of Section 4).

One major reason for the 1934 amendment (as stated earlier) was the infiltration of temporary employees into the civil service. In what seems to be a direct response to this, the amendment addressed itself to the issue of temporary appointments, in Section 5:

"(a) No temporary appointment of a person to any position shall be made unless there is no employment list from which such position can be filled.

"(b) No person shall hold a given position under temporary appointment for a longer period than nine months in any consecutive 12 months, nor shall any person serve in the state civil service under temporary appointment for a longer total period than nine months in any consecutive 12 months."

The tradition of giving veterans preference in hiring, which had been an implicit policy of public service employment since the early days of American government and was made explicit in the Pendleton Act, was once again reaffirmed as state policy. The 1934 amendment provided that:

"Nothing herein contained shall prevent or modify the giving of preferences in appointments and promotions in the State civil service to veterans and widows of veterans as is now or hereafter may be authorized by the Legislature."

The State Personnel Board

The provisions for state civil service adopted in 1934 remained unchanged for some 30 years. The thrust of change came within the initiatives taken by the State Personnel Board. The Board, in its attempts to enforce and administer the 1934 provisions, was charged with establishing rules and procedures relating to the ongoing purposes and functions of a merit system. The Board must concern itself with a vast array of subjects including salary administration, job classifications, examination standards, and even the nature of its own administrative procedures. Its administration of these matters, among others, continues today.

The basic provisions of the 1934 amendment, and their implications, continue relatively unchanged today. On November 3, 1970, the 1934 amendment was repealed. However, what took its place was no more than a reorganized, refined, and somewhat updated version of the basic 1934 provisions. (See appendix to this section for the 1970 amendments).

FOOTNOTES

1. Frederick C. Mosher, Democracy and the Public Service, (Oxford University Press: New York, 1968) chaps. 3, 5 & 7.
2. Ibid.
3. H. Eliot Koplan, The Law of Civil Service, (Matthew-Bender & Co.: New York, 1958) pp. 1-29.
4. Ibid.
5. Mosher, op. cit.
6. Ibid.
7. U.S. Department of Labor, Collective Bargaining in Public Employment and the Merit System, Labor-Management Services Administration (Government Printing Office: Washington, D.C., 1972), chaps. 1, 5 & 9.
8. Ibid.
9. Koplan, op. cit.
10. Winston W. Crouch, et al, State and Local Government in California (University of California Press: Berkeley, 1953), chap. 10.
11. Deering's, General Laws of California, Act. 1401.
12. Crouch, op. cit.
13. Ibid.
14. Winston W. Crouch, et al, California Government and Politics (Prentice-Hall, Inc.: Englewood Cliffs, 1964), p. 185.
15. Ibid.

APPENDIX TO TAB A

Civil Service Act of 1883 (The
Pendleton Act)
Constitution - State of California:
Article XXIV (State Civil Service)
Supplemental Materials and Amendment
Adopted at the General Election
Held November 5, 1974.
Constitutional Amendment on State
Civil Service, State of California,
Adopted November, 1970.

CIVIL SERVICE ACT OF 1883
(THE PENDLETON ACT)

CHAP. 27.—An act to regulate and improve the civil service of the United States.

Jan. 16, 1883.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as Civil Service Commissioners, and said three commissioners shall constitute the United States Civil Service Commission. Said commissioners shall hold no other official place under the United States.

Civil service.

Commission.

The President may remove any commissioner; and any vacancy in the position of commissioner shall be so filled by the President, by and with the advice and consent of the Senate, as to conform to said conditions for the first selection of commissioners.

**Removals.
Vacancies, how
filled.**

The commissioners shall each receive a salary of three thousand five hundred dollars a year. And each of said commissioners shall be paid his necessary traveling expenses incurred in the discharge of his duty as a commissioner.

Compensation.

SEC. 2. That it shall be the duty of said commissioners:

Duties.

FIRST. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect.

Rules.

SECOND. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which will fairly test the

**Competitive ex-
aminations.**

	relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.
Offices, etc., how filled.	Second, that all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.
Appointments, how apportioned.	Third, appointments to the public service aforesaid in the departments at Washington shall be apportioned among the several States and Territories and the District of Columbia upon the basis of population as ascertained at the last preceding census. Every application for an examination shall contain, among other things, a statement, under oath, setting forth his or her actual bona fide residence at the time of making the application, as well as how long he or she has been a resident of such place.
Applications, how made.	Fourth, that there shall be a period of probation before any absolute appointment or employment aforesaid.
Contributions for political purposes prohibited.	Fifth, that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.
	Sixth, that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body.
Non-competitive examinations.	Seventh, there shall be non-competitive examinations in all proper cases before the commission, when competent persons do not compete, after notice has been given of the existence of the vacancy, under such rules as may be prescribed by the commissioners as to the manner of giving notice.
Notice of appointment, etc.	Eighth, that notice shall be given in writing by the appointing power to said commission of the persons selected for appointment or employment from among those who have been examined, of the place of residence of such persons, of the rejection of any such persons after probation, of transfers, resignations, and removals, and of the date thereof, and a record of the same shall be kept by said commission. And any necessary exceptions from said eight fundamental provisions of the rules shall be set forth in connection with such rules, and the reasons therefor shall be stated in the annual reports of the commission.
Regulations for examinations; record to be kept.	THIRD. Said commission shall, subject to the rules that may be made by the President, make regulations for, and have control of, such examinations, and, through its members or the examiners, it shall supervise and preserve the records of the same; and said commission shall keep minutes of its own proceedings.
Duties of commissioners.	FOURTH. Said commission may make investigations concerning the facts, and may report upon all matters touching the enforcement and effects of said rules and regulations, and concerning the action of any examiner or board of examiners hereinafter provided for, and its own subordinates, and those in the public service, in respect to the execution of this act.
Report of commissioners.	FIFTH. Said commission shall make an annual report to the President for transmission to Congress, showing its own action, the rules and regulations and the exceptions thereto in force, the practical effects thereof, and any suggestions it may approve for the more effectual accomplishment of the purposes of this act.
Chief examiner.	SEC. 3. That said commission is authorized to employ a chief examiner, a part of whose duty it shall be, under its direction, to act with the examining boards, so far as practicable, whether at Washington or elsewhere, and to secure accuracy, uniformity, and justice in all their proceedings, which shall be at all times open to him. The chief examiner shall be entitled to receive a salary at the rate of three thousand dollars a year, and he shall be paid his necessary traveling expenses incurred in the discharge of his duty. The commission shall have a secretary, to be appointed by the President, who shall receive a salary
Compensation.	
Traveling expenses.	
Secretary.	

of one thousand six hundred dollars per annum. It may, when necessary, employ a stenographer, and a messenger, who shall be paid, when employed, the former at the rate of one thousand six hundred dollars a year, and the latter at the rate of six hundred dollars a year. The commission shall, at Washington, and in one or more places in each State and Territory where examinations are to take place, designate and select a suitable number of persons, not less than three, in the official service of the United States, residing in said State or Territory, after consulting the head of the department or office in which such persons serve, to be members of boards of examiners, and may at any time substitute any other person in said service living in such State or Territory in the place of any one so selected. Such boards of examiners shall be so located as to make it reasonably convenient and inexpensive for applicants to attend before them; and where there are persons to be examined in any State or Territory, examinations shall be held therein at least twice in each year. It shall be the duty of the collector, postmaster, and other officers of the United States, at any place outside of the District of Columbia where examinations are directed by the President or by said board to be held, to allow the reasonable use of the public buildings for holding such examinations, and in all proper ways to facilitate the same.

Compensation.
Stenographer.
Messenger.

Board of examiners.

Examinations, when made.

U. S. officials to allow use of public buildings for examinations.

SEC. 4. That it shall be the duty of the Secretary of the Interior to cause suitable and convenient rooms and accommodations to be assigned or provided, and to be furnished, heated, and lighted, at the city of Washington, for carrying on the work of said commission and said examinations, and to cause the necessary stationery and other articles to be supplied, and the necessary printing to be done for said commission.

Secretary Interior to provide rooms, etc., at Washington, D. C.

SEC. 5. That any said commissioner, examiner, copyist, or messenger, or any person in the public service who shall willfully and corruptly, by himself or in co-operation with one or more other persons, defeat, deceive, or obstruct any person in respect of his or her right of examination according to any such rules or regulations, or who shall willfully, corruptly, and falsely mark, grade, estimate, or report upon the examination or proper standing of any person examined hereunder, or aid in so doing, or who shall willfully and corruptly make any false representations concerning the same or concerning the person examined, or who shall willfully and corruptly furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person so examined, or to be examined, being appointed, employed, or promoted, shall for each such offense be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars, or by imprisonment not less than ten days, nor more than one year, or by both such fine and imprisonment.

Violation of duties, etc.; penalty.

SEC. 6. That within sixty days after the passage of this act it shall be the duty of the Secretary of the Treasury, in as near conformity as may be to the classification of certain clerks now existing under the one hundred and sixty-third section of the Revised Statutes, to arrange in classes the several clerks and persons employed by the collector, naval officer, surveyor, and appraisers, or either of them, or being in the public service, at their respective offices in each customs district where the whole number of said clerks and persons shall be all together as many as fifty. And thereafter, from time to time, on the direction of the President, said Secretary shall make the like classification or arrangement of clerks and persons so employed, in connection with any said office or offices, in any other customs district. And, upon like request, and for the purposes of this act, said Secretary shall arrange in one or more of said classes, or of existing classes, any other clerks, agents, or persons employed under his department in any said district not now classified; and every such arrangement and classification upon being made shall be reported to the President.

Secretary of the Treasury to make classification of certain clerks.

R. S. 163, 27.

Report to be made to President U. S.

Duties of Postmaster-General.

R. S. 158, 26.
Classification of officers not heretofore classified.

After six months from passage of act all appointments and promotions to be made only upon examination, etc.

Exemptions.
Preference of persons disabled in military or naval service.

R. S. 1754, 312.
President to regulate admissions to the civil service.

R. S. 1753, 312.

Use of intoxicating beverages to excess a bar to official position.

Members of a family.

Recommendations by Representatives in Congress as to character and residence, only, to receive consideration.

Assessments, subscriptions, or contributions for political purposes prohibited.

General, in general conformity to said one hundred and sixty-third section. Second. Within said sixty days it shall be the duty of the Postmaster of the United States, where the whole number of said clerks and persons shall together amount to as many as fifty. And thereafter, from time to time, on the direction of the President, it shall be the duty of the Postmaster-General to arrange in like classes the clerks and persons so employed in the postal service in connection with any other post-office; and every such arrangement and classification upon being made shall be reported to the President.

Third. That from time to time said Secretary, the Postmaster-General, and each of the heads of departments mentioned in the one hundred and fifty-eighth section of the Revised Statutes, and each head of an office, shall, on the direction of the President, and for facilitating the execution of this act, respectively revise any then existing classification or arrangement of those in their respective departments and offices, and shall, for the purposes of the examination herein provided for, include in one or more of such classes, so far as practicable, subordinate places, clerks, and officers in the public service pertaining to their respective departments not before classified for examination.

SEC. 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes; nor shall any officer not in the executive branch of the government, or any person merely employed as a laborer or workman, be required to be classified hereunder; nor, unless by direction of the Senate, shall any person who has been nominated for confirmation by the Senate be required to be classified or to pass an examination.

SEC. 8. That no person habitually using intoxicating beverages to excess shall be appointed to, or retained in, any office, appointment, or employment to which the provisions of this act are applicable.

SEC. 9. That whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to any of said grades.

SEC. 10. That no recommendation of any person who shall apply for office or place under the provisions of this act which may be given by any Senator or member of the House of Representatives, except as to the character or residence of the applicant, shall be received or considered by any person concerned in making any examination or appointment under this act.

SEC. 11. That no Senator, or Representative, or Territorial Delegate of the Congress, or Senator, Representative, or Delegate elect, or any officer or employee of either of said houses, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States.

SEC. 12. That no person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in this act, or in any navy-yard, fort, or arsenal, solicit in any manner whatever, or receive any contribution of money or any other thing of value for any political purpose whatever.

SEC. 13. No officer or employee of the United States mentioned in this act shall discharge, or promote, or degrade, or in manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.

Immunity from official proscription, etc.

SEC. 14. That no officer, clerk, or other person in the service of the United States shall, directly or indirectly, give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of the House of Representatives, or Territorial Delegate, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.

Giving money, etc., to officials for political purposes prohibited.

SEC. 15. That any person who shall be guilty of violating any provision of the four foregoing sections shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding five thousand dollars, or by imprisonment for a term not exceeding three years, or by such fine and imprisonment both, in the discretion of the court.

Penalty.

Approved, January sixteenth, 1883.

CONSTITUTION OF THE STATE OF CALIFORNIA*

ARTICLE XXIV

STATE CIVIL SERVICE

[Former Article XXIV, adopted November 6, 1934, and amended November 7, 1950; November 6, 1962, consisting of §§ 1-7, was repealed November 30, 1970.]

DISPOSITION OF REPEALED SECTIONS

<i>Former Sections</i>	<i>Present Sections</i>
1	1
2	2, 3
3	3
4	1, 4
5	—
6	5
7	6

- § 1. Scope of civil service—Merit system
- § 2. Personnel Board
- § 3. Enforcement and administration
- § 4. Exempt positions
- § 5. Temporary appointments
- § 6. Veterans' preferences—Saving provisions

§ 1. [Scope of civil service—Merit system]

(a) The civil service includes every officer and employee of the state except as otherwise provided in this Constitution.

(b) In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination.

Adopted November 3, 1970.

Prior Law: Based on former Article XXIV §§ 1, 4.

(1) Prior to repeal former § 1 provided: "Permanent appointments and promotion in the State civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination."

(2) For text of former § 4, see prior law note under Article XXIV § 4.

Former Sections: Former § 1, adopted Nov. 6, 1934, was repealed Nov. 3, 1970.

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Cross References:

- Civil service exemptions: Art XXIV § 4.
- Officers and employees of Adult Authority as included in civil service: Gov C § 18591.
- Bureau of National Defense Education Act Administration personnel as within civil service: Gov C § 18599.
- Personnel Classification Plan: Gov C § 18800.
- Civil Service examinations: Gov C §§ 18930-18941.
- Civil service appointments generally: Gov C §§ 19050 et seq.
- Performance reports as factor in promotional examinations: Gov C § 19303.
- Right of permanent employee, displaced by employee with right of return, to elect demotion in lieu of layoff: Gov C § 19536.5.
- Prohibition of use of non-job-related educational prerequisites: Gov C § 19702.2.

Collateral References:

- Cal Jur 2d Civil Service §§ 6, 7, 18.
- 15 Am Jur 2d Civil Service §§ 12-15, 20-22.

Law Review Articles:

- Fourteenth Amendment, fundamental fairness, the probationary instructor, and the University of California. 5 UCD LR 608.

Attorney General's Opinions:

1. In General
2. Status and Classification
3. State Contracts
4. Board's Powers

1. In General

- Ops Atty Gen No. 10125 (Aug. 16, 1935) (Subds M, N and O of Pol C § 360c, as codified in Sec 121 of Stats 1935, Ch 27, providing for disciplining of members of the Highway Patrol, are nullified by Art XXIV).
- Ops Atty Gen No. NS-1602 (Apr. 3, 1939) (one cannot claim that an employee held his position for six months prior to the effective date of Art XXIV because of his claimed employment in June, 1934 by one member of the Board of Equalization, when the record shows that such employment was not made by the board itself, nor was his name placed on the salary roll until Aug. 1934).
- Ops Atty Gen No. NS-2362 (Feb. 21, 1940) (payroll claims presented to the Personnel Board Dec. 5, 1939, covering amounts unpaid because of salary adjustments made by the Board of Equalization between June 20, 1934, and Aug. 7, 1935, are barred by CCP § 338).
- Ops Atty Gen No. NS-2554 (May 6, 1940) (Pol C § 893 is not applicable to civil service appointees).
- Ops Atty Gen No. NS-2664 (June 10, 1940) (Veh C § 117 is ineffective to extent of conflict with provisions of the Civil Service Act or rules and regulations of the Personnel Board).
- Ops Atty Gen No. NS-2740 (June 28, 1940) (a member of the Highway Patrol may be elected to and hold office as a school trustee unless the holding interferes with the discharge of his duties as a member of the patrol, or in conduct of his candidacy he is guilty of "improper political activity" under the Civil Service Act, in which case the facts would be passed upon by the Personnel Board; the Chief of the Patrol is not authorized to pass a rule preventing such candidacy).
- Ops Atty Gen No. NS-3494 (May 7, 1941) (resignation of a state employee to be effective at a future date, which is duly accepted, does not prevent the allowance of pay for the earned vacation period which will not expire before the effective date of his resignation).
- Ops Atty Gen No. NS-4130 (Mar. 26, 1942) (under Pen C § 2792 where paroled prisoners are employed at certain camps by the Divisions of Forestry, Parks, Fish and Game, or State Lands, such parolees do not become "employees," but are merely used pursuant to Pen C § 2791; where parolees are employed at forestry

camps established by the Division of Forestry under its general powers, such parolees may become civil service employees, depending on civil rights restored by the Board of Prison Directors and the discretion of the Personnel Board).

- 6 Ops Atty Gen 198 (state official leaving California for temporary U. S. paid-service may not receive California salary concurrently, but may use accumulated vacation time for such service and be paid therefor).
- 21 Ops Atty Gen 92 (if otherwise qualified, person retired under State Employees' Retirement System is not barred from office by retirement alone, provided that he meet requirements of reinstatement from retirement).

2. Status and Classification

- Ops Atty Gen No. 10050 (July 16, 1935) (power of board to change the class or grade and salary of civil service employees so long as they exercise a reasonable discretion; a person without civil service status may displace a person with civil service status if the latter is holding a position which is exempt by law).
- Ops Atty Gen No. 10497 (Feb. 4, 1936) (Art XXIV controls the civil service status of members of the California Highway Patrol).
- Ops Atty Gen No. NS-471 (July 23, 1937) (position of the State Architect is under civil service).
- Ops Atty Gen No. NS-728a (Dec. 6, 1937) (assignment or transfer of members of the Highway Patrol to various districts throughout the State is the duty of the Chief of the Highway Patrol).
- Ops Atty Gen No. NS-2433 (March 16, 1940) (effect upon the status of certain civil service employees of a reclassification of the positions to which such employees were appointed in 1935, depends upon whether there was a change in the duties to be performed by such employees after their appointment from eligible lists).
- Ops Atty Gen No. NS-3301 (June 10, 1941) (clerks of the Board of Prison Directors appointed to serve temporarily as secretaries of the Board of Prison Terms and Paroles without extra compensation have no civil service status as such).
- Ops Atty Gen No. NS-4778 (Apr. 13, 1943) (appointments for the duration of the war as proposed by Sec 8 of AB 1569, adding Sec 152.6 to the Civil Service Act, are not prohibited by Art XXIV).
- Ops Atty Gen No. NS-5027 (July 30, 1943) (state traffic officer assigned to perform the duties of a sergeant, though he continues to serve in such capacity for more than six months, would not acquire permanent civil service status as a sergeant).
- Ops Atty Gen No. NS-5478 (Apr. 29, 1944) (state employees in the Department of Public Health paid out of funds allotted to the State by the Federal Government, are subject to civil service in the absence of any rule or requirement of the Federal Government as to their selection).
- 6 Ops Atty Gen 90 (an employee's civil service status, in its true sense, ordinarily is that which he gains as a result of his competitive examination and his appointment to his position from the eligible list; with respect to such, the State Civil Service laws have consistently provided that such status shall not be affected by reclassification).
- 8 Ops Atty Gen 48 (Youth Authority member is not within civil service, and does not accumulate vacation time for which he can be paid on separation).
- 14 Ops Atty Gen 198 (visiting teacher to blind children of preschool age under position established in connection with the California School For The Blind under Ed C § 20975, is exempt from state civil service).
- 20 Ops Atty Gen 251 (upon dismissal of an employee from service, employee's name must be removed from all employment, re-employment, and eligible lists, irrespective as to whether they are for related classes to that from which the employee is dismissed, unless State Personnel Board otherwise orders).
- 28 Ops Atty Gen 265 (applicant for a State civil service position as entitled to appeal from written examinations in certain instances).
- 34 Ops Atty Gen 128 (an officer upon separation from state military duty in the office of the Adjutant General and reinstatement in his civil service position, may receive a lump sum payment for the leave which accrued that was unused during his military service).

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- 34 Ops Atty Gen 244 (Deputy Real Estate Commissioner is a state officer although he is also an employee within the meaning of Gov C §§ 18522, 18526, relating to Civil Service).
- 37 Ops Atty Gen 169 (State Personnel Board may reclassify position of Commandant of Veterans Home to require medical qualifications and other duties and responsibilities commensurate with a proposed change in program emphasis for home; such a classification would require abolition of present civil service class of Commandant and lay off or demote incumbent subject to right of appeal).
- 43 Ops Atty Gen 319 (crossing guards hired by the California Highway Patrol would be in the civil service).

3. State Contracts

- Ops Atty Gen No. 10292 (Oct. 21, 1935) (where services of a highly expert character and temporary nature are required in the construction of public works, they may be procured through independent contracts).
- Ops Atty Gen No. NS-2219 (Dec. 27, 1939) (employment of a private law firm to perform certain legal service in connection with the exchange of San Francisco-Oakland Bay Toll Bridge bonds held by the Reconstruction Finance Corporation and a new issue of revenue bonds and sale of same by the Reconstruction Finance Corporation to a group of underwriters, when such employment is in accord with agreements entered into between the Toll Bridge Authority and the Reconstruction Finance Corporation is not in contravention of state civil service).
- Ops Atty Gen No. NS-3960 (Dec. 10, 1941) (right of a district agricultural association to enter into a two-year contract with a person selected to fill a position lawfully established as the one confidential position to the board of directors, with the approval of Department of Finance, is not free from doubt; assuming such contract legal, same may be voided should the person so employed breach the contract).
- 17 Ops Atty Gen 152 (private accounting firm may not be employed to conduct independent audit of state accounts in absence of showing that work is such as could not be done by civil service employees).
- 24 Ops Atty Gen 173 (contract between Department of Finance and contractor for delivery of parcel post from various state offices to post office in Sacramento would violate Art XXIV; contracts between Department of Fish and Game and contractor for delivery of hunting and fishing licenses to various retailers in Los Angeles and San Francisco areas would not violate such provision).
- 30 Ops Atty Gen 75 (a contract by the State Department of Social Welfare in behalf of counties for services of a private medical group to provide medical aid to certain recipients of public assistance as not invalid hereunder).

4. Board's Powers

- Ops Atty Gen No. NS-728 (Nov. 26, 1937) (Art XXIV controls over Veh C § 123 as amended by Ch 295, Stats 1937; Rule 18, subd 3, of the Personnel Board should still be considered effective, unless difficulties arise).
- Ops Atty Gen No. NS-4013 (Feb. 7, 1942) (the State Board is without jurisdiction to reclassify a position retroactively or to effect the promotion of an employee by a reclassification or to sit in review of its own final orders).
- Ops Atty Gen No. NS-4029 (Feb. 3, 1942) (the Personnel Board may change a salary range under Sec 70 of the Civil Service Act, bringing the employee down to a new maximum, but may not reduce the salary for this range except for cause under Sec 173(a) of the Act).
- 12 Ops Atty Gen 143 (State Personnel Board as unauthorized to provide that time of employment in exempt state position can be counted for automatic salary increase by employee now in civil service position).
- 15 Ops Atty Gen 146 (right of State Personnel Board to determine whether minimum age requirement of Gov C § 1020 applies to particular positions).
- 36 Ops Atty Gen 138 (that part of Rule 202 of the State Personnel Board providing for ratings on the part of the Board on hearing from the qualifications appraisal panel is compatible with Art XXIV § 1).

Annotations:

- Application of civil service laws and regulations to court officers, attaches, or attendants. 14 ALR 636.
- Applicability of civil service rules as affected by attempt to enter into contract with one rather than appoint him to office or position. 111 ALR 1509.
- Objective test as condition of competitive examination under civil service. 112 ALR 665.
- Right of civil service commission to prescribe maximum or minimum age requirements for candidates for positions or promotions in civil service. 122 ALR 1452.
- Power to allow credit for education or training in relevant field in establishing a competitive civil service list. 129 ALR 351.
- Civil service laws, rules, or regulations as applicable to persons employed by one under contract with municipal corporation or other governmental body to do certain work for it or its residents. 134 ALR 1149.
- Civil service laws as within permissible limits of delegation of legislative power. 79 L Ed 474, 577.

NOTES OF DECISIONS

Case Law Assessor: Evaluation of Decisions under Prior Law

The scope of subsec (a), including all within the ambit of civil service except those specifically exempted (under Art XXIV § 4), is co-extensive with breadth of former Art XXIV § 4; subsec (b) is identical in effect to merit requirement of former Art XXIV § 1. Decisions construing repealed sections appear, in a single scheme with cases decided hereunder, for persuasive and precedential value; cases under former § 4 determining whether specific positions are included within or exempt from civil service appear as notes of decisions under Art XXIV § 4.

1. In General
2. Scope of Coverage
3. Classification Generally
4. Appointments and Promotions
5. — Examinations
6. Dismissals

1. In General

An officer whose appointee is selected from a restricted list and who is under civil service regulations, may be liable for the acts of such appointee if he has directed such act be done, or has otherwise personally cooperated in the doing of the act. *Lorah v Biscailuz* (1936) 12 CA2d 100, 54 P2d 1125, disapproved on other grounds (bond liability) *Union Bank & Trust Co. v Los Angeles County* 11 C2d 675, 81 P2d 919.

Where a general and a special provision of a statute are in conflict, the latter is paramount and controls the general provision; and while Sec 14 of the Civil Service Act, if construed literally, would apply to all persons holding civil service positions, insofar as its provisions are inconsistent with the special provisions of Sec 9, the latter control the

matter of dismissal of such employees. *Neuwald v Brock* (1939) 12 C2d 662, 86 P2d 1047.

In a proceeding for a writ of habeas corpus to secure petitioner's release from custody after conviction of a violation of a municipal ordinance which required him to obtain a certificate to do plumbing work within city limits, although he was a civil service state employee and engaged in the work of a plumber on state property within the city limits, the ordinance did not conflict with the general Civil Service Act and, therefore, was not unconstitutional, where the city adopted same under its general police power and its specifically given charter powers, and it dealt exclusively with the regulation of plumbing within the city. *Means, In re* (1939) 31 CA2d 290, 87 P2d 894.

Civil Service Act, Sec 231, reasonably interpreted, requires that all procedure taken subsequent to the effective date of the Act in any action or proceeding commenced before that date, or with respect to any right which accrued prior thereto, shall conform to the provision of the new statute so far as possible without affecting the substance of such accrued right; but where the procedure thereafter taken cannot conform to the 1937 Act, then the procedure existing under the former law applies. *Pohle v Christian* (1942) 21 C2d 83, 130 P2d 417.

In the absence of legislative authority, public employees in general have no right to strike against the government. *Pranger v Break* (1960) 186 CA2d 551, 9 Cal Rptr 293.

2. Scope of Coverage

Under [former] Art XXIV § 5(e) the attorney for the Board of Dental Examiners, who at time of appointment was exempt from civil service, but which position was included by Art XXIV, effective Dec. 20, 1934, was subject to dismissal during the probationary period; the contention that when the Board fixed the period prior to the expiration of two months from the adoption of the amend-

ment, the minimum period of two months became automatically the period of probation, and that the employee's permanent status began at that time, cannot be maintained. *Kennedy v State Personnel Board* (1936) 6 C2d 340, 57 P2d 486.

Persons appointed by the Board of Equalization to civil service positions, who held such positions prior to Dec. 20, 1934, but for less than six months prior thereto, did not thereupon acquire a permanent civil service status under [former] Art XXIV § 5(d), and could not claim that they were not subject to dismissal except under the provisions of the Civil Service Act. *Huston v State Personnel Board* (1936) 13 CA2d 707, 57 P2d 976.

One who occupied a noncivil service position with the Board of Harbor Commissioners, and was given notice that her services would terminate at the close of business on Dec. 19, 1934, which occurred at 4:30 p.m., was not a state employee when Art XXIV became effective immediately after midnight of said day, and having been dismissed she was not blanketed into civil service. *Hall v Board of State Harbor Comrs.* (1937) 21 CA2d 680, 70 P2d 199.

In an action to compel reinstatement of petitioner as a civil service employee, the fact that he did not acquire his status as a probationer under Sec 9 of the Civil Service Act, but was "blanketed in" by Art XXIV did not in any manner affect the provisions of said Act relative to his dismissal or retention, and as a probationer he was subject to the provisions of the Act, insofar as the power to dismiss him was concerned, no matter how he attained his position. *Neuwald v Brock* (1939) 12 C2d 662, 86 P2d 1047.

To hold unconstitutional Mil and Vet C § 395, providing for the absence of public officers or employees while in military service, would be contrary to national policy. *People v Sischo* (1943) 23 C2d 478, 144 P2d 785, 150 ALR 1431.

Officers of the Highway Patrol are included within civil service and come within the definition of the word "employee" for the purposes of the State Civil Service Act. *Martin v Henderson* (1953) 40 C2d 583, 255 P2d 416.

Civil service coverage restricts but does not prohibit the performance of government work by independent contractors; on appeal from a judgment for defendant state officials and private insurance carriers in an action to enjoin alleged violation of the civil service amendment, reversal was not required by the sustaining of defendants' demurrers on an erroneous ground, where the alleged violation was based on statutes and a contract calling for conduct of administrative tasks of the medical program by private insurance carriers, where, in addition to the erroneous ground relied on by the trial court, defendants urged the absence of any collision with the constitutional provision, and where the complaint alleged no facts showing that partial contractual conduct of the program

effected a displacement of state civil service; on the face of the complaint, the authorizing statutes and the contract did not violate the constitutional article. *California State Employment Assn. v Williams* (1970) 7 CA3d 390, 86 Cal Rptr 305.

3. Classification Generally

The Board has a sound discretion in determining what duties shall be imposed upon an employee in a particular position, and whether the addition of certain duties requires a reclassification of that position, and unless there is a clear abuse of discretion a court may not interfere with the province of the Board. *Otto v Reardon* (1937) 21 CA2d 260, 69 P2d 185; *Stockton v Department of Employment* (1944) 25 C2d 264, 153 P2d 741.

The fact that, at time of appointment, petitioner signed a "report of appointment," in which he accepted the appointment and agreed to work for the compensation then provided by law for said position, did not preclude him from receiving an increase thereafter provided upon a reclassification of said position. *Raymond v Christian* (1937) 24 CA2d 92, 74 P2d 536.

A State highway employee may be transferred from one portion of a highway district to another or from one portion of the State to another, in the manner provided by law, and he may not arbitrarily refuse to accept such transfer when it does not appear that there was any arbitrary, discriminatory or unreasonable action in making the assignment. *Spaletta v Kelly* (1939) 30 CA2d 656, 86 P2d 1074.

Adoption of Art XXIV did not carry with it a requirement that classification and grading of positions of persons blanketed into civil service be accomplished within the eight months probationary period specified in [former] § 5 thereof. Where an investigator in the Dept. of Motor Vehicles was blanketed into civil service upon adoption of Art XXIV, the classification and grading of his position was completed when the salary range for such position was fixed; and the earlier designation of the title of the position which he held did not operate to set his salary at the amount he was then receiving. *Stephens v Clark* (upholding Sec 5 of the State Civil Service Act) (1940) 16 C2d 490, 106 P2d 874.

Provision is made in the Act and the rules adopted by the Personnel Board under the authority of the statute, for temporary and emergency appointments under certain specified conditions. *People v Standard Acci. Ins. Co.* (1941) 42 CA2d 409, 108 P2d 923.

On appeal from a judgment denying a writ of mandate on behalf of a "platen pressman" seeking permission to perform services as "lithograph offset pressman" pursuant to Civil Service Act, Sec 157, the court, pursuant to CCP § 956a, and as a basis for affirmance, made findings upon substantially undisputed evidence that the two positions

required different qualifications. *Noce v Department of Finance* (1941) 45 CA2d 5, 113 P2d 716.

Under the Unemployment Insurance Act the Employment Commission has authority to create, abolish or recreate divisions from time to time, and the Personnel Board has no jurisdiction to determine when or under what conditions divisions may be abolished; abolition of a position by the Dept. of Employment does not affect the Board's power to order the reinstatement of the former holder of the position, where the duties are still performed, but by persons who, according to the classifications by the Board, are not entitled to perform those duties. *Stockton v Department of Employment* (1944) 25 C2d 264, 153 P2d 741.

There is a legitimate difference between employees in private business and those in state employ that makes a separate statutory classification by the Legislature a reasonable one. *Board of Administration v Ames* (1963) 215 CA2d 215, 29 Cal Rptr 917.

4. Appointments and Promotions

Art XXIV was designed to bring numerous positions, formerly exempt, under the civil service system, thereby making them subject to examination and selection on the basis of merit; and "State civil service" was obviously used to describe the established merit system, not merely the "civil" character of the employment. *Kennedy v State Personnel Board* (1936) 6 C2d 340, 57 P2d 486.

Although petitioners were assigned, and were performing, the duties of intermediate positions, where they had been certified for only the class of junior positions, and they did not qualify for the intermediate positions, either by examination, certification or appointment under civil service statutes, they could not be permitted to assume the classification title to such positions. *Pinion v State Personnel Board* (1938) 29 CA2d 314, 84 P2d 185.

Persons holding position of collector, but who performed the duties of investigator, had no rights under Civil Service Act, Secs 5, 60, 61 to compel the board to classify them in such higher positions for the period for which they served and to pay them the differential in salary, since under Art XXIV § 1, permanent appointments and promotions can be based on merit and fitness ascertained only by competitive examination. *Allen v State Board of Equalization* (1941) 43 CA2d 90, 110 P2d 73.

Civil Service Act, Sec 157, does not authorize the transfer of an employee, without examination, from one classification to another which requires different training, qualifications and duties. *Noce v Department of Finance* (1941) 45 CA2d 5, 113 P2d 716.

5. —Examinations

The plaintiff in an action to cancel civil service examinations and the eligible lists established

therefrom on the grounds that he had been unlawfully failed in certain examinations and arbitrarily barred from further participation therein did not perform a condition precedent to maintenance of suit, where he did not petition the State Personnel Board for a rehearing, the rule of exhaustion of administrative remedies being applicable; moreover, in that the action was brought against the Board, its members and its executive officer, it lacked an essential jurisdiction requirement, since every person named in such eligible list was not only a necessary but an indispensable party to the action. *Child v State Personnel Board* (1950) 97 CA2d 467, 218 P2d 52.

6. Dismissals

In a proceeding in mandamus to compel reinstatement of petitioner, where the only reason given for the separation was "dismissed—unsatisfactory service," although the instructions of the Personnel Board to the department contained the following: "Dismissed during probationary period for unsatisfactory conduct or capacity. Report must contain a statement of reasons for dismissal," "unsatisfactory service" could not be a reason for unsatisfactory conduct or capacity; but the court was not concerned with any motive there may have been for dismissal where no showing was attempted to indicate bad faith or fraud. *Kelly v State Personnel Board* (1939) 31 CA2d 443, 88 P2d 264.

In a proceeding for a writ of mandate to compel the Unemployment Reserves Commission to reinstate petitioner to a position as a probationary employee after his separation therefrom by said Commission and a subsequent order of Personnel Board for his reinstatement, Art XXIV was not in conflict with, nor did it control over, Secs 122 and 123 of the Civil Service Act, and the Personnel Board's order of reinstatement was unauthorized. *Stephenson v Unemployment Reserves Com.* (1939) 34 CA2d 19, 92 P2d 931.

In a mandamus proceeding against the Department of Employment to compel reinstatement of a Division Chief, the Employment Commission, which abolished the chief's position and ordered his layoff, was not an indispensable party to the proceeding. *Stockton v Department of Employment* (1944) 25 C2d 264, 153 P2d 741.

Where a decision of the Personnel Board ordering the reinstatement of a deposed Chief of Division of State Employment Agencies with back salary becomes final because the aggrieved party has failed either to exhaust his administrative remedies or to seek judicial redress, the courts will not review the merits of the controversy if the board acted within its jurisdiction. *Stockton v Department of Employment* (1944) 25 C2d 264, 153 P2d 741.

Where, pending a mandamus proceeding to compel compliance with an order of the Personnel Board reinstating a deposed Chief of Division of State Employment Agencies, said division and all

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employees therein were inducted into the employment of the Federal Government with civil service status, the reinstated chief was entitled under the Board's order to be certified to the Federal Government for induction into the federal service on the basis of his former position. *Stockton v Department of Employment* (1944) 25 C2d 264, 153 P2d 741.

A civil service employee who has been unlawfully deprived of his position is entitled, on reinstatement, to recover the amount of his accrued salary during the period he is prevented from performing his duties, less the amount he has received from private or public employment during that period. *Stockton v Department of Employment* (1944) 25 C2d 264, 153 P2d 741.

The dismissal of an employee from his civil service position is within jurisdiction of the Personnel Board. *Boren v State Personnel Board* (1951) 37 C2d 634, 234 P2d 981.

Where, because the civil service laws are explicit in the manner in which civil servants may be removed, it is necessary to follow the layoff provisions of Gov C § 19541, to remove an incumbent executive secretary of the Board of Nurse Examiners to make room for an appointee selected by the Board for such position, because it is a position having a confidential relationship to the board, this is not a circumvention of the civil service laws but an exact compliance therewith. *Feider v Hanna* (1959) 172 CA2d 201, 342 P2d 344.

§ 2. [Personnel Board]

(a) There is a Personnel Board of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for 10-year terms and until their successors are appointed and qualified. Appointment to fill a vacancy is for the unexpired portion of the term. A member may be removed by concurrent resolution adopted by each house, two-thirds of the membership of each house concurring.

(b) The board annually shall elect one of its members chairman.

(c) The board shall appoint and prescribe compensation for an executive officer who shall be a member of the civil service but not a member of the board.

Adopted November 3, 1970.

Prior Law: Based on former Art XXIV § 2, which provided prior to repeal:

"(a) There shall be a State Personnel Board of five members appointed by the Governor with the advice and consent of the Senate. The first terms of office shall expire on January 15, 1937; January 15, 1939; January 15, 1941; January 15, 1943; and January 15, 1945. Each subsequent appointee shall hold office for 10 years from the expiration of the term of his predecessor and until his successor is appointed and qualified, except that an appointment to a vacancy occurring before the expiration of a term shall be but for the remainder of that term. A member may be removed by a vote of two-thirds of the members elected to each house of the Legislature.

"(b) The board shall annually elect one of its members president.

"(c) The board shall appoint and fix the compensation of an executive officer who shall be a member of the state civil service but not a member of the board.

"Said executive officer shall perform and discharge all of the powers, duties, purposes, functions and jurisdiction hereunder or which hereafter by law may be vested in the board except that the adoption of rules and regulations, the creation and adjustment of classifications and grades, and dismissals, demotions, suspensions and other punitive action for or in the state civil service shall be and remain the duty of the board and a vote of a majority of the members of said board shall be required to make any action with respect thereto effective."

Former Sections: Former § 2, adopted Nov. 6, 1934, and amended Nov. 6, 1962, was repealed Nov. 3, 1970.

Cross References:

State Personnel Board generally: Gov C §§ 18650–18656.

Collateral References:

Cal Jur 2d Civil Service § 5.

15 Am Jur 2d Civil Service § 6, 7.

CEB: California Administrative Mandamus § 5.68.

Attorney General's Opinions:

24 Ops Atty Gen 56 (only exempt deputies designated in Gov C §§ 7.5, 7.6 may appear in place and stead of director of department or constitutional officer who by law is made appointive or ex officio member of board, commission, or other body).

44 Ops Atty Gen 40 (a deputy state sealer of weights and measures is under the direction of the Director of Agriculture and the State Personnel Board and not the county).

56 Ops Atty Gen 217 (constitutional jurisdiction of State Personnel Board as primary and exclusive in examination and selection of civil service personnel).

NOTES OF DECISIONS

The State Personnel Board is a statewide administrative agency, which is created by and derives adjudicating power from the state Constitution. *Hingsbergen v State Personnel Board* (1966) 240 CA2d 914, 50 Cal Rptr 59; *Gee v California State Personnel Board* (1970) 5 CA3d 713, 85 Cal Rptr 762.

Under Gov C § 18653, providing for meetings of the State Personnel Board, the Board is required to hold public hearings, but when the hearing has reached the decisional stage, it may hold an executive session for the sole purpose of deliberating on the decision to be reached, and at the conclusion

of the executive session, the Board must reconvene the public hearing and make public announcement of its decision; that part of § 18653 authorizing the Board to hold executive sessions "as provided in" Gov C § 11126, containing exceptions to the declared policy of public hearings, was intended to identify the exceptions in § 18653 with those of § 11126, and as so construed, the words "as provided in" are synonymous with "in accordance with" rather than being interpreted as "only as provided in." *California State Employees' Assn. v State Personnel Board* (1973) 31 CA3d 1009, 108 Cal Rptr 57.

§ 3. [Enforcement and administration]

(a) The board shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions.

(b) The executive officer shall administer the civil service statutes under rules of the board.

Adopted November 3, 1970.

Prior Law: Based on former Article XXIV §§ 2, 3.

(1) For text of former § 2, see Prior Law note under Art XXIV § 2.

(2) Prior to repeal former § 3 provided: "Said board shall administer and enforce, and is vested with all of the powers, duties, purposes, functions, and jurisdiction which are now or hereafter may be vested in any other state officer or agency under, Chapter 590 of the California Statutes of 1913 as amended or any and all other laws relating to the state civil service as said laws may now exist or may hereafter be enacted, amended or repealed by the Legislature."

Former Sections: Former § 3, adopted Nov. 6, 1934, and amended Nov. 6, 1962, was repealed Nov. 3, 1970.

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Cross References:

Investigatory powers of State Board: Gov C §§ 18670–18682.
Board's powers and duties generally: Gov C §§ 18701–18714.
Probationary periods generally: Gov C §§ 19170–19180.

Collateral References:

Cal Jur 2d Civil Service § 5.
15 Am Jur 2d Civil Service §§ 8–11.

Attorney General's Opinions:

Ops Atty Gen No. NS-3433 (May 15, 1941) (duly qualified civil service employees are entitled to the salary increases provided for in Sec 70 of the Civil Service Act unless there is not sufficient money available in the appropriation from which the salaries must be paid and the Director of Finance shall so certify; where a payroll submitted by the appointing power does not show a salary adjustment in conformity with the records of the State Personnel Board, Board should investigate the reason therefor and cause necessary correction to be made).

56 Ops Atty Gen 217 (constitutional jurisdiction of State Personnel Board as primary and exclusive in examination and selection of civil service personnel).

Annotations:

Discretion of civil service commission as regards promotional examinations for eligible lists. 75 ALR 1234.

Power of discretion of civil service commission in respect of classifying or grading positions in civil service. 134 ALR 1103.

Power of civil service body on own motion and without notice or hearing to reconsider, modify, vacate, or set aside order relating to dismissal of employee. 16 ALR2d 1126.

NOTES OF DECISIONS

Case Law Assessor: *Evaluation of Decisions under Prior Law*

Grant of power to, and allocation of functions between, Board and executive officer remain the same as under former Art §§ 2 and 3, except that Board's role in disciplinary actions is now limited to rule-making and review; decisions construing former §§ 2 and 3 appear for persuasive and precedential value in a single scheme with cases decided hereunder.

1. Board's Powers Generally
2. Appointment and Classification
3. Compensation
4. Suspension, Demotion, Dismissal, Reinstatement
5. ———Action Proper
6. ———Action Improper
7. Investigations
8. Hearings
9. Judicial Review
10. ———Exhaustion of Administrative Remedies
11. Executive Officer's Powers

1. Board's Powers Generally

No benefit can accrue a State civil service employee from the claim that no resolution was

passed by the Personnel Board concerning his appointment to a permanent position after certification and that the appointment was by the Board's secretary only, since if the action of said secretary was ineffectual, the employee could not show that any appointment whatever was made after such certification. *Allen v Corbett* (1938) 25 CA2d 202, 77 P2d 261.

The State Personnel Board has power under Gov C § 18707 to make its services available to state agencies excepted from civil service. *California State Employees Asso. v Trustees of Cal. State Colleges* (1965) 237 CA2d 530, 47 Cal Rptr 73.

The jurisdiction of the State Personnel Board, including its adjudicating power, is derived directly from Art XXIV § 3, which directs that the Board shall administer and enforce the civil service laws, and its authority is governed by the Constitution as well as by the Civil Service Act. *Ferdig v State Personnel Board* (1969) 71 C2d 96, 77 Cal Rptr 224, 453 P2d 728.

In an action to enjoin alleged violation of the civil service amendment, it was error to sustain general and jurisdictional demurrers on the ground that plaintiffs had failed to exhaust administrative remedies before suit, where the alleged violation was based on statutes and a contract calling for the conduct of administrative tasks of the Medi-Cal

program by private insurance carriers, where Gov C § 18670, investing the State Personnel Board with investigatory and enforcement powers, was relied upon by the court as the source of an administrative remedy which plaintiffs had bypassed, and where that statute did not empower the board to adjudicate the contractual status of the private carriers or to intercept their payments from the state treasury and did not rise to the level of an "administrative remedy" for the solution of a grievance by taxpayers. *California State Employees' Assn. v Williams* (1970) 7 CA3d 390, 86 Cal Rptr 305.

2. Appointment and Classification

State Board was within its power in entertaining a challenge to the legality of a civil service applicant's appointment, in holding a hearing and conducting an investigation on such complaint, and in rectifying the appointment which had been improperly based on unauthorized veterans' preference credits, where the Board received the prompt and full cooperation of the Department of Veterans Affairs which itself reexamined the applicant's eligibility for veterans' preference credits and removed them, where an objection was raised with the Department only a month after the applicant's appointment, an objection being made to the Board approximately three months later, and where both agencies promptly reviewed the matter. *Ferdig v State Personnel Board* (1969) 71 C2d 96, 77 Cal Rptr 224, 453 P2d 728.

3. Compensation

Where petitioner was duly appointed to a position at a specified monthly salary, and at all times he was a civil service employee, and the Personnel Board readjusted and increased the minimum salary range for said position, it was mandatory, that petitioner be paid at least the readjusted minimum salary. *Raymond v Christian* (1937) 24 CA2d 92, 74 P2d 536.

The State Personnel Board was not powerless to adopt Rule 191, allowing a civil service employee sick leave with pay, by virtue of Pol C § 350, since such section does not effectively limit the power otherwise conferred on the board by Art XXIV and the 1937 Civil Service Act. *Nelson v Dean* (1946) 27 C2d 873, 168 P2d 16, 168 ALR 467.

Where the salary of a civil service employee is fixed by statute and rule of the State Personnel Board, it may not be altered by contract; where there is no statute permitting additional compensation for services required to be performed by an employee at the monthly salary fixed for his position, he may not recover compensation for hours worked in excess of regular hours of duty. *Jarvis v Henderson* (1953) 40 C2d 600, 255 P2d 426.

Contention that by virtue of the enactment of Gov C § 18850 and Ed C § 22607, the Legislature effectively delegated the duty to the State Person-

nel Board and the college trustees to establish the salaries and wages of the state employees within their respective jurisdiction, and rendered itself powerless in these areas, rejected in view of Legislature's constitutional powers under Art XIII § 21. *California State Employees Assn. v State* (1973) 32 CA3d 103, 108 Cal Rptr 60.

4. Suspension, Demotion, Dismissal, Reinstatement

Under the Unemployment Insurance Act the Employment Commission has authority to create, abolish or recreate divisions from time to time, and the Personnel Board has no jurisdiction to determine when or under what conditions divisions may be abolished; abolition of a position by the Dept. of Employment does not affect the Board's power to order the reinstatement of the former holder of the position, where the duties are still performed, but by persons who, according to the classifications by the Board, are not entitled to perform those duties. *Stockton v Department of Employment* (1944) 25 C2d 264, 153 P2d 741.

By prescribing in Gov C § 19503 the period which must elapse before absence without leave constitutes automatic resignation from State service, the Legislature put it beyond the power of the State Personnel Board to designate a shorter period; State Personnel Board's Rule 369, declaring that a State employee's failure to return at termination of his leave of absence is an automatic resignation conflicts with and must yield to § 19503. *Hamblin v State Personnel Board* (1957) 148 CA2d 53, 306 P2d 118.

Gov C §§ 19574, 19575, 19579, permitting punitive action against a civil service employee and making the action final unless the employee answers and, in effect, appeals to the State Personnel Board, do not conflict with Art XXIV § 2, requiring action by the State Board to make any action with respect to dismissals effective, since Art XXIV § 5 provides that the Legislature may enact legislation not in conflict with the article to facilitate its operation, and the statutes facilitate the operation of the Article. *Payne v State Personnel Board* (1958) 162 CA2d 679, 328 P2d 849.

Under the Civil Service Act the Board had jurisdiction to determine the propriety of the layoff of a Chief of Division of State Employment Agencies, whose duties were transferred to another officer. *Stockton v Department of Employment* (1944) 25 C2d 264, 153 P2d 741.

Where proceedings were commenced within three months after notice of severance was served, and about seven months thereafter petitioner was appointed a deputy sheriff, the State could not say that he was not in its employ and at the same time be heard to object to him seeking to maintain himself while the question was being tested; and where petitioner, was not an officer but an employee, under Pol C § 360c he was only entitled,

on reinstatement, to the accrued salary less such sums paid him as a deputy sheriff. *Kelly v State Personnel Board* (1939) 31 CA2d 443, 88 P2d 264.

5. —Action Proper

In a proceeding to review an order of dismissal of petitioner as a member of the Highway Patrol, because of his activities in soliciting business for a firm of attorneys, the complaint sufficiently stated wrongful acts within Sec 14 of the Civil Service Act, even though the allegations therein to the effect that the acts of petitioner were in violation of Sec 6 of the Runners and Cappers Act were ignored as surplusage, and it was not necessary to allege that he had been convicted under said Sec 6. *Vadnais v Department of Motor Vehicles* (1935) 3 CA2d 562, 40 P2d 559.

Under Art XXIV which created the State Personnel Board, the existing rules of the Civil Service Commission were continued in force [former § 5(b)], and where said rules provided that the probationary period should not include time served as a temporary or emergency appointee, an employee could not count as part of his probationary period the time served as a temporary appointee, and said Board had a right to dismiss him any time within six months after his appointment to a permanent position. *Allen v Corbett* (1938) 25 CA2d 202, 77 P2d 261.

Under the substantial evidence rule, the State Personnel Board's decision and order dismissing a civil service employee for mistreating a mental patient was more than adequately supported by the testimony of two eyewitnesses who observed the employee twist the exposed breast of a patient in an attempt to subdue her at a time when six employees were present and two of them were holding the patient. *Lorimore v State Personnel Board* (1965) 232 CA2d 183, 42 Cal Rptr 640.

A finding that a memorandum by an Industrial Accident Commission referee to his superior demonstrated inefficiency within the meaning of Gov C § 19572 subd (c), was supported by substantial evidence where it was shown that the referee sent the memorandum reiterating his oral objections to an oral request and asking the disposition to be made of the matter though he had already been advised how to dispose of it. *Neely v California State Personnel Board* (1965) 237 CA2d 487, 47 Cal Rptr 64.

A finding that an Industrial Accident Commission referee was discourteous to a member of the public within the meaning of Gov C § 19572 was supported by substantial evidence where it was shown that during a hearing before the referee an attorney became angry, argumentative and disrespectful toward the referee and that after adjournment of the hearing the referee approached the attorney with clenched fists and said, "I ought to punch you in the nose." *Neely v California State Personnel Board* (1965) 237 CA2d 487, 47 Cal Rptr 64.

A finding that the conduct of an Industrial Accident Commission referee constituted insubordination and discourteous treatment of another employee within the meaning of Gov C § 19572 subds (e), (m), was supported as to discourteous treatment but not as to insubordination where it was shown that the referee, on receiving a notice of being relieved of his duties as presiding referee, used vulgar language in speaking about the matter to his superior. *Neely v California State Personnel Board* (1965) 237 CA2d 487, 47 Cal Rptr 64.

A state auditor's dismissal for dishonesty, in obtaining liquor licenses as a bar owner for bars owned by others, prior to his state employment, was within the power of the Attorney General and the State Personnel Board. *Gee v California State Personnel Board* (1970) 5 CA3d 713, 85 Cal Rptr 762.

6. —Action Improper

A letter from the Director of Agriculture, in whose department petitioner was working, to his chief accountant did not vest in the latter the power of dismissal where it apparently contained no statement conferring general authority to act in any matter of appointment or dismissal; and petitioner was never lawfully dismissed where the instructions for dismissal were given by said chief accountant, and no reasons relating to petitioner's conduct or capacity were stated in writing as a ground for dismissal. *Nilsson v State Personnel Board* (1938) 25 CA2d 699, 78 P2d 467.

In a proceeding in mandamus to compel reinstatement to a civil service position, where petitioner received a temporary appointment for three months, and his roster card, kept by the Civil Service Commission, contained a notation, about nine months later, purporting to extend his term of service until eligibles were appointed, although the official minutes of the Commission for that date were silent thereon, and said card also showed a check after each month for three years, indicating that his status had been checked by the Commission and that he had been found to be lawfully holding his position, the trial court was warranted in finding that he was the lawful holder of his position and had obtained civil service status. *Nilsson v State Personnel Board* (1938) 25 CA2d 699, 78 P2d 467.

The transfer of a state highway employee from one portion of the State to another must be made pursuant to law and the authorized rules adopted by the Personnel Board; and under Sec 3, of Rule 18 of said rules, which requires consent of the Board to such a transfer, where an attempted transfer is without approval or authorization of the Board, or its executive officer, but appears to have been directed by the principal personnel technician, who had no authority of law to perform administrative or executive duties of said executive officer, the attempted transfer is ineffectual and void. And where the employee refused to

accept such transfer, but at all times held himself in readiness to perform his duties, he was entitled to reinstatement and to recover his salary from the date of dismissal. *Spaletta v Kelly* (1939) 30 CA2d 656, 86 P2d 1074.

7. Investigations

A civil service employee has the right to disobey the orders of his superiors and refuse to answer questions only if in fact some valid reason excused his disobedience, and though it might be to his best interest to follow his attorney's advice and refuse to answer questions, he must, as a state employee, regardless of his rights as a private citizen, obey orders to cooperate in an investigation of a state agency or be subject to disciplinary action. *Hingsbergen v State Personnel Board* (1966) 240 CA2d 914, 50 Cal Rptr 59.

8. Hearings

In a civil service proceeding, where petitioner was not charged with crime, but merely with conduct which was not good behavior, and it was not claimed any statutory rule of procedure had been violated, it was immaterial that the complaint was made on information and belief. *Vadnais v Department of Motor Vehicles* (1935) 3 CA2d 562, 40 P2d 559.

The burden of proof that an officer did not perform his official duty is upon one asserting such irregularity; and in a proceeding, where it was the duty of the chief of personnel and organization to make an extension of petitioner's appointment upon the roster, and it appeared that such notation had been made, in the absence of proof that such notation had not been made under the direction of such officer, the presumption that official duty had been regularly performed was evidence of that fact. *Nikson v State Personnel Board* (1938) 25 CA2d 699, 78 P2d 467.

Art XXIV § 2(c) is not violated, notwithstanding that charges against a civil service employee are heard by a hearing officer, and that he makes no findings, where the Board's findings recite that the "board has carefully considered the evidence submitted at the hearing." *Nelson v Department of Correction* (1952) 110 CA2d 331, 242 P2d 906.

In a hearing for the discharge of a civil service employee, credibility of witnesses and the proper weight to be given their testimony were matters within the exclusive province of the State Personnel Board, and a finding on conflicting testimony, that an employee's conduct with a mental patient constituted physical abuse and a flagrant violation of her instructions was conclusive. *Lorimore v State Personnel Board* (1965) 232 CA2d 183, 42 Cal Rptr 640.

In a proceeding to consider the punitive action to be taken against a civil service employee who was charged with misconduct by his superior, the superior's motive, in making the charges of mis-

conduct, was not relevant and the hearing officer properly restricted cross-examination as to motive. *Neely v California State Personnel Board* (1965) 237 CA2d 487, 47 Cal Rptr 64.

In a hearing to consider the punitive action to be taken against an Industrial Accident Commission referee for being discourteous to an attorney, testimony of prominent persons to prove that the referee's conduct, both as a referee and supervising referee, was competent, impartial and courteous was properly rejected; the referee's good character was not in issue and evidence of the character was not admissible. *Neely v California State Personnel Board* (1965) 237 CA2d 487, 47 Cal Rptr 64.

Under Gov C § 18653, providing for meetings of the State Personnel Board, the Board is required to hold public hearings, but when the hearing has reached the decisional stage, it may hold an executive session for the sole purpose of deliberating on the decision to be reached, and at the conclusion of the executive session, the Board must reconvene the public hearing and make public announcement of its decision; that part of § 18653 authorizing the Board to hold executive sessions "as provided in" Gov C § 11126, containing exceptions to the declared policy of public hearings, was intended to identify the exceptions in § 18653 with those of § 11126, and as so construed, the words "as provided in" are synonymous with "in accordance with" rather than being interpreted as "only as provided in." *California State Employees' Assn. v State Personnel Board* (1973) 31 CA3d 1009, 108 Cal Rptr 57.

9. Judicial Review

Since jurisdiction of the Personnel Board, including its adjudicating power, is derived directly from Art XXIV § 3, certiorari is available to review the Board's decision dismissing an employee from his civil service position. *Boren v State Personnel Board* (1951) 37 C2d 634, 234 P2d 981.

Factual determinations of a statewide administrative agency which derives adjudicating power from the Constitution, such as the Personnel Board, are not subject to reexamination in a trial de novo but are to be upheld by a reviewing court if they are supported by substantial evidence. *Shepherd v State Personnel Board* (1957) 48 C2d 41, 307 P2d 4; *Hingsbergen v State Personnel Board* (1966) 240 CA2d 914, 50 Cal Rptr 59; *Bodenschatz v Personnel Board* (1971) 15 CA3d 775, 93 Cal Rptr 471; *Blake v State Personnel Board* (1972) 25 CA3d 541, 102 Cal Rptr 50.

Where the basis of a decision of the State Personnel Board approving a state employee's dismissal partially fails, the reviewing court should remand the case to the administrative agency empowered to act so that it may reconsider the penalty to be imposed. *Shepherd v State Personnel Board* (1957) 48 C2d 41, 307 P2d 4.

This Article does not carry an obligation to review

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the evidence, and in this sense the State Personnel Board is not different from an agency governed by the Administrative Procedure Act; in neither case is review of the evidence commanded, and in both, due process of law is essential. *Fichera v State Personnel Board* (1963) 217 CA2d 613, 32 Cal Rptr 159.

A party aggrieved by the appointment of one not an orthodox Rabbi to act as the State Kosher Food Law Representative of the state is not without a direct remedy; Art XXIV § 2 subd (c) makes dismissal of public officers the duty of the State Personnel Board, and though the Board has wide discretion to decide whether to institute administrative proceedings against an ineligible representative, an abuse of discretion is subject to judicial control by writ of mandate. *West Coast Poultry Co. v Glasner* (1965) 231 CA2d 747, 42 Cal Rptr 297.

In determining whether the State Personnel Board arbitrarily discharged a civil service employee, the trial court is obligated to confine itself to the record of the administrative proceeding before the Board and to refrain from exercising its independent judgment on the weight of the evidence. *Lorimer v State Personnel Board* (1965) 232 CA2d 183, 42 Cal Rptr 640.

Though a state auditor was dismissed for dishonesty in obtaining bar licenses for bars owned by others, the superior court did not abuse its discretion in denying him leave to amend his petition for mandate by alleging matters occurring after the Board's decision with respect to actions by the State Department of Employment and the Department of Alcoholic Beverage Control indicating a less onerous view of the transactions and his use as a witness by his late employer, the Department of Justice; the action and inaction by other departments was hearsay and the calling of the auditor as a witness had no discernible relation to his honesty or character traits. *Gee v California State Personnel Board* (1970) 5 CA3d 713, 85 Cal Rptr 762.

On appeal from a judgment for defendant state officials and private insurance carriers in an action to enjoin alleged violation of the civil service amendment, reversal was not required by the sustaining of defendants' demurrers on an erroneous ground, where the alleged violation was based on statutes and a contract calling for conduct of administrative tasks of the Medi-Cal program by private insurance carriers, where, in addition to the erroneous ground relied on by the trial court, defendants urged the absence of any colli-

sion with the constitutional provision, and where the complaint alleged no facts showing that partial contractual conduct of the program effected a displacement of state civil service; on the face of the complaint, the authorizing statutes and the contract did not violate the constitutional article. *California State Employment Asso. v Williams* (1970) 7 CA3d 390, 86 Cal Rptr 305.

10. —Exhaustion of Administrative Remedies

Gov C §§ 19574, 19575, 19579, permitting punitive action against a civil service employee and making the action final unless the employee answers and, in effect, appeals to the State Personnel Board, do not conflict with Art XXIV § 2, since Art XXIV § 5 provides that the Legislature may enact legislation not in conflict with this the Article to facilitate its operation, and the statutes so facilitate its operation. *Payne v State Personnel Board* (1958) 162 CA2d 679, 328 P2d 849.

In an action to enjoin alleged violation of the civil service amendment, it was error to sustain general and jurisdictional demurrers on the ground that plaintiffs had failed to exhaust administrative remedies before suit, where the alleged violation was based on statutes and a contract calling for the conduct of administrative tasks of the Medi-Cal program by private insurance carriers, where Gov C § 18670, investing the State Personnel Board with investigatory and enforcement powers, was relied upon by the court as the source of an administrative remedy which plaintiffs had bypassed, and where that statute did not empower the board to adjudicate the contractual status of the private carriers or to intercept their payments from the state treasury and did not rise to the level of an "administrative remedy" for the solution of a grievance by taxpayers. *California State Employees' Asso. v Williams* (1970) 6 CA3d 554, 86 Cal Rptr 305, mod & reprinted in 7 CA3d 390, 86 Cal Rptr 305.

11. Executive Officer's Powers

Under Art XXIV § 2(c) the adoption of rules and regulations is specifically reserved to the Personnel Board, and the executive officer of said board is given no power to adopt rules or regulations; and Sec 3 of Rule 18 of the rules of said Board, which authorizes the transfer of an employee from one part of the State to another only with the consent of said Board, is a reasonable regulation which is authorized by law, and not in conflict with said Art XXIV. *Spaletta v Kelly* (1939) 30 CA2d 656, 86 P2d 1074.

§ 4. [Exempt positions]

The following are exempt from civil service:

EXEMPTIONS

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- (a) Officers and employees appointed or employed by the Legislature, either house, or legislative committees.
- (b) Officers and employees appointed or employed by councils, commissions or public corporations in the judicial branch or by a court of record or officer thereof.
- (c) Officers elected by the people and a deputy and an employee selected by each elected officer.
- (d) Members of boards and commissions.
- (e) A deputy or employee selected by each board or commission either appointed by the Governor or authorized by statute.
- (f) State officers directly appointed by the Governor with or without the consent or confirmation of the Senate and the employees of the Governor's office, and the employees of the Lieutenant Governor's office directly appointed or employed by the Lieutenant Governor.
- (g) A deputy or employee selected by each officer, except members of boards and commissions, exempted under Section 4(f).
- (h) Officers and employees of the University of California and the California State Colleges.
- (i) The teaching staff of schools under the jurisdiction of the Department of Education or the Superintendent of Public Instruction.
- (j) Member, inmate, and patient help in state homes, charitable or correctional institutions, and state facilities for mentally ill or retarded persons.
- (k) Members of the militia while engaged in military service.
- (l) Officers and employees of district agricultural associations employed less than 6 months in a calendar year.
- (m) In addition to positions exempted by other provisions of this section, the Attorney General may appoint or employ six deputies or employees, the Public Utilities Commission may appoint or employ one deputy or employee, and the Legislative Counsel may appoint or employ two deputies or employees.

Adopted November 3, 1970.

Prior Law: Based on former Art XXIV § 4, which provided prior to repeal:

“(a) The provisions hereof shall apply to, and the term ‘state civil service’ shall include, every officer and employee of this State except:

“(1) State officers elected by the people.

“(2) State officers directly appointed by the Governor with or without the consent or confirmation of the Senate and the employees of the Governor's office.

“(3) State officers and employees directly appointed or employed by the Attorney General or the Judicial Council; or by any court of record in this State or any justice, judge or clerk thereof.

“(4) State officers and employees directly appointed or employed by the Legislature or either house thereof.

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"(5) One person holding a confidential position to any officer mentioned in paragraphs (1), (2) or (4) hereof except that there shall be but one such position to any board or commission composed in whole or in part of officers mentioned in said paragraphs, each such person to be selected by the officer, board or commission to be served.

"(6) One deputy for the Legislative Counsel and for each state officer elected by the people, each such deputy to be selected by the officer to be served.

"(7) Persons employed by the University of California.

"(8) Persons employed by any state normal school or teachers college.

"(9) The teaching staff of all schools under the direction or jurisdiction of the Superintendent of Public Instruction, the Department of Education or the director thereof or the State Board of Education who otherwise would be members of the state civil service.

"(10) Employees of the Federal Government, or persons whose selection is subject to rules or requirements of the Federal Government, engaged in work done by cooperation between the State and Federal Government or engaged in work financed in whole or in part with federal funds.

"(11) Persons appointed or employed by or under the State Board of Prison Directors or any warden of a state prison.

"(12) The officers and employees of the Railroad Commission.

"(13) Member help in the Veterans' Home of California and inmate help in all state charitable or correctional institutions.

"(14) The members of the militia of the State while engaged in military service.

"(15) Officers and employees of district agricultural associations employed less than six months in any one calendar year.

"(16) Stewards and veterinarians of the California Horse Racing Board who are not employed on a full time basis.

"(b) The Legislature may provide that the provisions of this article shall apply to, and the term 'state civil service' shall include, any person or group of persons hereinbefore excepted other than those mentioned in paragraphs (1), (2), (7) or (14) of subdivision (a) of this section. Hereafter, no exception shall be revived with respect to any person or group of persons heretofore or hereafter included in the state civil service under this subdivision. The Legislature may, however, provide that any officer included in the state civil service pursuant to this paragraph may be appointed by the Governor, and in such case the provisions of paragraph (2) shall apply.

"(c) Whenever the appointment or employment of new or additional officers or employees of this State is hereafter authorized by law, such officers or employees shall be subject to the provisions hereof and included within the state civil service unless of a class excepted herein."

Former Sections: Former § 4, adopted Nov. 6, 1934, and amended Nov. 7, 1950, was repealed Nov. 3, 1970; for similar provisions, see Art XXIV §§ 1, 4.

Cross References:

Exempt appointees of Director of Alcoholic Beverage Control: Art XX § 22.

State Board's continuation of exempt status: Art XXIV § 6.

Executive secretary of Board of Social Work Examiners: B & P C § 9005.

Designation of person exempt under subsec (g) of this section as Deputy Director of Commerce: Gov C § 14983.

Approval of salary of position exempt from civil service under subd (b) of this section: Gov C § 18004.

Collateral References:

Cal Jur 2d Civil Service §§ 6, 7.

Witkin Procedure 2d pp 39, 40.

15 Am Jur 2d Civil Service §§ 14, 15.

Attorney General's Opinions:

1. In General
2. Exempt Status
3. Non-Exempt Status

1. In General

- Atty Gen's Letter to Assemblyman of 26th District L.B. 161, p 28 (Oct. 7, 1937) (there is no irreconcilable conflict between Art XVI § 10(h) and exception of Art XXIV § 4(a)(10)).
- Atty Gen's Letter to State Architect L.B. 162, p 147 (Nov. 19, 1937) (State Board of Prison Directors may construct a unit of the Southern California State Prison and employ an architect to prepare plans and specifications).
- Ops Atty Gen No. NS-1424 (Feb. 2, 1939) (Legislature has power to bring the employees of the State Board of Prison Directors into the civil service system, but cannot provide special provisions regarding the employment and dismissal of such employees when brought under civil service).
- Ops Atty Gen No. NS-1497 (Mar. 6, 1939) (advisory boards appointed as provided in Agr C § 1300.15, are not "State" boards, and members thereof are not state officers or employees).
- Ops Atty Gen No. NS-1642 (Apr. 29, 1939) (exemption of the officers and employees of the Horse Racing Board from civil service was superseded by Art XXIV).
- Ops Atty Gen No. NS-2489 (Apr. 6, 1940) (Board of Funeral Directors and Embalmers is entitled to one confidential employee).
- 6 Ops Atty Gen 300 (California Food and Fiber Production Act may not empower Governor to appoint agency's employees, and insofar as it does so, is unconstitutional).

2. Exempt Status

- Ops Atty Gen No. 9763 (Feb. 4, 1935) (the State Forester is protected by Art XXIV, and his position may not be declared a confidential position by the Board of Forestry; but the Director of Natural Resources may declare the position confidential, and exempt from civil service).
- Ops Atty Gen No. 10172 (Oct. 2, 1935) (provisions of Art XXIV do not embrace inheritance tax appraisers).
- Ops Atty Gen No. NS-222a (July 30, 1937) (advisory boards appointed by the Director of Agriculture under Stats 1937, Chap 404 and employees of such boards do not have civil service status).
- Ops Atty Gen No. NS-641 (Oct. 13, 1937) (person employed as a guard in a convict road camp under jurisdiction of the Board of Prison Directors is exempt from civil service).
- Ops Atty Gen No. NS-735 (Dec. 1, 1937) (secretary-treasurer of a district agricultural society may be designated as the one confidential officer of the board).
- Ops Atty Gen No. NS-1762 (June 8, 1939) (certain employees of the Vocational Educational Division of the Department of Education of a professional class are to be considered exempt from civil service under Art XXIV § 4(a)(10); other employees, such as clerical, stenographic, etc., are subject to civil service).
- Ops Atty Gen No. NS-2294 (Jan. 25, 1940) (an Assistant Attorney General is in fact a deputy, and is exempted from civil service to the same extent as a Deputy Attorney General; such assistant is not brought within civil service by Sec 57 of the Civil Service Act).
- Ops Atty Gen No. NS-2568 (May 17, 1940) (California Polytechnic School, created by Stats 1901, p 115, is deemed a "State normal school or teachers' college" as used in Art XXIV § 4(a)(8), for which reason the institution's employees are exempt from civil service).
- Ops Atty Gen No. NS-4764 (Mar. 10, 1943) (state college employees are exempt from civil service).
- Ops Atty Gen No. NS-5227 (Jan. 27, 1944) (notwithstanding that the Employment Stabilization Commission is composed of members of the Unemployment Insur-

- ance Appeal Board, the Chief of the Division of Public Employment Offices and Benefit Payments, and the Chief of the Division of Accounts and Tax Collections, serving ex officio, the Commission as well as the Appeal Board and each division chief is entitled under Art XXIV to select one person holding a confidential position to it or him exempt from civil service).
- 8 Ops Atty Gen 53 (Adult Authority may appoint chief parole officer outside civil service, or Director of Corrections may appoint other exempt person for confidential position).
- 14 Ops Atty Gen 198 (visiting teacher to blind children of pre-school age under position established in connection with California School for the Blind as exempt from state civil service).
- 17 Ops Atty Gen 127 (the Chief of Division of Housing and the Commission of Housing are both state officers appointed by the Governor and therefore each is entitled to one confidential appointee).
- 18 Ops Atty Gen 209 (State Board of Cosmetology may dismiss its Secretary, who holds position exempt from civil service, without necessity for filing any statement of issues).
- 20 Ops Atty Gen 155 (Fish and Game Commission as coming within Art XXIV § 4(a)(5)).
- 34 Ops Atty Gen 54 (members of the militia on active duty with the state are exempt from requirements of civil service but the conditions of employment when assigned to the office of the Adjutant General are governed by the Military and Veterans Code and regulations of the Adjutant General).
- 37 Ops Atty Gen 69 (Art XXIV referring in terms to State Teachers' Colleges applies to State Colleges and has effect of exempting employees of State Colleges from civil service).
- 40 Ops Atty Gen 121 (where Governor has appointed the same person to two compatible offices, the person may appoint two persons to exempt confidential positions).

3. Non-Exempt Status

- Ops Atty Gen No. NS-189 (Mar. 6, 1937) (position of Chief of the Highway Patrol cannot be said to be a confidential position to the Director of Motor Vehicles).
- Ops Atty Gen No. NS-446 (July 30, 1937) (commissary clerk in a convict road camp employed by the Department of Public Works under Stats 1923, Chap 316, as amended, is entitled to civil service status notwithstanding the source of funds out of which he is paid).
- Ops Atty Gen No. NS-2106 (Nov. 3, 1939) (employees of the Division of Forestry, including the chief of the division, are not exempt from civil service, under Art XXIV § 4(a)(10), where when selection is not subject to a rule or regulation of the Federal Government).
- Atty Gen's Letter to Board of Trustees, Calif. Institution for Women L.B. 156, p 830 (Apr. 29, 1937) (the California Institution is not under control of the Board of Prison Directors and its employees are not now exempt from civil service, for the institution is no longer under control of a warden of a state prison).
- Ops Atty Gen No. NS-3351 (Mar. 14, 1941) (an attempt to except from civil service intermittent employees, other than that permissible under one of the exceptions in Art XXIV § 4, would be void).
- Ops Atty Gen No. NS-5045 (Dec. 23, 1943) (a member of the Board of Barber Examiners elected to serve as its secretary between 1927 and 1937 who was not selected as exempt under Art XXIV was blanketed into civil service as such secretary by said Article; such person may, however, be replaced by a member of such board selected as exempt under § 4(a)(5)).
- 3 Ops Atty Gen 242 (civil service department of public health employees paid by federal government as within civil service).
- 14 Ops Atty Gen 262 (effect of adoption of civil service provisions on status of social welfare department employees).

Annotations:

Application of civil service laws and regulations to court officers, attaches, or attendants. 14 ALR 636.

TEMPORARY APPOINTMENTS

§ 5

Applicability of civil service rules as affected by attempt to enter into contract with one rather than appoint him to office or position. 111 ALR 1509.

NOTES OF DECISIONS

Case Law Assessment: Evaluation of Decisions under Prior Law

This section makes several specific changes in designating exempt positions, deletes legislative authorization for altering certain classifications, and omits provision concerning status of new positions; decisions construing former Art XXIV § 4 appear for persuasive and precedential value.

1. In General
2. Status

1. In General

In passing the Donahoe Act of Higher Education (Ed C § 22500 et seq.), the Legislature understood that the exemption from civil service of the teaching staff of state colleges was based on Const., Art XXIV § 4(a)(8), which refers particularly to normal schools and state colleges, not to the more general section Art XXIV § 4(a)(9), relating to all schools under the Director of Education. *California State Employment Asso. v Trustees of Cal. State Colleges* (1965) 237 CA2d 530, 47 Cal Rptr 73.

Civil service coverage restricts but does not prohibit the performance of government work by independent contractors. *California State Employment Asso. v Williams* (1970) 7 CA3d 390, 86 Cal Rptr 305.

2. Status

A "confidential position" is one where the duties of the position are not merely clerical and are such

as especially devolve on the head of the office and which, by reason of his numerous duties, he is compelled to delegate to others; the executive secretary to the Board of Nurse Examiners represents the board in matters requiring skill, integrity and judgment, and such position is a "confidential position" within the meaning of Art XXIV § 4(a)(5), exempting from state civil service one person holding a confidential position to any state officer mentioned in prior paragraphs of the section. *Feider v Hanna* (1959) 172 CA2d 201, 342 P2d 344.

Under Art XXIV § 4(a)(3), providing that "civil service" includes every state officer and employee except one directly appointed or employed "by any court of record in this State," inheritance tax appraiser comes within exception. *Daggett v Cranston* (1961) 189 CA2d 774, 11 Cal Rptr 404.

The existing state colleges are the statutory successors of the state colleges whose employees are exempt from civil service. *California State Employment Asso. v Trustees of Cal. State Colleges* (1965) 237 CA2d 530, 47 Cal Rptr 73.

Transfer of nonacademic employees of the former Division of State Colleges and Teacher Education of the Department of Education from civil service status to a status excepted from civil service as employees of the Trustees of the California State Colleges is plainly directed by the Legislature and is constitutional. *California State Employment Asso. v Trustees of Cal. State College* (1965) 237 CA2d 530, 47 Cal Rptr 73.

§ 5. [Temporary appointments]

A temporary appointment may be made to a position for which there is no employment list. No person may serve in one or more positions under temporary appointment longer than 9 months in 12 consecutive months.

Adopted November 3, 1970.

Prior Law: Based on former Art XXIV § 6, which provided prior to repeal: "(a) No temporary appointment of a person to any position shall be made unless there is no employment list from which such position can be filled.

"(b) No person shall hold a given position under temporary appointment for a longer period than nine months in any consecutive 12 months, nor shall any person serve in the state civil service under temporary appointment for a longer total period than nine months in any consecutive 12 months."

Former Sections: Former § 5, adopted Nov. 6, 1934, and amended Nov. 6, 1962, was repealed Nov. 3, 1970; prior to repeal former § 5 provided: "The provisions of this article

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shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation."

Cross References:

"Temporary employee" for civil service purposes: Gov C § 18529.
Temporary appointments in absence of employment lists: Gov C § 19058.
Status of temporary appointees: Gov C § 19059.
Limited term appointments generally: Gov C §§ 19080-19083.
Intermittent appointments: Gov C §§ 19100, 19101.
Emergency appointments: Gov C § 19120.

Collateral References:

Cal Jur 2d Civil Service § 20.
15 Am Jur 2d Civil Service § 25.

Attorney General's Opinions:

Ops Atty Gen No. NS-392 (June 23, 1937) (under Art XXIV and Sec 9 of the Civil Service Act, the Personnel Board may abolish an eligible list and make a temporary appointment only when there is no appropriate list from which the appointment may be made).
Ops Atty Gen No. NS-1502 (Mar. 7, 1939) (length of a probationary period as fixed by rule of the board is not affected by whether the employed probationer is working under full-time or part-time employment, providing the employment is continuous; same rule applies in temporary employment in determining the six months' period of limitation of Art XXIV § 6).
Ops Atty Gen No. NS-1935. (Sept. 6, 1939) (the six month limitation for temporary appointments under Art XXIV § 6(b) applies when no eligible list is available; if a vacancy again occurs after appointment from an eligible list, and no such list is in existence, temporary appointments may again be made during the six months' period).
Ops Atty Gen No. NS-2441 (Mar. 20, 1940) (a person employed by the Registrar of Contractors for a period prior to and subsequent to Dec. 20, 1934, under a so-called contract as public relations counsel, was properly declared by the Personnel Board as placed into civil service as a probationer for the reason that such contract was in violation of civil service regulations).
Ops Atty Gen No. NS-3407 (Apr. 17, 1941) (a lithographic offset pressman serving in a given position under temporary authorization of the Personnel Board, cannot hold the position as a temporary appointee for longer than 6 months).
Ops Atty Gen No. NS-4778 (Apr. 13, 1943) (appointments for the duration of the war as proposed by Sec 8 of A.B. 1569 adding Sec 152.6 to the Civil Service Act are not prohibited by Art XXIV).
Ops Atty Gen No. NS-5027 (July 30, 1945) (state traffic officer assigned to perform the duties of a sergeant, though he continues to serve in such capacity for more than six months, would not acquire permanent civil service status as a sergeant).
Ops Atty Gen No. NS-5556 (June 13, 1944) (power of Legislature under Art XXIV to blanket into permanent status persons previously blanketed into duration status).

NOTES OF DECISIONS

Highway patrol officer's service as temporary officer for more than one year did not entitle him to automatic status of permanent officer, where his appointment as temporary officer was made when there was no eligible list from which position could be filled, and he had no civil service status entitling him to permanent appointment. *Shubert v Department of Motor Vehicles* (1936) 16 CA2d 353, 60 P2d 538.

Where a person acted under a temporary appointment as inspector in the Highway Patrol for twenty months, pursuant to § 11 of the prior Civil Service Act, and after examination was placed on an eligible list for the position of inspector at large, and was thus without civil service status, other than that of traffic officer held pursuant to another examination and appointment, it was an abuse of discretion of the former Civil Service

VETERANS' PREFERENCES

§ 6

Board, several years after the abolition of the eligible list, to reclassify him as inspector and give him a higher position. *Spaulding v Philbrick* (1940) 42 CA2d 58, 108 P2d 59.

Appointment of employee was temporary rather than permanent, where request for certification of

eligibles was no duration basis, employee was insufficiently high on eligible list to be certified for permanent appointment, and representative of appointing commission had no authority to represent that position was permanent. *Patten v State Personnel Board* (1951) 106 CA2d 168, 234 P2d 987.

§ 6. [Veterans' preferences—Saving provisions]

(a) The Legislature may provide preferences for veterans and their widows.

(b) The board by special rule may permit persons in exempt positions, brought under civil service by constitutional provision, to qualify to continue in their positions.

(c) When the state undertakes work previously performed by a county, city, public district of this state or by a federal department or agency, the board by special rule shall provide for persons who previously performed this work to qualify to continue in their positions in the state civil service subject to such minimum standards as may be established by statute.

Adopted November 3, 1970.

Prior Law: Based in part on former Art XXIV § 7, which provided prior to repeal:

"Nothing herein contained shall prevent or modify the giving of preferences in appointments and promotions in the State civil service to veterans and widows of veterans as is now or hereafter may be authorized by the Legislature."

Former Sections: Former § 6, adopted Nov. 6, 1934, and amended Nov. 7, 1950, was repealed Nov. 3, 1970; for similar provisions, see Art XXIV § 5.

Cross References:

"Veteran" for purposes of civil service: Gov C § 18540.4.

Veterans' preferences on eligibility and promotional listings: Gov C § 18937.

Collateral References:

Cal Jur 2d Civil Service § 14.

15 Am Jur 2d Civil Service §§ 26, 27, 43.

5 Am Jur Pl & Pr Forms (Rev ed), Civil Service, Form 2.

Attorney General's Opinions:

6 Ops Atty Gen 140 (veterans' disability preference under State Civil Service applies to disability existing at time preference is claimed).

Annotations:

State veterans' public employment preference law. 161 ALR 494.

State veterans' tenure laws as affecting dismissal of noncivil service public employees. 58 ALR2d 960.

NOTES OF DECISIONS

State Board was within its power in entertaining a challenge to the legality of a civil service applicant's appointment, in holding a hearing and conducting an investigation on such complaint, and in rectifying the appointment which had been improperly based on unauthorized veterans' prefer-

ence credits, where the Board received the prompt and full cooperation of the Department of Veterans Affairs which itself reexamined the applicant's eligibility for veterans' preference credits and removed them, where an objection was raised with the Department only a month after the applicant's

§ 6

CIVIL SERVICE

appointment, an objection being made to the Board approximately three months later, and where both agencies promptly reviewed the matter. *Ferdig v State Personnel Board* (1969) 71 C2d 96, 77 Cal Rptr 224, 453 P2d 728.

Authority to determine the allowance of veterans' civil service preferences emanates from Art XXIV § 7 and has been conferred by the Legislature upon the Department of Veterans Affairs (Gov C § 18976); the Department is charged with the

responsibility of notifying the State Personnel Board which candidates have qualified for veterans' preference and in carrying out this responsibility it must make its determination in accordance with the statute allowing additional credit to veterans (Gov C § 18973), but the veteran has some responsibility in presenting proof of eligibility to the department. *Ferdig v State Personnel Board* (vet held ineligible under § 18973) (1969) 71 C2d 96, 77 Cal Rptr 224, 453 P2d 728.

§ 7. [Adopted November 6, 1934; and repealed November 3, 1970.]

Superseding Provisions: For similar provisions, see Art XXIV § 6(a).

Supplemental materials and amendment adopted at the General Election held November 5, 1974*

ARTICLE XXIV

State Civil Service

Cross References:

Application of provisions of this Article to include the Chief of the Bureau of Narcotic Enforcement: H & S C § 11451.

Collateral References:

Witkin Summary (8th ed) pp 648, 649.
13 Cal Jur 3d Constitutional Law § 4.

§ 1. [Scope of civil service—Merit system]

Collateral References:

Witkin Summary (8th ed) p 649.

Attorney General's Opinions:

56 Ops Atty Gen 353 (application of this article to employees of California Coastal Zone Conservation Commission and regional coastal zone commissions).
56 Ops Atty Gen 416 (preclusion against Department of California Highway Patrol's changing examination plan from departmental promotional only to open; permitted lateral transfers of personnel from certain classes of state service only to class of state traffic officer).

§ 2. [Personnel board]

(a) There is a Personnel Board of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for 10-year terms and until their successors are appointed and qualified. Ap-

*See Deering's California Constitution, 1976.

pointment to fill a vacancy is for the unexpired portion of the term. A member may be removed by concurrent resolution adopted by each house, two-thirds of the membership of each house concurring.

(b) The board annually shall elect one of its members as presiding officer.

(c) The board shall appoint and prescribe compensation for an executive officer who shall be a member of the civil service but not a member of the board.

Amendments:

1974 Amendment: Substituted "as presiding officer" for "chairman" in subd (b).

§ 3. [Enforcement and administration]

8. Hearings

In reviewing a decision of the State Personnel Board sustaining the dismissal of one employed as a tenured civil service employee serving as a teacher of emotionally and mentally disturbed children at a state hospital, the trial court properly applied the substantial evidence rather than the independent judgment test of review of the record of the administrative hearing. The board is an agency with adjudicatory powers created by Cal Const, art XXIV, § 3, which provides that the "board shall . . . review disciplinary actions," and the substantial evidence test therefore governs

judicial review of its determinations. *Kristal v State Personnel Board* (1975) 50 CA3d 230, 123 Cal Rptr 512.

9. Judicial Review

Inasmuch as the State Personnel Board is a statewide agency deriving its adjudicating powers from the state Constitution, the Board's factual determinations are not subject to re-examination in a trial de novo, but are to be upheld by a reviewing court if supported by substantial evidence. *Skelly v State Personnel Bd.* (1975) 15 C3d 194, — Cal Rptr —, — P2d —.

§ 4. [Exempt positions]

Cross References:

Exempt deputy or employee of Occupational Safety and Health Standards Board and Occupational Safety and Health Appeals Board: Lab C §§ 145, 148.2.

Collateral References:

Witkin Summary (8th ed) p 649.
12 Cal Jur 3d Clerks of Court § 1.

Attorney General's Opinions:

56 Ops Atty Gen 353 (application of this article to employees of California Coastal Zone Conservation Commission and regional coastal zone commissions).

Notes of Decisions

2. Status

On appeal from a judgment of the trial court upholding a decision of the State Personnel Board sustaining the dismissal of a tenured civil service employee who served as a teacher of emotionally and mentally disturbed children at a state hospital, the employee could not successfully argue the applicability of Cal Const, art XXIV, § 4, excepting from the jurisdiction of the state civil service system and consequently from the administrative jurisdiction of the board "the teaching staff of schools under the jurisdiction of the Department

of Education or the State Superintendent of Public Instruction," where he made no showing before the administrative agency or in the trial court, or in his briefs on appeal, that the teaching staff of the hospital school was under such jurisdiction, and where he did not, at any stage of the proceedings, attempt to establish that the instructional function at the hospital was performed by a "school" so as to bring the teachers at the institution within Cal Const, art IX, and the statutes governing discharge of public school teachers implementing it. *Kristal v State Personnel Board* (1975) 50 CA3d 230, 123 Cal Rptr 512.

Constitutional Amendment, State of California, Referendum,
Adopted November 1970.

14	STATE CIVIL SERVICE. Legislative Constitutional Amendment. Continues existing civil service system, revises language and removes certain provisions. Requires additional positions be civil service and removes certain positions from civil service.	YES	
		NO	

(For Full Text of Measure, See Page 12, Part II)

General Analysis by the Legislative Counsel

A "Yes" vote on this measure is a vote to revise the civil service provisions of the State Constitution to restate these provisions and to exempt from civil service employees of the Lieutenant Governor's office directly appointed or employed by the Lieutenant Governor, to exempt an additional employee for each member of an elected board or commission, and to authorize the inclusion in state civil service of certain nonstate employees in programs taken over by the state.

A "No" vote is a vote to reject this revision.

For further details, see below.

Detailed Analysis by the Legislative Counsel

Generally, Article XXIV of the Constitution now provides for (1) a state civil service which includes every state officer and employee, with certain specified exceptions; (2) permanent appointments and promotions based upon merit ascertained by competitive examination; (3) a Personnel Board to enforce the civil service laws, and an executive officer to perform and discharge all powers and functions vested in the board by the Constitution or by law, except for certain specified duties requiring action by the board itself; (4) temporary appoint-

ment; and (5) preferences for veterans and their widows.

The revision would retain the substance of these provisions with the following major changes:

(1) All employees of the Lieutenant Governor's office directly appointed or employed by the Lieutenant Governor would be exempt from the civil service system.

(2) The number of exemptions for the Public Utilities Commission would be reduced.

(3) The Constitution now provides for two exempt positions for each elected state officer but provides that in the case of a state board composed of elected members the members each have one exempt position and the board as a whole has one exempt position. The revision gives each member of such a board two, rather than one, exempt position, and retains the board's one exempt position.

(4) The Constitution now provides an exempt position for each board and commission whose members are appointed by the Governor. Under the revision an exempt position would also be given to each statutory state board or commission whose members are not appointed by the Governor.

(5) The existing constitutional provision which authorizes the Legislature to transfer

into the civil service system exempt positions except elected officers, Governor's appointees, and employees in the Governor's Office, employees of the University of California, and militia on active duty, would be deleted. Under the revision, if exempt positions are brought under civil service by constitutional amendment, the State Personnel Board would be authorized to include within the state's civil service system individuals holding exempt positions.

(6) Employees of a county, city, or district or a federal agency in programs taken over by the state would be allowed to qualify for their positions in the state civil service system subject to such minimum standards as the Legislature may establish.

Statutes Contingent Upon Adoption of Above Measure

The text of Chapter 764 of the Statutes of 1970, which was enacted to become operative if and when the above revision is approved, is on record in the office of the Secretary of State in Sacramento and will be contained in the 1970 published statutes. A digest of that chapter is as follows:

It would add one section to the Government Code to provide that the executive officer of the State Personnel Board shall administer the civil service statutes under rules of the board, subject to the right of appeal to the board.

Argument in Favor of Proposition 14

Proposition 14 is a recommendation of California Constitution Revision Commission and both Houses of the Legislature.

Vote YES on Proposition 14. This measure deserves your support because it assures the continued high quality of service by employees of the state government.

A YES vote will retain our excellent civil service system, while eliminating obsolete language and providing new provisions to suit modern needs.

A YES vote on Proposition 14 continues the requirement that permanent appointments and promotion in the state civil service shall be based on merit and competitive examinations. It continues the independent State Personnel Board to enforce civil service statutes and to review disciplinary actions. This proposal has been endorsed by the State Personnel Board and the California State Employees Association.

A YES vote on Proposition 14 promotes efficiency and economy in state government,

and prevents appointment of inefficient employees for political reasons.

DAVID A. ROBERTI
Member of the Assembly,
48th District

ED REINECKE
Lieutenant Governor

GEORGE DANIELSON
State Senator
Los Angeles-Alhambra

Argument Against Proposition 14

The people of California gave constitutional protection to the State Civil Service System by an initiative measure in 1934. A new system of employment based on merit replaced the old, corrupt methods of political appointment. Since that time California's system has been a model for the entire country. Now we are told by the Constitution Revision Commission that the system which has served so well must be revised and updated. But in fact this proposition makes additional positions subject to political appointment even though the existing article already contains numerous exemptions from the merit system. The Constitution Revision Commission has once again gone beyond their charge of updating the Constitution and has recommended substantive changes. It is time to halt the erosion of constitutional guarantees which have served us so well.

Furthermore, this same proposition has already been on the ballot in the last two statewide elections and the people have twice defeated it. Nevertheless, the Legislature has persistently placed it on the ballot once again. The first defeat in the 1968 General Election was credited to the fact that the issues had been confused by placing all of the constitution revision proposals in one "package" proposition. This problem was supposedly solved by breaking the package down into four propositions on the June 1970 ballot. But, once again, the people rejected the proposal. Is the Legislature relying on the rules of chance to pass this proposal? After two defeats, it should be clear that the people do not want this proposition. Yet the will of the people has been ignored by presenting the same proposal once again.

This time the people must make it very clear that this proposition weakens working constitutional provisions by voting overwhelmingly against it. Vote NO on Proposition 14.

JOHN L. HARMER
Senator

14	STATE CIVIL SERVICE. Legislative Constitutional Amendment. Continues existing civil service system, revises language and removes certain provisions. Requires additional positions be civil service and removes certain positions from civil service.	YES	
		NO	

(This amendment proposed by Assembly Constitutional Amendment No. 36 of the 1970 Regular Session, as amended by SB 780 of the 1970 Regular Session, expressly repeals an existing article of the Constitution, and adds a new article thereto; therefore, **EXISTING PROVISIONS** proposed to be **REPEALED** are printed in **STRIKEOUT TYPE**; and **NEW PROVISIONS** proposed to be **ADDED** are printed in **BOLDFACE TYPE**.)

**PROPOSED AMENDMENTS TO
ARTICLE XXIV**

First—That Article XXIV is repealed.

ARTICLE XXIV

STATE CIVIL SERVICE

SECTION 1. Permanent appointments and

promotion in the State civil service shall be made exclusively under a general system based upon merit, efficiency and fitness as ascertained by competitive examination.

Sec. 2. (a) There shall be a State Personnel Board of five members appointed by the Governor with the advice and consent of the Senate. The first terms of office shall expire on January 15, 1937; January 15, 1939; January 15, 1941; January 15, 1943; and January 15, 1945. Each subsequent appointee shall hold office for 10 years from the expiration of the term of his predecessor and until his successor is appointed and qualified, except that an appointment to a vacancy occurring before the expiration of a term shall be but for the remainder of that term. A member may be removed by a vote of two-thirds of

the members elected to each house of the Legislature.

(b) The board shall annually elect one of its members president.

(c) The board shall appoint and fix the compensation of an executive officer who shall be a member of the State civil service but not a member of the board.

Said executive officer shall perform and discharge all of the powers, duties, purposes, functions and jurisdiction hereunder or which hereafter by law may be vested in the board except that the adoption of rules and regulations, the creation and adjustment of classifications and grades, and dismissals, demotions, suspensions and other punitive action for or in the State civil service shall be and remain the duty of the board and a vote of a majority of the members of said board shall be required to make any action with respect thereto effective.

Sno. 3. Said board shall administer and enforce, and is vested with all of the powers, duties, purposes, functions, and jurisdiction which are now or hereafter may be vested in any other state officer or agency under Chapter 500 of the California Statutes of 1913 as amended or any and all other laws relating to the state civil service as said laws may now exist or may hereafter be enacted, amended or repealed by the Legislature.

Sno. 4. (a) The provisions hereof shall apply to, and the term "state civil service" shall include, every officer and employee of this State except:

(1) State officers elected by the people.

(2) State officers directly appointed by the Governor with or without the consent or confirmation of the Senate and the employees of the Governor's office.

(3) State officers and employees directly appointed or employed by the Attorney General or the Judicial Council, or by any court of record in this State or any justice, judge or clerk thereof.

(4) State officers and employees directly appointed or employed by the Legislature or either house thereof.

(5) One person holding a confidential position to any officer mentioned in paragraphs (1), (2) or (4) hereof except that there shall be but one such position to any board or commission composed in whole or in part of officers mentioned in said paragraphs; each such person to be selected by the officer, board or commission to be served.

(6) One deputy for the Legislative Counsel and for each state officer elected by the people; each such deputy to be selected by the officer to be served.

(7) Persons employed by the University of California.

(8) Persons employed by any state normal school or teachers college.

(9) The teaching staff of all schools under the direction or jurisdiction of the Superintendent of Public Instruction, the Department of Education or the director thereof or the State Board of Education who otherwise would be members of the state civil service.

(10) Employees of the Federal Government, or persons whose selection is subject to rules or requirements of the Federal Government, engaged in work done by cooperation between the State and Federal Government or engaged in work financed in whole or in part with federal funds.

(11) Persons appointed or employed by or under the State Board of Prison Directors or any warden of a state prison.

(12) The officers and employees of the Railroad Commission.

(13) Member help in the Veterans' Home of California and inmate help in all state charitable or correctional institutions.

(14) The members of the militia of the State while engaged in military service.

(15) Officers and employees of district agricultural associations employed less than six months in any one calendar year.

(16) Stewards and veterinarians of the California Horse Racing Board who are not employed on a full time basis.

(b) The Legislature may provide that the provisions of this article shall apply to, and the term "state civil service" shall include, any person or group of persons heretofore excepted other than those mentioned in paragraphs (1), (2), (7) or (14) of subdivision (a) of this section. Hereafter, no exception shall be revived with respect to any person or group of persons heretofore or hereafter included in the state civil service under this subdivision. The Legislature may, however, provide that any officer included in the state civil service pursuant to this paragraph may be appointed by the Governor, and in such case the provisions of paragraph (2) shall apply.

(c) Whenever the appointment or employment of new or additional officers or employees of this State is hereafter authorized by law, such officers or employees shall be subject to the provisions hereof and included within the state civil service unless of a class excepted herein.

Sno. 5. The provisions of this article shall be self-executing but legislation not in conflict herewith may be enacted to facilitate its operation.

Sno. 6. (a) No temporary appointment of a person to any position shall be made unless there is no employment list from which such position can be filled.

(b) No person shall hold a given position under temporary appointment for a longer period than nine months in any consecutive 12

months; nor shall any person serve in the state civil service under temporary appointment for a longer total period than nine months in any consecutive 12 months.

Sec. 7. Nothing herein contained shall prevent or modify the giving of preferences in appointments and promotions in the State civil service to veterans and widows of veterans as is now or hereafter may be authorized by the Legislature.

Second—That Article XXIV is added to read:

ARTICLE XXIV STATE CIVIL SERVICE

Sec. 1. (a) The civil service includes every officer and employee of the state except as otherwise provided in this Constitution.

(b) In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination.

Sec. 2. (a) There is a Personnel Board of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for 10-year terms and until their successors are appointed and qualified. Appointment to fill a vacancy is for the unexpired portion of the term. A member may be removed by concurrent resolution adopted by each house, two-thirds of the membership of each house concurring.

(b) The board annually shall elect one of its members chairman.

(c) The board shall appoint and prescribe compensation for an executive officer who shall be a member of the civil service but not a member of the board.

Sec. 3. (a) The board shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions.

(b) The executive officer shall administer the civil service statutes under rules of the board.

Sec. 4. The following are exempt from civil service:

(a) Officers and employees appointed or employed by the Legislature, either house, or legislative committees.

(b) Officers and employees appointed or employed by councils, commissions or public corporations in the judicial branch or by a court of record or officer thereof.

(c) Officers elected by the people and a deputy and an employee selected by each elected officer.

(d) Members of boards and commissions.

(e) A deputy or employee selected by

each board or commission either appointed by the Governor or authorized by statute.

(f) State officers directly appointed by the Governor with or without the consent or confirmation of the Senate and the employees of the Governor's office, and the employees of the Lieutenant Governor's office directly appointed or employed by the Lieutenant Governor.

(g) A deputy or employee selected by each officer, except members of boards and commissions, exempted under Section 4(f).

(h) Officers and employees of the University of California and the California State Colleges.

(i) The teaching staff of schools under the jurisdiction of the Department of Education or the Superintendent of Public Instruction.

(j) Member, inmate, and patient help in state homes, charitable or correctional institutions, and state facilities for mentally ill or retarded persons.

(k) Members of the militia while engaged in military service.

(l) Officers and employees of district agricultural associations employed less than 6 months in a calendar year.

(m) In addition to positions exempted by other provisions of this section, the Attorney General may appoint or employ six deputies or employees, the Public Utilities Commission may appoint or employ one deputy or employee, and the Legislative Counsel may appoint or employ two deputies or employees.

Sec. 5. A temporary appointment may be made to a position for which there is no employment list. No person may serve in one or more positions under temporary appointment longer than 9 months in 12 consecutive months.

Sec. 6. (a) The Legislature may provide preferences for veterans and their widows.

(b) The board by special rule may permit persons in exempt positions, brought under civil service by constitutional provision, to qualify to continue in their positions.

(c) When the state undertakes work previously performed by a county, city, public district of this state or by a federal department or agency, the board by special rule shall provide for persons who previously performed this work to qualify to continue in their positions in the state civil service subject to such minimum standards as may be established by statute.

And be it further resolved, That it is intended that if both this measure and Assembly Constitutional Amendment No. 79 of the 1969 Regular Session of the Legislature are

adopted and approved by the electors at the November 1970 election that both be given effect, and to that end subdivision (m) is added to Section 4 of Article XXIV, to read:

(m) In addition to positions exempted by other provisions of this section, the Attorney General may appoint or employ six deputies or employees, the Public Utilities Commission may appoint or employ one deputy or employee, the Legislative Counsel may appoint or employ two deputies or employees, and the State Board of Education, on nomination of the Superintendent of Public Instruction, may appoint not more than two Deputy Superintendents of Public Instruction and not more than four Associate Superintendents of Public Instruction, whose

terms of office shall run concurrently with the term of the Superintendent of Public Instruction who nominated them, but shall not exceed four years.

And be it further resolved, That the provisions of the second resolved clause of this measure shall become operative only if Assembly Constitutional Amendment No. 79 is adopted by the electors at the November 1970 election, in which case subdivision (m) of Section 4 of Article XXIV as added by the first resolved clause of this measure, and subdivision (d) of Section 4 of Article XXIV as added by the first resolved clause of Assembly Constitutional Amendment No. 79, shall not take effect.

B

TAB B

PUBLIC SECTOR COLLECTIVE BARGAINING:

ORIGINS AND PERSPECTIVES

Introduction

The most significant development in American labor relations since the 1960s has been the spectacular growth of collective bargaining in the public sector. The dimensions of this development are impressive. In the last thirty years public payrolls have more than tripled. The largest and fastest growing industry in the nation today is government employment, especially at the local and state levels. Public employment has been rising not only in absolute terms, but also as a percentage of the total civilian labor force.

In 1940 there were approximately three and one-half million government employees, representing about 6.5 percent of the civilian labor force. By 1950 government employment had climbed to 5.5 million, or 9 percent of the civilian labor force. In 1960 it had reached 7.8 million, over 11 percent of the labor force. By mid-1970 the total number of employees on government payrolls had reached the staggering figure of 12.6 million, or about 15 percent of the civilian labor force (10 million were on state and local government payrolls and 2.6 million in the federal service). By 1975 employment at all levels of government was approximately 15 million, or about 20 percent of the labor force; about one out of every five employees working for government.

The rise in the payroll of local and state government, as well as of public education institutions has been accompanied by increased employee organizational activity. Teachers, nurses, social workers, police, fire fighters, garbage collectors, technicians, maintenance workers, clerical personnel, lifeguards, and even zoo attendants have demanded and have been granted the right to organize and bargain collectively on wages, hours, and working conditions. Membership has risen steadily in affiliated unions representing public employees, as well as in professional and non-affiliated employee associations. In addition, many independent employee groups and professional organizations in the public sector have modified their policies and practices in the direction followed by traditional labor unions. Strikes and slowdowns among public employees, once a rarity, have now become an almost daily occurrence.

The increase in public union membership and negotiation has significantly expanded the scope of bargaining between employee organizations and the employing governmental agency. Public professional employee organizations and white-collar groups have considered negotiations not only as a means of improving wages, hours, and working conditions, but also as an instrument of more fundamental social change.

Teachers demand a voice in determining basic educational policy; they bargain about school curriculum, class size, and the quality of education. Nurses bargain about professional standards. Social workers insist upon negotiating the level of benefits for welfare recipients.

Policemen seek to regulate the number of men on a given patrol and on the relationship between law enforcement officials and suspected law violators. Air traffic controllers want to bargain about their equipment and work load.

These developments certainly match in scope and importance the major breakthrough of union organization in the mass production industries during the thirties.

Reasons for Change

How did these developments come about? What forces in the environment contributed to the changing role of public-sector labor relations?

Many theories have been advanced-- historical, sociological, and others economic or political in nature. Most authorities agree on the following explanations:

1. Population Growth and an Increased Social Consciousness. Just as the Great Depression was the engine propelling the forces for economic and social change in the thirties, so the unprecedented population growth and a pronounced heightening of social consciousness during the fifties and sixties have provided the major impetus for the extraordinary increase in demand for a wide range of social and welfare services.

The rapid rate of population growth is evident from the following: In 1930 the total population of the United States was roughly 123,000,000.

By 1940 it had increased by 9 million to 132,000,000. However, by 1950 population growth more than doubled that of the previous decade, climbing to 152,000,000, an increase of 20 million. By 1960 the largest increment of the century occurred, the population reaching 180,000,000, an increase of 28 million. According to recent Census Bureau estimates, the total U.S. population on July 1, 1970 was approximately 205,000,000, an increase of 25 million over 1960. Thus, in the 30 year period 1940-1970, the population has risen by 73 million persons, almost the total population of the nation at the start of the twentieth century.

The period 1940-1970 has been one of great change and intense social ferment. Not only characterized by large population increases, it was an era that also experienced rapid growth of cities, momentous shifts in population, extensive industrial expansion, and impressive technological advance. These far-reaching developments gave rise to enormous and complex problems of health, welfare, housing, sanitation, environmental pollution, and traffic congestion.

Government at all levels became increasingly involved in these problems since the private sector had failed to allocate sufficient resources to their resolution. But more important, a changing social consciousness led to a changing view of the role of government. With the passage of the Social Security Act of 1935, government has been called upon to provide an ever growing variety of services in the critical areas of health needs, education, and economic security. In 1964 Congress passed

three major pieces of legislation which considerably expanded the sphere of government activity. The 1965 Medicare amendment to the Social Security Act provided for more health services. The Education Act of 1965 greatly enlarged school facilities in urban ghettos and low income communities, which in turn stimulated the demand for more teachers and educational specialists. Related to the Education Act was a section of the Economic Opportunity Act of 1964, which established the Head Start program. The expansion of Head Start again has increased the demand for pre-school teachers, particularly at the nursery and kindergarten levels. Legislation in the 1970s in many areas has further expanded the role of government at all levels.

2. Pressures of the Competitive Labor Market. The sharply increased demand for teachers, nurses, social workers, and other categories of professional, semi-professional, and white-collar personnel forced the government into greater competition with the private sector in a relatively tight wartime and postwar labor market. With acute shortages in many of these classifications, public employees soon began to attain secure feelings that they could not easily be replaced. Concerted action to improve wages, hours, and working conditions became far less precarious. The pressures of the competitive labor market thus contributed to far greater public employee militancy than had previously existed, which in turn triggered the demand for collective negotiation.

3. President Kennedy's Task Force and Executive Order 10988. Five months after Kennedy became President in 1961, he appointed a Task Force to

review employee relations in the federal service and to submit recommendations for future action. In November 1961, the Task Force submitted its report recommending establishment of a comprehensive system for improving federal employee-management relations.

On January 12, 1962, based on the recommendations of the Task Force, President Kennedy issued Executive Order 10988 which set forth the procedures to facilitate union recognition and negotiations. The Order guaranteed to most federal employees the right to join or not to join a labor organization; it granted the right of exclusive recognition to an employee organization that represented a majority of employees in an appropriate unit; and it provided for advisory arbitration in any dispute over the scope of an appropriate unit.

The Order had a profound effect on labor relations in government service. It directly stimulated employee organization and negotiations not only in the federal service, but also indirectly at the state and local level as well. The Order provided somewhat the same impetus for public-sector labor relations that the Wagner Act of 1935 had done in the 1930s for private-sector labor relations.

4. The Decline of Unionism in the Private Sector. In the early sixties it became evident that the American labor movement was declining significantly in strength and membership. Union membership growth was not keeping pace with the growth of the civilian labor force. Traditionally, unions had been most successful in organizing blue-collar

workers in production and maintenance jobs of mass production industries. However, automation and other forms of improved production technology significantly reduced the number of such jobs, and as a result, union membership declined in a number of industries which had been strongholds of organized labor.

During this period, there also occurred a pronounced shift of employment to service industries. The expansion in that sector, and especially in government jobs, exceeded any increase in the industrial centers of traditional union power. It is not surprising, therefore, to find organized labor looking to this new burgeoning service area as a possible breakthrough to gain potential union membership among such diverse groups as federal civil servants, teachers, municipal workers, and other categories of state and local government employees.

5. The Impact of Inflation. The rapidly rising price level since the mid-sixties has adversely affected the real income of government personnel. Worker pressures for substantial wage increases were most obvious in the private sector where unions were negotiating healthy cost-of-living adjustments and fringe benefits to offset the inflationary trend. However, wages and benefits of government employees were generally not keeping pace with either the rising price level or with settlements in the private sector. For example, negotiated wage increases for the private sector in 1968 were higher than in any previous year. The situation was even more pronounced in 1969 because private-sector.

agreements emphasized immediate gains in both wages and supplementary benefits. The publicity given to huge private-sector bargaining settlements had an unstabilizing effect upon the morale of government employees, whose wages and fringe benefits had previously suffered by comparison with those in private industry. White-collar and salaried professional workers witnessed the effectiveness of unions in partially raising blue-collar incomes to keep pace with the rising price level. Small wonder that government workers looked to the unions for support and that organized labor looked to the public sector as a ripe field for organization.

6. The Mood of the Times. Professor Nigro, of the University of Delaware, has attributed much of the militancy among government employees to the contagion of general dissatisfaction with the status quo and the challenge to constituted authority:

Not just teachers, but all government workers are influenced by the effectiveness of civil rights marches, open-housing demonstrations, student sit-ins, and other forms of non-cooperation or civil disobedience.¹

The widespread revolt against authority (even within the union ranks) stimulated a further questioning of established institutions and traditional methods for adjusting employee problems and grievances. Tactics of direct action seemed to produce faster and better results than continued petitioning.

7. The Inexperience of Government Management. A number of public administrators failed to keep pace with the advanced techniques of

personnel management in private industry, and this factor contributed to the greater militancy of government workers. Some public managers are reluctant to consult employees on procedures and policies affecting their working lives. Many public officials, particularly at the state and local levels, firmly believe in principle that unions have no place in the public service; there is no need to recognize organized employee groups; and it is inappropriate to engage in collective negotiations. The refusal of some government administrators to consult with employees on a variety of day-to-day problems has widened the gap between management and labor. Available evidence indicates that a significant number of strikes, resignations, sick leave calls, slow-downs, and other disruptive tactics are in part a result of the hostile attitude toward public employee organization.

8. The Impact of U.S. Supreme Court Decisions. Professor Jack Stieber, of Michigan State University, suggests that the High Court's reapportionment decisions of 1962 and 1964 had a direct impact on the changed relationship between public sector management and its employees. According to Stieber, the reconstitution of state legislatures pursuant to the Court rulings were more representative of urban centers, which made them more friendly to organized labor and more sympathetic to collective negotiations in the public sector. Stieber describes two situations as illustrative of this development:

Michigan provides a dramatic example of the effect of reapportionment. The first legislature in 20 years controlled by Democrats, drawn heavily from the populated

urban areas of the state, replaced the punitive Hutchison Act with the Public Employee Relations Act of 1965, which prohibits strikes of government employees but also includes provisions for certification of employee representatives, processing charges of unfair labor practices, mediation of disputes and fact-finding. In Delaware, a reapportioned legislature also passed a new labor relations law for public employees. Since the impact of reapportionment on state legislatures has only begun, we may find other states changing their laws on organization and bargaining for public employees as the composition of their membership changes.²

Comparison of Public vs. Private Sector Bargaining

It has taken approximately 35 years for the private sector to reach the degree of sophistication and professionalization which today characterizes labor-management relations in the major urban centers of the country. Over this period the private sector has developed many techniques, concepts, and institutions which have facilitated conflict resolution in labor relations and minimized disruptions. A critical question facing the public sector today is whether it can and should adopt--in its entirety--the systems, methods, and techniques which have been perfected in private industry.

There are two opposing schools of thought on this matter: One group, largely reflecting the views of organized labor, perceives little fundamental difference between public and private sector labor relations. Whether an employee works for government, they say, or for private industry is irrelevant. In both instances the employee has similar economic, social, and psychological needs and is entitled to the same fundamental rights as any citizen. Most government jobs have

their counterparts in private industry; and managements in both sectors adhere to identical basic philosophies. Accordingly, there is no need to devise different methods and institutions for dealing with public sector employee relations. The more militant unions, such as the American Federation of Teachers, and the American Federation of State, County, and Municipal Employees, also assert that the right to strike is just as inherent and essential in public as in private employment.

The opposing point of view questions the necessity or even the desirability of transferring the entire machinery of private sector bargaining to public employment. They argue that public sector labor relations have distinctive features which reflect the unique characteristics of the government as employer and the manner in which tax-supported services are rendered. Thus, a modified approach to bargaining in the public sector is urged, which takes into account the peculiar aspects of the state as an employer and the relatively recent development of public employee organizations.

As in many such controversies, there is considerable merit to both points of view. A comparison of collective bargaining in the private and public sectors reveals many similarities. It is well-known, for example, that an employee-employer relationship tends to generate problems of some kind. And it makes little difference whether the employer is a private corporation, a government agency, a university, or even a union. Whenever certain individuals (called administrators, department heads, or supervisors) have authority over

other individuals (called subordinates, employees, or just hired help) some friction is bound to develop sooner or later. As Clark Kerr has so succinctly noted:

Someone manages and someone is managed; this represents an eternal opposition of interest, which may be made bearable but can never be eliminated....³

Nor does the character of the work alter the situation. Whether the employee is a factory worker, an insurance salesman, a bank teller, a public school teacher, a university professor, or a government-employed scientist, all are subject at times to feelings of discrimination and ill treatment, or to a strong sense of dissatisfaction and frustration over terms and conditions of employment. The same forces that motivate industrial workers to substitute collective strength for individual weakness operate also in the public sector. The political theory of checks and balances in the exercise of authority applies to government employment, as it does to the private sector where the union traditionally acts as a counterbalancing influence on the exercise of managerial authority.

The similarities should not obscure some fundamental differences between private and public sector bargaining. These distinctive features derive from the nature of public employment and may be described as economic, political, and structural in nature:

1. Economic Factors. A recent analysis of collective bargaining stresses the decisive role of economic constraints in private

sector bargaining that generally do not operate in the public sector:

In the private sector, union demands are usually checked by the forces of competition and other market pressures. Negotiators are typically limited by such restraints as the entry of nonunion competitors, the impact of foreign goods, the substitution of capital for higher-priced labor, the shift of operations to lower-cost areas, the contracting out of high-cost operations to other enterprises, the shutdown of unprofitable plants and operations, the redesign of products to meet higher costs, and finally the managerial option to go out of business entirely. Similar limitations are either nonexistent or very much weaker in the public sector. While budgets and corresponding tax levies operate in a general way to check increases in compensation, the connection is remote and scarcely applicable to particular units or groups of strategically located public employees.⁴

2. Political Differences. The political character of public management has no direct counterpart in private industry. At most levels of government, the ultimate decisions on matters of employee relations are made by elected administrative officials or legislative bodies. These officials are subject to strong political pressures which do not normally affect industry executives. The plans and operations of government are also far more subject to public scrutiny. Budget hearings are open and elected officials are often required to carry on their deliberations in public.

Whereas the checks and balances in private sector bargaining are normally bilateral, in the public sector they are trilateral. There is a built-in, often hidden, tension between the elected executive officer and the professional management team. An excellent

description of this internal conflict on the municipal level is the following:

The mayor of a city is rarely on the municipal bargaining team, but he may have a significant effect on negotiations. Besides being chief executive of the city, the mayor is also a politician. The dual nature of the job often leads mayors to undercut the position of their own bargaining team; their political interests may be completely divorced from the interests of their constituents. For example, in one city the mayor unilaterally reopened contract negotiations prior to a mayoralty election and gave city workers one of the best public employee pension plans in the nation. The mayor was reelected by a small plurality, thanks to union assistance in his election campaign. Another common occurrence in municipalities, is for unions to go through the motions of collective bargaining knowing that the mayor will enter negotiations just before the strike deadline and give the union a favorable settlement.⁵

In many bargaining situations, especially at the local level, it is most difficult to insulate the process from political pressures. This is particularly true where the public employee organizations are affiliated with a powerful central body or federation of unions which operate in the private sector.

The doctrine of sovereignty also pervades much public sector bargaining. This concept, rooted in the old common law precept that "the King can do no wrong," appears in the principle that an individual cannot sue the government without its consent. The sovereignty proponents maintain that public officials cannot legally delegate their decision-making authority to outsiders. According to this view, only the government can establish wages, hours, and conditions

of employment. Any suggestion that these matters should be determined jointly with employee organizations is considered utterly incompatible with the sovereignty principle, which has virtually disappeared from the private sector.

3. Structural Conditions. A far-reaching difference between private and public sector bargaining is the greater diffusion of decision-making authority in the latter. Management representatives in private industry generally possess broad discretion to negotiate with the union and to make commitments on virtually all issues. Not so in the public sector. Many terms and conditions of employment are decided by legislative bodies or prescribed by civil service regulations. In municipal bargaining the head of one department may have authority to negotiate on some issues, but not on other which are citywide. Even the chief administrative officer is limited in that he has no authority to determine the ultimate distribution of funds. He submits recommendations to the legislative body, which has final responsibility for passing on the budget and levying of taxes.

The diffusion of the authority predicament in the public sector has been most aptly described as follows:

In coming to grips with the concept of collective bargaining in a public service, one of the most difficult problems is to find management and, having found it, to clothe it with the authority it needs to play its part. In a public service setting, managerial authority tends to be divided between a legislature and an executive, between politicians and bureaucrats, between independent commissions and operating

departments. Because badly dispersed, it tends to lack substance and definition and almost, at times, to disappear in a forest of checks and balances. One could almost sustain the thesis that collective bargaining has been slow to establish itself in public service because employee representatives have been unable to identify individuals with whom they could really deal.⁶

Scope of Negotiations

A major problem in the public sector concerns the kinds of subjects or issues that may be considered or excluded from negotiations. As in the private sector, management strives to retain as much unilateral authority over as many areas as possible. The opposite approach is followed by employee organizations, who quite naturally desire to expand the scope of negotiations. Some matters, such as wage and salary scales, retirement benefits, etc., may be excluded by statute or regulation, and other areas may be excluded because it is felt they enroach too far on governmental sovereignty. Scope of negotiations in the public sector is considered in greater detail under Tab C.

FOOTNOTES

1. Felix A. Nigro, "Collective Negotiations in the Public Service," Public Administration Review (March-April 1968), p. 115.
2. Lloyd Ulman (ed.), Challenges to Collective Bargaining (New Jersey: Prentice-Hall, Inc., 1967), pp. 68-69.
3. Clark Kerr, Labor and Management in Industrial Society (New York: Doubleday & Company, 1964), p. 170.
4. Derek C. Bok and John T. Dunlop, Labor and the American Community (New York: Simon and Schuster, 1970), pp. 334-335.
5. Michael H. Moskow, J. Joseph Loewenberg, and Edward Clifford Koziara, Collective Bargaining in Public Employment (New York: Random House, 1970), p. 109.
6. J. Douglas Love, "Proposals for Collective Bargaining in the Public Service of Canada: A Further Commentary," Collective Bargaining in Public Service (Wisconsin: Industrial Relations Research Association, 1966), p. 28.

C

TAB C

COLLECTIVE BARGAINING AND THE MERIT SYSTEM...SCOPE OF BARGAINING

The scope of bargaining issue is at the heart of the conflict between collective bargaining and the merit system. Four different viewpoints describe the various perspectives surrounding this issue. They range from the belief that civil service and collective bargaining systems cannot co-exist to the position that the collective bargaining system is a supplement to, and not necessarily an impingement on, the merit system.

Theories of Compatibility

First, there is the incompatibility theory. Those who espouse it feel that there is no way for the two systems to coexist. The Secretary of the Wisconsin Public Affairs Commission holds this view. He believes that "the merit principle is dead" and that such things as pay plans and integrated position classifications and common fringe benefits applicable to all employees are "a thing of the past." Instead, according to him, we are seeing promotions based on seniority, compulsory arbitration of grievances and fringe benefits for separate bargaining units. Muriel Morse of the Los Angeles Civil Service Commission shares this outlook and says that the civil service is headed for a "life and death struggle."¹

The second theory contends that there are no real conflicts between the two systems. One consultant is of the opinion that the civil service neither prohibits nor pretends to substitute for the advantages which can be obtained through collective bargaining. Civil service, according

to his view, does not necessarily provide the same protections as the collective bargaining process. He points out that the protective measures of the civil service--to prevent poor selection or political manipulation of employees--are designed primarily for the public. Therefore, he feels that collective bargaining should not be considered a substitute for the merit system, but rather, a useful supplement.² This argument also separates non-merit elements (those factors non-essential to the merit principle) and maintains that these aspects of public personnel administration cannot be immune to collective bargaining.

The third theory is that the civil service system and collective bargaining will struggle for supremacy until one finally supersedes the other in all aspects of public personnel administration. Those who take this position see collective bargaining as a "comprehensive management system," rather than a mechanism whereby employees obtain representation in the area of personnel decision making. In fact, some believe that if the merit principle is retained during collective bargaining, the negotiated agreement constitutes a reasonable substitute for the merit system.³

Finally, there is the resolvable conflicts theory. This viewpoint is well expressed by David T. Stanley in his article, "What Are Unions Doing to Merit Systems?" He says, "civil service is not disappearing, nor is it fighting unions to a standstill, nor is there beautiful collaboration everywhere." Helsby and Joyner of the New York State Public Employment Relations Board recognize possible conflict areas, but

as yet, no conflicts have emerged. In fact, through bargaining the unions have encouraged effective implementation of the civil service program by demanding more frequent examinations, updating of the classification system and more strict adherence to the civil service law.⁴ Another interesting example of union support of the merit principle is union preference for the "rule-of-one" instead of the "rule-of-three" in selection from civil service lists.⁵ Currently public management selects one of the top three candidates for a position, instead of choosing the person at the top of the list, that is, the one with the highest test score. Presumably, this allows management some latitude in selecting the person it feels will best fill the position; there is no doubt, however, that this practice runs counter to the merit principle. So, in this area, state Lewin and Horton, if the union were to prevail, the collective bargaining process would service to strengthen the merit system. It appears, then, that management favors the merit system when it serves its interest to do so, usually in the area of enhancing its discretion in personnel decision making.⁶

This same selective tendency is shown by unions as well. Although employee representatives usually try to limit some of management's authority, there are certain traditional procedures which seem to be preferred by public employees. The prevailing wage is part of the total concept of the civil service system whereby it is mandated by law or regulation in many jurisdictions. With the prevailing rate system,

public employees expect that their wages will be at least comparable to the wages received by the private sector employees who are doing the same or similar work. Employees and their organizations, particularly the weaker ones, are quite satisfied with this arrangement. If they had to bargain for wages without the aid of the prevailing rate as a floor, they might find they could not command the salaries they have obtained.

In short, each side is opting for the particular procedure or principle or system (or a combination) which most closely meets its needs and desires.

Having viewed the situation in Wisconsin, Michigan and New York as models, Arvid Anderson sees no collective bargaining threat to the merit system. In these states the essential functions, such as recruiting and hiring qualified people, preparing, administering and grading exams, determining job content and standards for promotion have not been impinged upon by collective bargaining. Where Anderson does forecast conflict is in the areas of "job classification and evaluation, administration of personnel rules and grievance procedures covering discipline and discharge."⁷

Emerging Patterns Regarding Scope

Bilateral decision making in the public sector is becoming less a subject for debate, and more a fact of life. What is still very much at issue, however, is the question of which subjects are bargainable and which

should remain the sole responsibility of the civil service commission. Generally speaking, the public sector has borrowed from the private in accepting the broad statement of scope as covering the areas of wages, hours, and terms and conditions of employment. Professor Paul Prasow has stated that blue-collar unions in the public sector are as concerned about job conditions as their private sector counterparts. Prasow expects the problems of scope for the blue collar unions to become more routine as unionization of public employees continues to gain acceptance.⁸

It is with public sector professionals that the real conflicts over scope have emerged. Because there has been very little unionization of professionals in the private sector, few precedents have been set in the area of scope of bargaining. The serious conflicts arise when professionals attempt to include policy decisions and standards within scope. Teachers, for example, want to bargain over class size and curriculum (California's Rodda Act, does, in fact, include class size as a mandatory subject of bargaining: see Appendix for the scope of negotiations delineated in the Act, and for California court decisions regarding scope issued before implementation of the Rodda Act); social workers want to include caseloads and welfare benefits, and law enforcement personnel want more control over their authority to make arrests.⁹ *

*For a more detailed discussion of collective bargaining for public sector professionals, see Professor Kleingartner's article in Appendix.

Don Vial presents two areas which impose some limitations on scope of bargaining. First, there is the management's rights doctrine. In the absence of a union in the private sector, management unilaterally determines its relationship with employees and exercises all its reserved rights. When unionization and bargaining occurs, management gives up or shares some of its rights, such as determining salaries, vacation schedules, or paid holidays, in exchange for the union's promise not to strike during the life of the contract.

Scope of Bargaining Categories

Three categories are usually differentiated in the scope of bargaining:

(a) mandatory subjects of bargaining are those which must be considered by the parties when either party brings them to the table. If one side should refuse to bargain over a mandatory subject, it is considered an unfair labor practice; (b) permissive subjects of bargaining are those which may be considered if both parties agree to do so, but either party may refuse to bargain over a permissive subject; (c) prohibited subjects of bargaining are those considered illegal. The closed shop is the most often cited example of a prohibited subject. What is happening in the private sector is that more and more issues are being pushed up from the permissive to the mandatory category through NLRB and court decisions on unfair labor practices cases.

Alternative Mechanisms May Limit Scope

The second area of limitation on scope in the public sector is the legal priority of alternative mechanisms for determining terms and

conditions of employment. A civil service commission or board is a prime example of such an alternative. In treating this problem of alternative systems, Don Vial has observed:

Useful as the "management reserved rights doctrine" may be in shedding light on scope of bargaining issues that revolve around management rights and mission-type questions, the doctrine falls short of providing an adequate framework for dealing with the confusion and controversy that surrounds other determinants of the scope of negotiations. Management rights constitute only one dimension of potential limitations on what may or may not be included in the scope of negotiations. An equally important dimension is the extent to which legal frameworks for public employee relations limit scope by giving priority or concurrent recognition to alternative methods of determining terms and conditions of employment. The latter constraints include statutory provisions which preserve the authority of civil service systems and which establish the priority over collective bargaining of other procedures for establishing terms and conditions of employment contained in city and county charters and other laws. 10

See Page C-8, Diagram 1 for the manner in which Don Vial pictures the scope areas. One way of looking at the situation would be to ignore "alternative systems" and consider A and B to be the "functional area" of bargaining. See C-9, Diagram 2 for another diagrammatic picture in which Vial stresses that it is possible to have successful collective bargaining covering those issues over which public management has control without interfering with the decision-making authority of an administrative agency such as the civil service commission.

It may well be (it seems to have already occurred to some extent in Connecticut, Delaware and Hawaii) that collective bargaining will move into some areas which have, up until recently, been under the sole jurisdiction of the civil service. See page C-10, Diagram 3 illustrates this. (For the complete text of the Vial article, see Appendix.)

Diagram 1 – Constraints on Scope
Total area = all employment issues

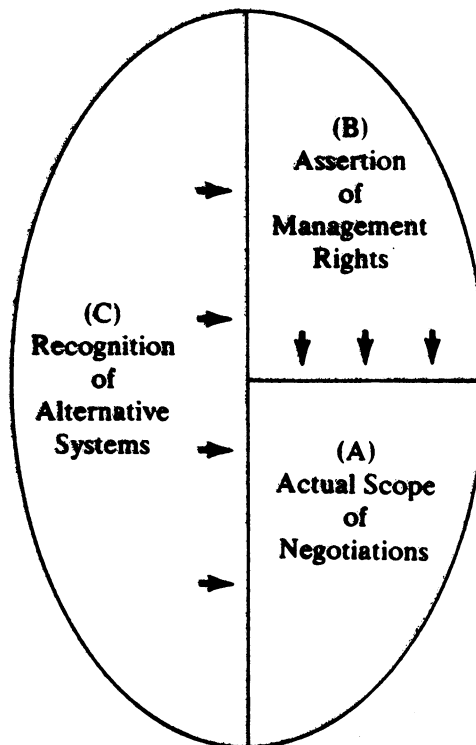


Diagram 2
Expansion of Scope Within Functional Area of Bilateral Determination

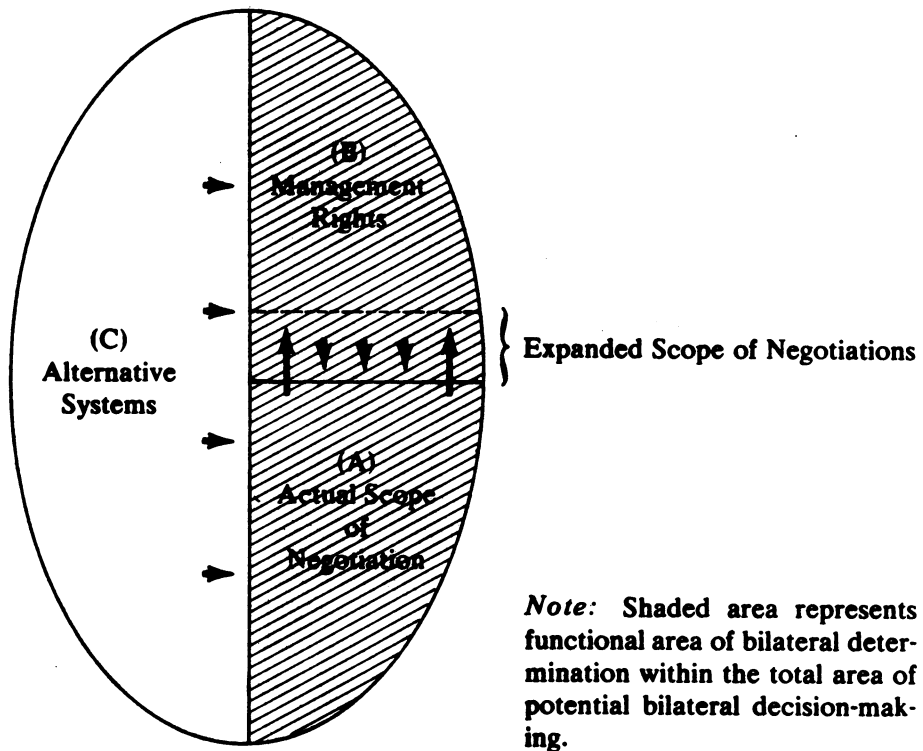
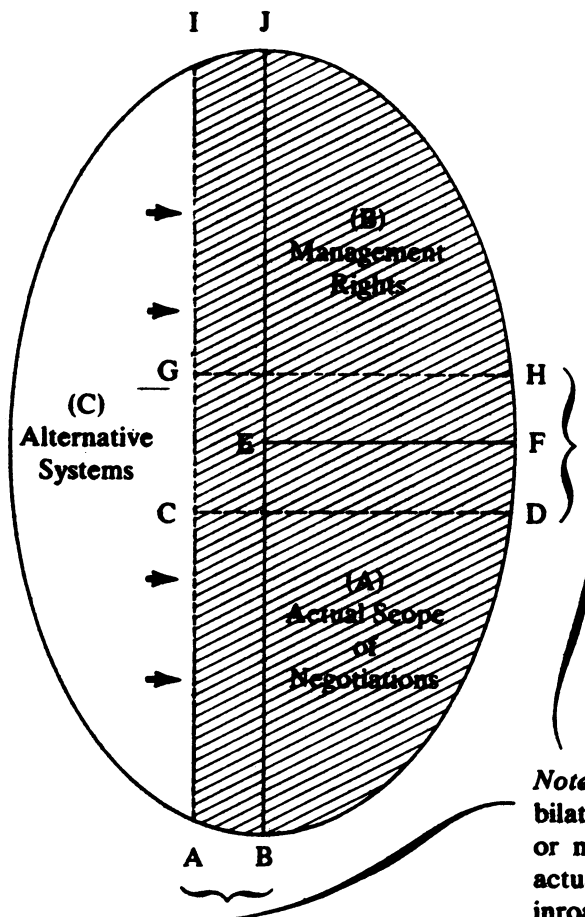


Diagram 3
Expansion of Functional Area of Bilateral Determination



Note: New area of functional bilateral determination that may or may not be included in the actual scope of negotiations as inroads are made against constraints of alternative systems.

Statutory Limitations on Scope

In some statutes the merit system is protected by the listing of specific functions which remain the responsibility of the civil service commission. In Connecticut, the grading of exams, subsequent rating of candidates and appointing candidates from the list all remain under the jurisdiction of the civil service commission. In Hawaii, the list is more extensive, including "classification and reclassification, retirement benefits, salary ranges, number of incremental and longevity steps." Hawaii law also states that no bargaining agreement can be inconsistent with the merit principle.¹¹

California is one of nine states which appears to give precedence to the civil service commission over collective bargaining. The California Government Code states:

....Nothing....shall....supersede the provisions of existing state law and the charters, ordinances and rules.....which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agency by which they are employed.
(Section 3500, California Government Code-MMB Act)

Unique Aspects of Scope in the Public Sector

Borrowing from the private sector in the area of scope presents some special problems because there are differences between these two sectors, which management, of course, tries to maximize:

- 1) The responsibility of management lies with elected officials.

This means that unions can exert political pressure because during election campaigns they are in a position to offer financial and manpower/womanpower support to candidates. Most unions belong to relatively strong city, county, or state federations, which seek to influence their membership during elections. Unlike the private sector, union organizations may have significant impact through the elective process on who will be managing the employees who are members of unions:

(2) The distinction often emphasized by public management is that private corporations sell goods and services in the private market, whereas public services with given priorities are fixed by statute and financed through the tax structure. On this point, the California Assembly Advisory Council on Public Employee Relations wrote in its 1973 report that:

Certainly there are real differences between goods and services which are privately marketed and those which are paid for by taxes through the process of socializing income for the purpose of making group purchases of public goods and services. However, the collective bargaining implications are less apparent. It should be remembered that some product markets in the private sector are less competitive than others, and that highly competitive product markets have a different impact on collective bargaining than those which are dominated by oligopolistic or monopolistic producers. Private management often has a great deal more latitude in negotiating collective bargaining contracts in less competitive product markets than in those characterized by strong competition. By the same token, public officials who function under tax structures which may be elastic--that is, those which produce revenues at a considerably faster rate than the growth of income in the economy--have more latitude in meeting the demands of public employee organizations

without re-ordering community priorities for public goods and services than do management officials who operate under tax structures which are less elastic or inelastic--that is, those which are poor revenue producers in relation to economic growth. Unfortunately, state and local tax structures are poor revenue producers in terms of their elasticity because of the dominance of sales and property taxes (as distinguished from income taxes, which are more elastic) as major sources of revenue. In other words, differences in the elasticities of tax structures can be equated to differences in product markets insofar as their impacts on collective bargaining are concerned. The sharp distinction between public and private sectors, therefore, has less validity than appears on the surface. 12

3) The public sector must contend with a variety of interest groups which pressure the government. This difference might prove to be very beneficial to government as pressure groups will act as counter-balance to union demands. Public opinion, in general, can also act as a constraint upon union militancy.¹³ The San Francisco Strike, generated by the electorate voting against the craft unions' prevailing wage criteria, is a recent example of public support for management and elected officials.

The Heart of the Problem

The heart of the debate between advocates and opponents of public sector bargaining is that collective bargaining restricts the merit principle, in particular, and weakens the merit system in general. For example, the possible inclusion of a union security clause in a contract could make something other than merit a condition of employment.

The questions which must be asked are: How significant are the differences between the public and private sectors? What can be done to preserve the merit principle?

In a special study of the subject, the Los Angeles County Citizens Economy and Efficiency Commission maintained that the special situation of the government sector does not necessarily make public management weaker.¹⁴ There is, in fact, some evidence that such unique inputs to public management as public opinion and interest group pressures may serve, at times, to strengthen management's position. The Commission has recommended that all those aspects of personnel administration necessary for the maintenance of the merit principle should be considered non-negotiable. Everything else may be considered fair game.

The natural outgrowth of this recommendation is to determine which items are essential to the principle and which are not. The Report on the National Governors Conference in 1967 lists the following items as essential to the principle; impartial recruiting, examining and selecting candidates, position classification plan based on duties and responsibilities, promotions based on merit, protection against arbitrary disciplinary action. The Report lists these items as going beyond the maintenance of the principle: grievance handling, salaries, training, safety, morale, suggestion procedures, attendance control, labor-management relations, merit awards, and communications programs.¹⁵

Burton notes that the merit principle can encompass varying degrees of responsibility. It can take a narrow view, which would include only recruitment of new personnel; an intermediate view, which would add to scope the areas of retention, training, promotion and position classification; or it can take a broad view, which would include the aforementioned issues in addition to salary administration.¹⁶

State Limitations on Scope: Liberal or Limited

Each state has varying degrees of limitations on the scope of bargaining, ranging all the way from a liberal policy of allowing the collective bargain agreement to prevail over the civil service commission rules when a conflict arises, to the strict statement that no agreement can be made which would run counter to the merit system and the civil service commission. (See Appendix for an illustration of two contrasting public employee regulations-Los Angeles and San Diego Counties.) The Connecticut statute for local employees is an excellent example of the liberal viewpoint. It states:

"Where there is a conflict between any agreement.....in matters appropriate to collective bargaining.....and any charter, special act, ordinance, rules or regulations adopted by the municipal employer or its agents such as a personnel board or civil service commission.....the terms of such agreement shall prevail;....."
(provided the legislative body approves the agreement.)

In contrast, the Wisconsin statute offers a very limited scope of bargaining. Management is not obligated to bargain over promotions, position classifications, layoffs, wages, fringe benefits, discipline, examinations, merit salary determination, and other issues addressed

in laws or civil service rules. The only negotiable items are those within the discretion of the appointing authority.¹⁷

California's Meyers-Miliias-Brown Act excludes from scope "consideration of the merit, necessity, or organization of any service or activity provided by law or executive order." Section 3507 gives the covered public agencies broad authority to deal with issues of scope in implementing ordinances.

A prevailing union viewpoint holds that the Civil Service Commission is required under the MMBA to meet and confer with employee organizations, to deal with union proposals within the jurisdiction of the Civil Service Commission, e.g., classifications, reclassifications, etc.

(See Appendix for article by attorney Edward L. Faunce: "L.A. SEIU-660 Claims Law Requires CSC to Meet and Confer" CPER, No. 23, Dec. 1974 and the decision of Feb. 25, 1976 dismissing the petitions of SEIU Local 660 to require the Civil Service Commission to negotiate with it or over rule changes.

The union position on this issue was upheld in June, 1976, by Superior Court Judge Harry L. Hupp who ruled that the Los Angeles County Civil Service Commission must meet and confer with the concerned employee organizations before adopting rules regulating layoffs or pay reductions. The suit was filed by SEIU Locals 434, 535, and 660.

Another example indicating that local Civil Service Commissions are required to meet and confer involves a significant arbitration with the

San Jose Fire Fighters, Local 873 as a complainant, and the City of San Jose as respondent, which strikes at the limitations on scope which the Civil Service Commission wishes to impose on public employees. The issue was the Civil Service Commission's abolition of seniority points for the promotional examinations of fire fighters. The union held that the seniority credit system was a benefit under the Memorandum of Understanding, that it was within the scope of bargaining, and therefore could not be unilaterally rescinded. The City contended that the changes made a unilateral decision regarding the seniority point issue. The arbitrator's recommendations favored the union position and the City subsequently complied with the union request to retain the seniority point system. (See Appendix for the text of Opinion and Recommendations of arbitrator William Eaton in this case.)

RECAPITULATION:

THE PROBLEM AREAS

The issues which cause most of the actual or potential conflict, depending upon how large the area of responsibility one feels civil service should have are:

(1) Wages Bargaining over salaries is already widespread, and although some public managers see themselves in the middle between employee organizations insisting on higher wages and the public pushing for lower taxes, major problems over this issue have not yet occurred. The recent problems in San Francisco seem to make it appear that public employees will have to give up the advantages of the prevailing rate system as a concession to those who do not support collective bargaining or who fear that it will end up costing the government more if the prevailing rate is used as a starting point in negotiations. Such developments may more than balance the bargaining power of management and some strong unions, but weaker employee organizations will undoubtedly be at a disadvantage.

Jean J. Couturier believes that wages for public employment will rise rapidly. Some reasons advanced are a lagging behind the private sector; the need for unions to expand membership; the competition between unions; the desire of managements to "buy peace"; the fact that, in general, public employee unions are becoming effective lobbying groups with "political muscle."

(2) Hiring Practices In this area there is harmony between the merit system and principle and the advocates of collective bargaining. For instance, unions prefer the more conservative "rule-of-one" practice in hiring rather than the "rule-of-three." David Stanley notes that his research shows unions usually accept most of the requirements for qualification and examination methods used by the civil service.¹⁹

(3) Classification The position classification is accomplished by "sorting jobs by occupation and level." This is a management function that unions would like to negotiate because it is thought that some jobs are under-valued. The unions are also pushing for new job levels in order to provide their members with more opportunities for promotion.²⁰ Unions have negotiated provisions whereby employees are paid the established rate for doing out-of-classification work. Public employee unions do subject this issue to the grievance procedure when necessary.

(4) Workloads For many years this has been an acceptable area of negotiations in the private sector. But public management has not always agreed on the negotiability of workloads. In Los Angeles County this issue had been appealed to both the Superior and Appellate Courts, which have ruled that caseloads for social workers are negotiable under provisions of the Employee Relations Ordinance.²¹

(5) Grievance Handling This is another sensitive issue as both civil service and public employee unions often prefer different methods for processing grievances, especially those having to do with discipline and discharge. Civil service generally establishes a procedure whereby the

employee grieves through management, with any final appeal terminating with the civil service commission. The unions prefer to negotiate a grievance procedure ending in final and binding arbitration by a third neutral party.²²

A negotiated grievance procedure is provided in the contract, then which prevails, the civil service procedure or the contract provisions? In an analysis of the Rodda Act, Edward Peters addresses this conflict. He asks: if there is a grievance procedure ending in arbitration in the agreement, will the union be allowed a selection of remedies? Would the possibility of "two bites of the apple" make the employee grievance procedure more equitable or will it simply cause problems in efficiency? Peters explains that the major objection of management to the election of remedies is that it would allow employees and their union to choose the procedure which proves most advantageous, given the circumstances. However, there are those in public management who see the election of remedies as an advantage to management as well. They view the grievance procedure as a therapeutic device for the grievant and would therefore like to provide employees with an outlet to air grievances which management has ignored and which the employee union might not take as far as the arbitration process.²³

(6) Seniority In the private sector seniority has become one of the most important union rallying points. It provides employees with job security because when layoffs occur the most senior employees are protected. It also favors senior employees when promotions and desirable transfers are available because those with seniority are given

preference, provided they are qualified. Public Management's objection to seniority is based on the conviction that this procedure may be antithetical to the merit principle.

The unions, however, continue to press this issue and support those procedures which favor job candidates from within the organization and selection for promotion on the basis of seniority if the candidate is basically qualified to do the job.

Seniority continues to be a controversial issue where both parties hold fast (outwardly, at least) to their philosophical and pragmatic preferences. The unions tend to equate seniority with merit, at least when the promotion is to a higher classification, but requires basically the same work. Public employers tend to insist that the merit principle be followed.

Many civil service systems have a "built-in" seniority system and many public employees feel the examination process is probably fairer than pure seniority.²⁴ Perhaps the sensible compromise may be to promote on both merit and seniority. In other words, if all candidates are equally qualified, the most senior employee should be chosen for the job.

(7) Policies Conflict in the area of decision-making on basic policy arises primarily between professionals and management in public employment. Management is anxious to keep the organization's mission within the scope of its responsibilities. Management seeks to establish and maintain the status quo and, therefore it attempts to control all organizational objectives and policies. Public employees, especially those in the professions, however, are concerned with the quality of

service being performed and direction of the organization, as well as with economic gains to be made. A major concession on this issue can be noted in the Educational Employment Relations of 1975 (Rodda Act) where class size is one of the mandatory bargaining subjects.

FOOTNOTES: TAB C

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2. Ibid., p.45
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FOOTNOTES: TAB C (Cont'd.)

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APPENDIX TO TAB C

Scope of Representation (negotiations)
S.B. 160
California Court Decisions on Scope
of Bargaining for Professionals
Prior to Implementation of the
Educational Employee Relations Act
Collective Bargaining Between Salaried-
Professionals and Public Sector
Management
Scope of Bargaining: Substantive Issues
vs. Procedural Hangups
Los Angeles County Employee Relations
Ordinance
Los Angeles SEIU 660 Claims Law Requires
Civil Service Commission to Meet and
Confer
Los Angeles County Employees Association,
Local 660, SEIU, AFL-CIO and County of
Los Angeles Civil Service Commission:
Decision and Order
San Jose Fire Fighters Local 873 and
City of San Jose (Arbitration)

EDUCATIONAL EMPLOYEE RELATIONS ACT (CALIFORNIA, 1975)

The scope of representation under the Rodda Act is divided into three main categories.

1. Mandatory subjects of representation are limited to matters relating to wages, hours of employment, and other terms and conditions of employment.

"Terms and conditions of employment" are expressly defined to mean:

- a. Health and welfare benefits
- b. Leave and transfer policies
- c. Safety conditions of employment
- d. Class size
- e. Procedures used for employee evaluation
- f. Organizational security
- g. Procedures for processing grievances

2. Consultative - The exclusive representative of certificated personnel may consult on:

- a. Definition of educational objectives
- b. Determination of course content and curriculum
- c. Selection of textbooks (subject to legal limitations)

3. Employer Reserved Rights - All matters not specifically enumerated are reserved to the employer and may not be a subject of meeting and negotiating. However, nothing in the definition of scope of representation may be construed to limit the right of the employer to consult with any employees or employee organization on any matter outside the scope of representation.

A public school employer or a designated representative who may, but need not, be subject to either certification or requirements for classified employees shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.

CALIFORNIA COURT DECISIONS ON SCOPE OF BARGAINING
FOR PROFESSIONALS
PRIOR TO IMPLEMENTATION OF THE RODDA ACT

CALIFORNIA

San Juan Teachers Association v. San Juan School District; Yuba City
Unified Education Association v. The Board of Trustees of the Yuba City
Unified School District
44 C A3d 232 (1975)

Two separate actions involving disputes as to the obligation to meet and confer under the Winton Act were consolidated for decision. In the San Juan case the Court of Appeals held that all matters relating to the implementation of a counseling program, including qualification criteria for, and selection of the counselors are included within the inherently broad scope of "all matters relating to employment conditions and employer-employee relations" within the provision of the Winton Act which defines the scope of representation. The Court also ruled that the school board had no power to expand the scope of representation delineated by the Winton Act, and that the school districts and their governing boards were not authorized to enter into binding agreements with employee representatives regarding matters of employment conditions or educational policy.

In the Yuba City case the Court ruled that fiscal matters bearing directly on teachers' salary increases and also, to some extent, on the formulation of educational policy are "matters relating to employment conditions and employer-employee relations," and therefore the school board must meet and confer over them upon request from the teachers.

Certified Employees of the Monterey Peninsula Unified School District v.
Monterey Peninsula Unified School District
42 CalApp 3d 328 (1974)

Reversing a Superior Court decision, the Court of Appeals ruled that the development and adoption of teacher evaluation and assessment guidelines are mandatory meeting and confer under the State's Winton Act.

Varying interpretations of two statutory provisions were at issue. The Stull Act provisions of the Education Code, passed in 1972, requires each school employer to develop and implement evaluation and assessment guidelines for its instructional staff with the advice of certified personnel. The Winton Act states that "Nothing contained herein shall be deemed to

Certified Employees of the Monterey Peninsula Unified School District
v. Monterey Peninsula Unified School District(Continued)

supersede other provisions of this code ... which establish and regulate tenure ... or which provide for other methods of administering employer-employee relations."

The Superior Court had held that: (1) The Stull Act was part of the tenure provisions of the Education Code, and therefore "expressly excepted" from the Winton Act; (2) that the Stull Act indicated a legislative intent to provide an alternate method of giving teachers a voice in development and implementation to replace that otherwise available under the Winton Act.

Rejecting this reasoning, the Court of Appeals found that the two acts can be "harmonized." The Court held that the "advice" requirement in the Stull Act is a "mandatory minimum requirement" for teacher participation. In the absence of that requirement, the Court notes, it would be possible for an employer to develop and adopt guidelines without any teacher participation whatsoever because" ... the Winton Act does not require a school employer to meet and confer... unless it is requested to do so .." Therefore, the Court concluded that the legislature wanted to ensure teacher participation in all cases by setting forth minimum requirements which would be "... in addition to, not to the exclusion of the meet-and-confer process."

The Court of Appeals also disagreed with the Superior Court's finding that the Stull Act's guidelines regulating tenure are exempt from the meet and confer provisions of the Winton Act. The Court found that the meet and confer process "was not intended to replace or supersede rules and regulations which establish and regulate tenure or other methods of administering employer-employee relations...but was intended to strengthen those rules by establishing orderly and uniform methods of communication between teachers and administrators."

Jefferson Elementary School District v. Joan Bent, et.al.
41 Cal app 3d 962 (1974)

The Court of Appeals affirmed trial court decision that an agreement between the parties is without legal effect. Quoting from other appeal and trial court decisions, the Court found that under the Winton Act rules and regulations adopted as a result of meeting and conferring must be subject to change at the sole discretion of the Board.

County of Los Angeles, Los Angeles County Department of Public Social
Services, et. al., v. Los Angeles County Employees Association, SEIU
Local 660, et. al. 33 Cal App 3d 1 (1973)

The Court of Appeals ruled that the number of cases assigned to county welfare workers is a working condition and therefore a mandatory

County of Los Angeles, Los Angeles County Department of Public Social Services, et. al., v. Los Angeles County Employees Association, SEIU Local 660 et. al. (Continued)

subject of negotiations under both the Meyer-Miliias-Brown Act and the County ordinance. The decision upheld a Superior Court ruling and a decision by the Los Angeles County Employee Relations Commission.

Grasko v. Los Angeles City Board of Education, et. al., and United Teachers of Los Angeles, et. al.

31 Cal App 3d 290 (1973)

The Court of Appeals upheld a decision of the Los Angeles Superior Court and nullified the binding agreement between the Board and the teachers. The Court pointed to the general rule that governing boards of school district have "...the power to contract on behalf of a district, but only to the extent that power is given expressly or by necessary implication by the legislature." The Court examined the legislative history of the Winton Act, the fate of proposed amendments explicitly allowing collective agreements, and the amendments which have passed, and concluded that the legislature "...has determined that binding written agreements have no place in the field of (school) labor relations." The Court held that any agreement reached in meeting and conferring can only be implemented in the form of board rules and regulations, and "...must be subject to change at the Board's pleasure."

Torrence Education Association v. Board of Education of the Torrance Unified School District

21 Cal App 3d 589 (1971)

Rejecting a teacher association's request for an injunction against a California school to stop administrators from meeting with individual association members, discussing negotiable issues and making adverse remarks about the association, the Court ruled that the Winton Act does not establish private industry-type collective bargaining but provides for a school and employee organization to "meet and confer" without closing off pre-existing or other means of employer-employee communication.

Collective Bargaining Between Salaried Professionals and Public Sector Management

Archie Kleingartner, *University of California, Los Angeles*

This article represents an analysis of one of the rather more troublesome areas accompanying the expansion of collective bargaining among professionals in the public sector, namely, the problem of defining the appropriate scope of negotiations. In the public sector, disputes over the proper subject matter for the bargaining process (to be distinguished from disputes over the disposition of subjects which the parties agree are properly on the bargaining table) tend to be more prevalent among professional occupations than among clerical and manual workers. That is, it is more likely that unions of teachers, social workers, nurses, and librarians will experience conflict with management over the proper subjects for negotiations than such groups as clerks, hospital orderlies, school bus drivers, and park employees. Unions which bargain for this second category of occupations tend to base their negotiating demands on the well-established bargaining subjects in the private sector. Public management generally accepts this arrangement.

Among professional and semi-professional employees we find unions wanting to bargain over matters different in both substance and implication from prevailing patterns among manual workers in the private or public sectors. Teachers wish to negotiate over class size and text materials used by students; social workers want a strong voice in the standards of service they provide to

■ The incidence of collective bargaining between salaried professionals and management at all levels of the public service has increased greatly in recent years. One of the most difficult issues which has confronted the parties to bargaining as well as legislative bodies is that of defining the appropriate subject matter for collective negotiations and those matters to be decided through other mechanisms. In general, employee organizations seek to expand the scope of negotiations; management seeks to retain as many issues as possible for purely managerial decision. This article is an inquiry into the roots of the scope of the negotiations problem among professionals in the public sector. Its central proposition is that there is embodied in the idea of professionalism a logic which imposes on those occupations which aspire to professional standards or are already characterized by them pressure for a broad and flexible approach to determination of appropriate subjects for the bargaining table.

the clients; and librarians want to participate in determining policy on book selection. Decisions about these kinds of issues are at the core of the mission of the public agencies where these professionals are generally employed. A good deal of self-interested behavior on both the union and management sides helps insure that conflicts lead with some regularity to proceedings before employee relations boards and occasionally the courts.

The central hypothesis of this article is that there is embodied in the idea of professionalism a logic which imposes on those occupations which aspire to professional standards or are already characterized by them certain imperatives in bargaining and in the employment relationship. Thus, this article represents an attempt to analyze

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certain aspects of the impact of occupational and professional factors on the scope of negotiations in the public sector. The frame of reference for this analysis is derived mainly from research which has been carried out on such salaried professional groups as teachers, social workers, nurses, and engineers. Between them they probably reflect most of the characteristics to be found among other professional groups.¹ To that extent, this analysis is intended to apply to all groups and occupations that operate within the orbit of professional standards and behavior.

The Goals of Professional Employees

Research into the literature reveals no general agreement on any authoritative statement on the meaning of the terms profession and professionalism. Nor is it necessary to attempt such a statement here. Yet, it is apparent that recognition as a profession has important social and economic consequences for the members of the occupation, and for the society. For some professions their professional character is explicitly recognized in legislation, giving them certain privileges and responsibilities that are denied other occupations.

In our society, to be recognized as a profession carries for its members an important assignment of differential prestige. Thus, for many occupations, the label rather than the substance of professionalism may become the end sought.

William J. Goode, in a recent analysis of the theoretical limits of professionalization, reached the conclusion that many aspiring occupations and semi-professions will never become professions in the full sense.² He included among the occupations inherently incapable of achieving full professional status those of school teaching, nursing, and librarianship, Social work, marital counseling, and perhaps city planning were identified by Goode as occupations that will achieve professionalism over the next generation. Dentistry, certified public accounting, clinical psychology, and aeronautical engineering are examples of occupations that have become professions in the last decade. If we assume a continuum ranging from occupations characterized by little or no professionalism at one end to full professionalism at the other, the concern of this analysis is with those occupations which in a relative sense tend toward the side of full professionalism.

Professionalism is a matter of degree, for the self-employed as well as for the salaried profes-

sional. It is not something which can be established once and for all, even for a single occupation. A cursory glance at the publications of the American Medical Association and the American Bar Association shows that even doctors and lawyers are deeply concerned with insuring their professional status and growth.

In many respects what professionals hope to derive from their work experience is not different from what all employees want. However, the intensity with which the former seek certain goals, the particular "mix" of work-related values that will provide optimum satisfaction and the hierarchy of these goals, tends to distinguish professionals from other groups.³ Just as there exist differences between professionals and non-professionals, so may differences exist between occupations within the professional category. In general, however, professionals as a group have a stronger attachment to their work and expect to derive more from it than do the nonprofessional categories.⁴ Clearly, for most professionals, work is more than "just a job." They expect to give a good deal of effort to their work and careers, and they expect to obtain a high level of reward for their efforts.

In order to link this discussion more closely to issues involving the scope of negotiations, it is helpful to separate the goals that professionals seek to achieve in their jobs and careers into two categories, which we can call level I and level II goals.

Level I Goals

Level I goals may be defined as those relating to fairly short-run job and work rewards. These goals are common to all categories of workers, irrespective of education, function, status, and related qualities. They have a relatively short-time horizon in the sense that they have a "now" focus. It would be a great mistake, however, to underestimate the importance of adequate satisfaction of these goals for all employees, professional and nonprofessional alike. The fundamental concern that all employees seem to have with satisfactory wages or salaries, suitable working conditions, fair treatment on the job, fringe benefits, and a measure of job security are illustrative of level I goals.

The phrase found in many statutes and ordinances providing for collective bargaining under which the parties are required to negotiate in good faith on matters relating to "wages, hours, and working conditions," has as its frame of reference

what is meant by level I goals. Wherever collective bargaining exists in the public sector, there is the recognition that level I goals are appropriate subjects to be brought to the bargaining table. While conflicts do develop over the employers' obligation to meet employees' specific demands with respect to these goals, the principle is rarely questioned that these matters are a proper and legitimate part of the collective bargaining process.⁵ The distinguishing feature of level I goals in collective bargaining is that they are pursued in the expectation that a fairly immediate, closely job-centered gain will result for the persons covered by the agreement.

Level II Goals

Level II goals may be defined as the longer-run professional goals. These goals are not generally held by manual workers as realizable objectives; they are viewed as highly desirable and may play an important part in their fantasy lives, but they are seldom translated into concrete objectives. These goals relate importantly to long-range career and professional objectives. For professional workers level II goals are centrally related to the mission and content of the functions performed by members of the profession. In practice they rarely become concrete objectives (although much discussed) at the level of professional ideology until level I goals are adequately met.⁶

It seems that much of the substance of level II goals can be encompassed by the concepts of (1) autonomy, (2) occupational integrity and identification, (3) individual satisfaction and career development, and (4) economic security and enhancement. An illustrative definition of each concept follows:⁷

- (1) *Autonomy*—In part, autonomy may be defined as the right to decide how a function is to be performed. It suggests the professional's right, indeed, obligation, to practice in his work that which he knows. He expects to be trusted—not judged—by those to whom he makes available his specialized knowledge. Once admitted to full membership in the profession, he expects to adhere to a code of conduct formulated by the profession and binding on all its members. He desires an authority structure which recognizes the characteristics of the professional role.
- (2) *Occupational Integrity and Identification*—A professional occupation tries to delimit its boundaries in its dealings with clients and employees and to gain public recognition.

With respect to internal organization, the occupation will take a position on whether to follow a policy of open or restricted entry. It will take action to protect itself from what it perceives as threats to its prerogatives and status. Salaried professionals are frequently subjected to a good deal of pressure to transfer their primary loyalty away from the profession to the goals of the organization which employs them, as for example, when management tells the engineer that he is really part of management.

- (3) *Individual Satisfaction and Career Development*—Professionals want a good deal of direct control over decisions affecting their work and careers. The hierarchial authority structure of most organizations interposes a screen between the professional employees and management, with the latter making most of the critical decision regarding the deployment of professional staff and rewards for performance.

Specific phrases commonly used in the literature to describe this area of professional interest include: "to be recognized as an expert in his field, especially by his employer," "to be protected from unqualified outsiders," "to do satisfying and socially useful work," "to have a predictable line of career development without leaving the profession," "a chance for social and economic mobility," etc. In part, professionals are conditioned by their training to want these things, but perhaps also, because some professions have achieved them, their achievement by members of the less successful professions become pressing occupational imperatives.

- (4) *Economic Security and Enhancement*—All employees want economic security and enhancement. In the context of level II goals, what makes that category important is the notion that the level of reward should be pegged not so much to the contribution made to the employing organization directly, or the need for having adequate income to sustain a certain standard of living, but rather that rewards bear a direct relationship to the quality of service rendered. Thus, for example, the quality of classroom teaching rather than the number of students taught or seniority would be the basis from which to measure professional worth.

Several observations may be made by way of comparing level I and level II goals. Whereas level I

goals were defined as being more "now" oriented than level II goals, at some point the level II goals may become just as compelling for professionals as level I goals.⁸ In collective bargaining, level I kinds of issues may involve greater dollar cost to the employer than level II issues. On the other hand, level I issues are less frequently disputed as appropriate subjects for bargaining. The level II issues, while clearly having economic consequences, are from the employer's point of view of greatest concern because they may provide a fundamental challenge to managerial authority. For that reason, level II goals are frequently more intractable in terms of conflict over whether they are appropriate subject for collective bargaining.⁹

Salaried professionals, to achieve both their level I and level II goals, must enter into a direct relationship with the employer. This can be done on an individual or on a group basis. Because the employer has many of his own goals to achieve, there may develop conflict at various points between the goals of the employees and the employers' own definition of his imperatives for success and survival.¹⁰

Unions and Associations Among Salaried Professionals

All salaried professions establish protective organizations to advance the interests of the occupation as a whole and of its individual members.¹¹ Historically, there emerged two main patterns of protective organizations among the salaried professions. The dominant pattern consisted of broadly based professional associations and societies with fairly open membership policies. The National Education Association, the National Social Work Association, and the American Nurses' Association are illustrative of these types of organizations. A number of these organizations very early assumed the responsibility to advance the full range of job and professional interests of their members. In practice, they paid relatively little attention to immediate job matters, concentrating instead on broad professional objectives such as developing codes of ethics, establishing standards for professional practice, and publishing professional journals. Frequently, leadership posts and the dominant influence within these organizations were in the hands of persons well placed in the management hierarchy. They adopted an attitude of full cooperation with the employer on the assumption that there exists a fundamental

identity of interest between their own professional goals and the goals of the employer. In this view there was little possibility that conflict could not be resolved through improved communication and education. The collective bargaining model which developed among industrial workers was viewed as quite unnecessary and unprofessional.¹²

The second general pattern of organization was that of independent and affiliated unions. The American Federation of Teachers, for example, was chartered by the AFL in 1917. What distinguished these organizations most critically from the various societies and associations was their early acceptance of the concept of direct negotiations with the employer. Characterized by varying degrees of militancy and success, they were vigorously opposed by the associations and employers. To the employers they represented an irritant rather than an effective force. The unions were handicapped by the associations' enormous edge in membership, influence, and prestige.

For a variety of reasons, the 1960's saw a marked movement in the direction of convergence in the goals, tactics, and strategies of the two kinds of protective organizations around a common set of job and professional problems. This convergence has advanced farther among some salaried professions (e.g., teachers and social workers) than among others (e.g., engineers and scientists).

Overall there has occurred a marked increase in the militancy and commitment to collective bargaining of both unions and professional associations in the public sector to achieve the full range of job and professional goals of their members. What we may see more of in the future are mergers of the two kinds of organizations into one inclusive type. In any event, the day of the primacy of the pure professional organization, shying away from confrontation with employers and unwilling to admit the need for collective action at the work place level, is drawing to a close.¹³

Management Response to Professional Unionism

Public management generally enters a bargaining relationship with salaried professional organizations with reluctance and apprehension. Management in both the private and public sectors is concerned about unions becoming involved in non-labor issues for fear of losing control and reducing operating efficiency. In the private sector, management's defense against union demands for more participation in decision making has been

that: (1) it is primarily accountable to the owners or the board of directors from whom it receives its authority, and (2) management needs the flexibility to insure that it achieves its profit goals. In the private sector the source of authority is downward from the owners or board of directors. In the public sector there is an upward flow of authority from the public-at-large to the elected or appointed managers. As such, decisions made or contemplated by the manager are open to public debate and scrutiny. While the public manager has no profit goals which he is expected to achieve, his performance may be judged in part on his ability to stay within his budget or his skill in locating new sources of revenue. Ultimately, the public manager's performance is evaluated in terms of what the legislative bodies and the public decide best serves their interests. Both can be very demanding and discriminating. Resisting union encroachment on their prerogatives may be one of the expectations that they have of the public manager.¹⁴

Additionally, we should not underestimate the shock effect on many public entities that is generated by the requirement of meeting at the bargaining table to negotiate about matters which management had previously always determined on a unilateral basis. Widespread collective bargaining in the public sector is not much more than 10 years old. Many public managers have little knowledge about the law, the art, or process of bargaining. It is natural to expect defensiveness and caution in the initial bargaining encounters.

An employee demand which in an established relationship appears routine and non-threatening may in a new relationship appear radical and destructive. Public management has perhaps not fully considered the unique aspects of managing a public enterprise or the opportunities for innovation and social invention through the dynamics of a bargaining relationship. There is need for trial and error in the public sector as there was in the private sector.

Perhaps a major step forward is taken when public management starts thinking less in terms of defending established managerial prerogatives and authority and more in terms of how to structure a relationship where the end result will be the most efficient service to the public at the lowest possible cost.

In some jurisdictions, public managers are prohibited by statute and civil service rules from participating definitively in negotiations on a wide variety of matters which are of central interest to

employee organizations and to management. From a practical standpoint, advantages might accrue from greater uniformity among the various states on the matters which affect the employment relationship that are prescribed by law. However, the fact that certain matters are precluded from direct negotiations does not alter what salaried professional organizations try to achieve for their members; it may alter the methods they need to use in achieving them.

The hypothesis may be suggested that the more salaried professional organizations are thwarted in channelling both level I and level II goals through the bargaining machinery, the more they will attempt to achieve these goals through other methods—the legislative and lobbying processes, for example. An important public policy issue therefore is the extent to which employee-management relations in the public sector are to be structured so as to indicate a clear bias in favor of maximum reliance on collective bargaining.

When we consider the array of methods that salaried professionals have used to achieve their goals, collective bargaining has been, in a historical sense, one of the least used. Some methods employed in the past are being discarded as ineffectual, while others, such as informal consultation with management, lobbying, mutual aid, publication of professional journals, and promulgation of codes of ethics, continue to serve a useful purpose. Most salaried professionals recognize that professionalism must in its concrete aspects be obtained primarily from the employer.¹⁵ However, what salaried professionals are ultimately committed to is not the bargaining process per se, but to achieve predictability about continuing adequate satisfaction of level I goals and to work toward achievement of the level II goals, which in the final analysis define what professionalism is all about.

In my view, the dominant pattern in negotiations between salaried professional organizations and public sector management is that in the early stages of the relationship the employee organization will typically focus primarily on achievement of level I goals. However, the logic of professionalism will not allow the protective organization to ignore for long the level II goals of its members. The more professional the orientation of the salaried occupation involved, the sooner it will begin focusing on level II types of concerns. Employee organizations will constantly confront the problem of reconciling what is doable in the

short run and what they are really trying to achieve in the longer run. Ida Klaus' description of the evolution of the bargaining relationship between the United Federation of Teachers and the Board of Education in New York provides partial verification of this hypothesis. She viewed the relationship as having moved through four stages between 1962 and 1969.¹⁶ The first stage, which commenced in 1962, she labelled the stage of "Exploration and Experimentation." It covers the initial bargaining encounter between the school board and the union. The end result of the negotiations was a 38-page collective bargaining agreement covering various aspects of salaries, hours, and working conditions, as well as the taking of some tentative steps toward union involvement in sharing decision making on more purely policy or managerial features of public school system administration.

The second stage of the relationship she called one of "Crisis and Turning Point." This stage commenced in early 1963, when negotiations got underway for the second agreement. Here it is instructive to quote her at some length:

The main field of conflict during the second year concerned an extremely grave and difficult area in public education: the proper scope and boundaries of collective bargaining. Where is the line between what is primarily within the sphere of working conditions and hence subject to negotiation and bilateral decision, and what is essentially within the realm of educational policy and hence within the exclusive authority of the Board or the Superintendent and not subject to negotiation and agreements. The Union sought to extend collective bargaining to new aspects of educational administration, and the Board rejoined that such matters were reserved exclusively to the discretionary professional judgment and policy making authority of the Board and of the Superintendent.¹⁷

The outcome of the second round of negotiations produced an agreement, 18 pages longer than the first, and included that the parties would "meet and consult" once a month during the school year "on matters of educational policy and development." One of the specific subjects of joint consultation was the development of a program for the improvement of "different schools."¹⁸

In 1965 when negotiations started for a third contract, the parties moved into the third stage of their relationship. By this time collective bargaining as the method for determining the salaries and working conditions of the teachers was firmly established. In addition,

The process of regular joint consultation on a year-round basis added a new and broader dimension to the teacher-

Board relationship. Through this process the Union became a truly powerful force in school administration.... It participated in planning the Board's internal procedures for administering the provision of the collective bargaining agreement.... On several occasions, the Board withdrew items appearing on the calendar for action at a public meeting upon the Union's insistence that the matter was a proper subject for collective bargaining and that "prior consultation and negotiation" had not taken place.¹⁹

Negotiations in 1967 for the fourth agreement between the parties and the agreement in effect at the time Ida Klaus published her analysis signified entry into still another stage of the relationship, which she called "The Emergence of Public Interest Issues Peculiar to the Enterprise." It would appear that in those negotiations the board sought to regain some of the authority it had agreed to share with the union in earlier contract negotiations. The union sought an additional extension of its role. After protracted negotiations, involving a special mediation panel and the longest strike in the history of the city, a settlement was reached in which the union achieved most of its final substantive demands directly affecting teacher working conditions. However, the union also made important concessions on the extension of its role in what the board considered to be policy matters.

It appears that over the period of time covered in Mrs. Klaus' analysis there occurred a steady expansion in the depth and variety of topics that became subject to bargaining. Many topics originally viewed by management as completely within its discretion gave way to joint determination. From Klaus' analysis, it can be seen that the initial major thrust of the union was on economic and job items, that is, level I issues. Over the years there has not been a lessening of the union's concern with these matters. However, it also seems clear that there has been a substantial measure of union penetration into the level II types of issues.

In presenting this much detail on teacher bargaining in New York City I do not mean to imply that it should be viewed as a model of what should or will occur in bargaining relations with teachers (or other professional groups) in other parts of the country. Each relationship tends to develop within a somewhat unique set of circumstances and will evolve somewhat differently. Yet, the overall direction of bargaining relationships for salaried professional employees will probably conform to the movement from level I to level II types of issues. The details of the timing, the path followed, and the problems that must be overcome will vary from situation to situation.

Public Policy Considerations

This article suggests that there is embodied in the idea of professionalism a certain logic which, to those occupations characterized by or aspiring to its substance, inevitably propels their protective organizations to move into areas of decision making including, but also going beyond, the collective bargaining goals of nonprofessional worker unions in the public or private sector.

Long before collective bargaining became prominent among professional employees, public employers and salaried professional organizations engaged in discussion and consultation on a wide range of level II or policy issues, as they are more commonly known. This kind of informal negotiation, which does not have a written agreement as its objective, is perhaps still the dominant pattern in public jurisdictions. The outcome of this consultation does not result in a redistribution of basic function or power. Part of the recent growth in collective bargaining stems from the unwillingness of public employers to take seriously the goals and aspirations of their salaried professional employees in these discussions.

Collective bargaining will probably have the effects of curtailing the importance and attractiveness of informal consultation, even in those public jurisdictions in which bargaining is not required because employers fear that informal negotiations could under certain circumstances be quickly transformed into an adversary bargaining relationship.

The general analysis put forward here does not suggest any easy or quick solutions by way of guidance for public management and legislative bodies in deciding how to deal with questions of scope of negotiations for professional employees. There are alternative approaches and assumptions which have been relied on in the search for a workable model.

There is one view which holds that legislation should attempt to specify with some precision the matters which must be kept out of the bargaining process. Alternatively there may be attempts to specify a narrow band of mandatory subjects of bargaining, leaving everything else either illegal or up to the discretion of management. In practical terms, management would probably give the language covering negotiable items a narrow construction. Whether or not prohibited from doing so, management would undoubtedly resist negotiating over most of what has been called here level II issues.

An alternative and perhaps more realistic ap-

proach to defining scope of negotiations is to take into account the particular circumstances surrounding the bargaining relationship. Except at the extremes this approach does not look to ideology, legal philosophy, or tradition for guidance. In the public sector, it would mean looking beyond what has worked in the private sector to a consideration of the unique features of public sector management, and to the specific goals and capabilities of the employees and their organizations.

Public management, operating with this orientation, recognizes that it is neither possible nor wise arbitrarily to delimit the scope of negotiations. It will appreciate that a universal definition does not provide the various occupational sub-groupings equal and adequate opportunity to bring to the negotiating table those benefits and rights associated with the expectations of the occupation and which lend themselves to the bargaining mechanism. In determining where authority and responsibility are to be located, management would not look so much to who has the right, or who has done it in the past, as to what the consequences of a change are likely to be. Will it make the agency more efficient? Will it improve the quality of service which it provides to the public?

A Concluding Note

A prominent complaint of professionals and their organizations has been that they are saddled with a lot of professional responsibility but without commensurate professional authority. Salaried professionals have made it clear that they want real authority to make decisions affecting not only their own status and career aspirations but the basic character, quality, and amount of services provided to the recipients of their professional services. We can expect for example, that increasingly teachers will be involved in deciding the content of the courses they teach, the textbooks they use, all of the learning activities within the classroom, overall curricular planning, recruiting of new colleagues, and promotion and tenure decisions. Parallel kinds of decisions exist for such groups as nurses, social workers, engineers, architects, and district attorneys in the public service.

We are rapidly moving from an era of unilateralism in public sector activity to one of bilateralism. This trend will undoubtedly continue at an accelerated rate. Consultation, negotiation, and bargaining which result in a genuine redistribution of authority are becoming part of everyday management in the public sector. The groups on the cutting edge of this revolution are the salaried

professions. The implications of this revolution are a tall challenge to public management and employee organization alike.

Notes

1. There is a substantial literature that deals with the salaried professions. I have completed studies on a number of different salaried professional occupations. In part this paper represents an interim report on a much longer-term study of various aspects of collective action among the salaried professions. Much of the literature especially relevant to the theme being developed here is treated in the following two books: Sigmund Nosow and William H. From (eds.), *Man, Work and Society* (New York: Basic Books, Inc., 1962), and Howard M. Vollmer and Donald L. Mills (eds.), *Professionalization* (Englewood Cliffs: Prentice Hall, Inc., 1966).
2. William J. Goode, "The Theoretical Limits of Professionalization," in *The Semi-Professions and Their Organizations*, Amitai Etzioni (ed.) (New York: The Free Press, 1969), pp. 266-313.
3. See, for example, Everette M. Kassalow, "White-Collar Unionism in the United States," in Adolf Sturmthal (ed.), *White-Collar Trade Unions* (Urbana: University of Illinois Press, 1966), pp. 359-360.
4. A classic study of this point is Robert Dubin's "Industrial Workers' Worlds: A Study of 'Central Life Interest' of Industrial Workers," *Social Problems*, Vol. III (January 1956), pp. 131-142, in which as many as three-fourths of the industrial workers in his sample turned out to be basically non-job oriented. Several years later Louis Orzack used Dubin's questionnaire and methodology among a group of nurses to attempt to verify his prediction that work is more likely to be a "central life interest for professionals than for industrial workers." Orzack summarized the overall results of the two studies as follows: "Dubin reported that '...for almost three out of every four industrial workers studied, work and the workplace are not central life interests.' In contrast, for four of every five nurses studied, work and the workplace are central life interests. We may infer that these professional nurses are much more interested in their work than Dubin's factory workers were in theirs." See Louis Orzack, "Work as a 'Central Life Interest' of Professionals," *Social Problems*, Vol. 7 (Fall 1959), p. 127. A number of other studies have come up with similar results.
5. For a very helpful discussion of a number of these points, see Russel A. Smith, "State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis," *Michigan Law Review*, Vol. 67 (March 1969), pp. 904-908. Also relevant to this point is Irving H. Sabghir, *The Scope of Bargaining in Public Sector Collective Bargaining* (Albany: State University of New York, 1970), *Passim*.
6. The hypothesis being expressed in this paragraph has its root in various treatments of the concept of professionalism and in ideas about the requirements for effective performance of professional jobs. This is expressed, for example, in such statements as, "The professional claims *autonomy*, the right to decide how his function is to be performed and to be free from lay restrictions," from George Strauss, "Professionalism and Occupational Associations," *Industrial Relations*, Vol. 2 (May 1963), p.8. Also implicit in this formulation is Maslow's development of the idea that the basic human needs are arranged in a hierarchy of prepotency. See A. H. Maslow, "A Theory of Human Motivation," *Psychological Review*, Vol. 50 (1943), pp. 370-396.
7. These definitions draw liberally on material contained in Archie Kleingartner, *Professionalism and Salaried Worker Organization*, (Madison, Wis.: Industrial Relations Research Institute, University of Wisconsin, 1967), especially Chapter III.
8. See Chapter 8 in Vollmer and Mills, *op.cit.*, pp. 264-294, for discussion of the importance of level II type goals to professionals.
9. See, for example, Sabghir, *op.cit.*, p. 114.
10. For an excellent theoretical development of this point, see Jack Barbash, "The Elements of Industrial Relations," *British Journal of Industrial Relations*, Vol. II (March 1964), pp. 66-78.
11. Occupational associations tend to emerge almost simultaneously with the occupation itself. Harold L. Wilensky, "The Professionalization of Everyone," *The American Journal of Sociology*, Vol. LXX (September 1964), p. 143.
12. Bernard Goldstein, "Some Aspects of the Nature of Unionism Among Salaried Professionals in Industry," *American Sociological Review*, Vol. 20 (April 1955), pp. 201-202.
13. Garbarino, writing in 1968, concluded that "...organizations of professional employees—both those which call themselves unions and those which do not—will increasingly...do their best to look and sound like professional societies, but, if necessary, will act more like unions." Joseph W. Garbarino, "Professional Negotiations in Education," *Industrial Relations*, Vol. 7 (February 1968), p. 106.
14. For additional treatment of various aspects of this issue see Michael H. Moskow, *et al.*, *Collective Bargaining in Public Employment* (New York: Random House, 1970), pp. 208-209, and Paul H. Appleby, "Government Is Different," in Dwight Waldo (ed.), *Ideas and Issues in Public Administration* (New York: McGraw-Hill Book Co., 1953), p. 61.
15. It seems to me that the important shift which has occurred here in recent years is that salaried professionals no longer derive much satisfaction from the rhetoric of professionalism. They increasingly want its substance. By rhetoric of professionalism I mean such things as being told that you are "part of management," that "unionism is incompatible with professionalism," and that professionals must never forget "to live up to their high professional calling and to the expectation of the community," and so forth.
16. Ida Klaus, "The Revolution of a Collective Bargaining Relationship in Public Education: New York City's Changing Seven-Year History," *Michigan Law Review*, Vol. 67 (March 1969), pp. 1036-1065.
17. *Ibid.*, pp. 1042-1043.
18. *Ibid.*, p. 1046.
19. *Ibid.*, p. 1048.

THE SCOPE OF BARGAINING CONTROVERSY: SUBSTANTIVE ISSUES VS. PROCEDURAL HANGUPS

By *Don Vial*, Institute staff*

"The scope of negotiations, which involves the number and types of items that may be subject to employer-employee discussions and negotiations, is one of the most critical issues in contemporary labor-management relations in the public sector."¹

Advisory Commission on Intergovernmental Relations

"The major issue at the public bargaining table is the same as in the private sector: more wages, fringes and economic benefits. However, public employee unions are also seeking to use collective bargaining as a means of effectuating social change and for determining public policy questions."²

Arvid Anderson

"A study of the scope of negotiations is basically a study of management's reserved rights. It poses the question: are there issues which should be sealed off from collective negotiations and impasse procedures?"³

Paul Prasow and Edward Peters

The above quotations suggest a loose frame of reference for examining some of the major issues and problems concerning the scope of negotiations in public sector labor relations. In California, the highly uneven development of bilateral relationships greatly complicates the task of examination and easy generalizations are precluded. Practical efforts to delineate the issues are also rendered difficult by the variety of laws governing public employee relations in California, by the divergent approaches to implementation of these laws by local agencies, and by the absence in most jurisdictions of administrative machinery to help the parties resolve impasses over the scope of negotiations.⁴

In states like New York, Michigan, Wisconsin, Pennsylvania, Hawaii, and Connecticut, differences over the scope of negotiations are being worked out fairly systematically as bargaining relationships evolve under comprehensive statutes providing for administrative boards to decide scope issues. By contrast, California's approach to determining what may be included in the scope of bargaining is affected by four basic statutes and an executive order (plus nine transit district acts with separate labor relations provisions).⁵ In turn, limitations on scope are multiplied in the second and more complex tier of local implementing ordinances.⁶

*Editor's note: CPER invites responses to, and comments on, the above article and on all material which appears in this Series.

¹ *Labor-Management Policies for State and Local Government*, Advisory Commission on Intergovernmental Relations (Washington, D.C.: September 1969), p. 76.

² As quoted in Paul Prasow and others, *Scope of Bargaining in the Public Sector—Concepts and Problems*, USDL Public Sector Labor Relations Information Exchange (Washington, D.C.: 1972), p. 125.

³ *Ibid.*, p. 5.

⁴ In the absence of a state employee relations board, only the Counties of Los Angeles and San Diego and the City of Los Angeles have provided for local boards to administer ordinances implementing MMB.

⁵ This complex of state laws creates a coverage maze for public employees. The Meyers-Milias-Brown Act (Government Code Sections 3500-3510) provides the legal framework for employees of cities, counties, and local public agencies other than school districts. State employees are covered by a separate statute—the original Brown Act (Government Code Sections 3525-36), augmented by an Executive Order. Fire Fighters have a separate statute (Labor Code Sections 1960-3), but they are also covered under the MMB and Brown Acts. School district employees fall under still another public employee relations law—the Winton Act (Ed. Code Sections 13080-90)—but its provisions, including those affecting the subject areas of meeting and conferring, differ for certified employees (teachers) and classified employees. Among public institutions of higher learning, employees of community colleges, as district colleges, are placed under the Winton Act; employees of the state colleges and university system fall under the legal framework governing other state employees; and the University of California, which until recently asserted its "constitutional" independence regarding labor relations policies, appears to have finally decided that its employees are also covered by the state employees statute. Finally, each of the nine state statutes providing for transit districts in various parts of the state carries its own, separate labor relations provisions. Only the latter fully embrace the concept of bilateral decision-making through collective negotiations.

⁶ See Marion Ross and Max DeGialluly, "Implementation of the Meyers-Milias-Brown Act by California's Counties and Larger Cities," *CPER* #8.

Within this legal context, it is important to bear in mind that there are many intermediate steps between the unilateral exercise of managerial authority and complete bilateral determination through collective bargaining. Moving from unilateral to bilateral decision-making involves a sharing of authority. The degree to which authority is shared can be readily seen as a continuum between the two extreme forms of decision-making.⁷ In line with this, most practitioners in the private sector would conclude that the amount of authority-sharing that occurs at any point in time is a function of the nature of the relationship between the parties—that is, the degree to which they accept the concept of formal bilateral decision-making within the context of their relative “power” positions. In the private sector where the National Labor-Management Relations Act mandates formal bilateral decision making (and also in states where public employee relations laws are substantially patterned after the private sector model), this viewpoint has a great deal of validity.

In California public employee relations, however, the situation is markedly different. Current “meet and confer” legal frameworks, in all their complexity, have a tendency to restrain the parties at intermediate steps along the continuum of shared authority.⁸ Controversies over what items should be included in the scope of negotiations tend to become complicated by disputes over the degree to which authority is being shared at all. Under the circumstances, the attention of the parties has become focused on provisions affecting scope in existing and proposed laws.⁹

This is not to say that an equal degree of importance is assigned to scope issues throughout the state. Given California’s relatively immature and unevenly developed system of public employee relations, one can expect a great deal of variation in attitudes among public jurisdictions.¹⁰ However, there are at least three reasons for anticipating that scope issues will loom larger in importance in the period ahead.

⁷ Informal authority-sharing occurs in the absence of an employee organization or the legal right to bargain, or both. For example, consultation (and de facto joint decision-making) has always been common in public schools and to some extent in other public agencies. In the same vein, historically, in many areas of labor relations the unilateral authority of public agency officials and managers has been modified and tempered by the authority of Civil Service Commissions and Personnel Boards. As such, civil service systems became substitutes for collective bargaining and civil service “appeals procedures” became substitutes for negotiated grievance procedures. Consultation and “due process” are characteristic of civil service procedures. Some de facto joint decision-making has also developed around civil service systems. This article, however, is concerned only with “formal” bilateral or unilateral systems.

⁸ For example, the Brown Act of 1961 (Government Code Sections 3525-3536), concerning state employees, defines the scope of representation in Section 3529 to include “all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment” without any statutory restrictions. However, Section 3530 only requires representatives of state agencies to “meet and confer with representatives of employee organizations upon request,” and to “consider as fully as such representatives deem reasonable such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.”

The Governor’s Executive Order on State Employee Relations, issued in March 1972 and currently in the process of being revised, is considered to have improved the position of state employees only very slightly. See Marion Ross, “Executive Order on State Employee Relations,” *CPER* #9, pp. 1-4; also text of order, pp. 49-51. In providing for meeting and conferring “in good faith” with the possibility of reaching agreement on a submission to the legislature, the Governor excluded from this “good faith” addition to the law, a host of items, including: “working conditions, merit system and related matters such as the examination, selection, recruitment, hiring, appraisal, training, retention, promotion, assignment, disciplining or transfer of employees; directing, deploying, and utilizing the work force; classifications plan and salary determination for individual classes; mission, purposes, objectives, and organization of the State; and facilities, methods, means, and number of personnel required to conduct state programs.” The Executive Order extended “meet and confer in good faith” to (1) the need for and amount of a *general* salary adjustment, (2) the *total* amount of any special inequity salary adjustment; and (3) *general* employee benefits.

⁹ It might be noted here that an early resolution of legislative controversies will hasten the day when more attention may be directed by the parties toward improving bargaining relationships and learning more about the mutual responsibilities that go with shared authority in bilateral decision-making.

¹⁰ Most of the concern is focused in agencies and districts where significant steps have been taken in the direction of bilateral determination. At the state level of employment, where the Brown Act provides for little more than the right of employee organizations to be consulted on behalf of their members prior to unilateral action, it is understandable that employee groups generally may give higher priority at this time to “getting a foot in the door” of bilateral determination. The current stage of development of public employee relations and applicable legal frameworks, however, appears to have little bearing on the degree of importance attached to scope of bargaining matters by salaried professionals and aspiring professionals who view collective bargaining as a means of securing their professional goals and aspirations. Their intense interest in the scope of bilateral determination cuts across all public jurisdictions where they are employed.

The *first* is the growing number of bilateral relationships which have proceeded beyond the recognition stage and the first round of "meeting and conferring" or negotiations. As the parties gain experience in negotiations, the scope of the process inevitably becomes a matter of more immediate concern, particularly in connection with the assertion of management rights or prerogatives. *Secondly*, this experience with the process is also having the effect of forcing the parties to re-examine their expectations in terms of what can reasonably be achieved through collective bargaining as opposed to other ways of deciding conditions of employment. Although adjusting expectations to reality is a difficult process, it does require some evaluation of the scope of negotiations in relation to the future operation and role of civil service systems and other competing methods of establishing the terms and conditions of employment. Both of these considerations, in turn, are reinforced by a *third* reason for anticipating a heightened interest in scope issues—namely, the present thrust in the direction of updating California's mixed bag of public employee relations laws.¹¹ Legislation currently in the hoppers clearly indicates that there is growing support for comprehensive legislation which establishes a state employee relations board to administer labor relations policies. In the shaping of such legislation, the scope of bargaining will be one of the major issues to be considered. For this reason the following is written with the legislative context in mind.

The article is divided into two major sections. The first part attempts (1) to cut through the confusion and controversy surrounding scope by defining the issues, and (2) to develop a practical framework that might help the parties delineate scope issues and review their own experience with negotiability problems. The second part of the article uses the suggested framework to consider recent scope problems in California. The emphasis throughout is on clarifying scope issues in order to provide a means of resolving problems. The point of view of the author is that there are no "right" or "wrong" approaches to dealing with scope of bargaining issues; there are only approaches which contribute to or detract from the development of constructive bilateral relationships as measured in terms of the goals of the parties and the interest of the public.

Determinants of Scope: Background to the Problem

One of the important premises of this paper is that there is as much confusion over the dynamic process by which the scope of bargaining is actually being circumscribed in practice as there is controversy over what should be included in the scope of bargaining. This is particularly the case in regard to legislation aimed at advancing or protecting the respective interests of employee organizations and public employers. For example, public management generally looks upon decisions affecting the "mission" of a public agency and the organization and direction of an agency's work force as falling in the realm of basic rights to be reserved to the public agency and its management. The objective of management may be to "seal off" these areas of decisions from collective bargaining (just as employee organizations may want to include aspects of them within the scope of negotiations). In this regard, restrictive statutory language inserted in labor relations legislation, either in the form of direct limitations on the defined scope of bargaining or in the form of strong management rights clauses, may in fact be useful to public employers in their efforts to confine the scope of negotiations. Such an outcome, however, should not be confused with the reality of management's authority to manage, for such clauses are not the *source* of management's rights. They exist independently of the labor-management relationship until modified by the relationship. In effect, a general presumption exists that all rights of management are reserved until agreement is reached through the bilateral decision-making process to share any part of them with an employee organization.

¹¹ It should be noted in this respect that the author is currently a member of the Assembly Advisory Council on Public Employee Relations, which is to submit a report to the State Assembly by January 1973. The views expressed in this article are those of the author and should not be interpreted in any way as necessarily reflecting the views of any other member of the Committee.

This doctrine of “management reserved rights”¹² provides a useful tool for cutting through much of the rhetoric in the currently raging debate over (1) whether language restrictive of the scope of negotiations and protective of management or public agency rights and prerogatives *need be* or *should be* contained in public employee relations laws, or (2) whether the scope of negotiations *need be* or *should be* left to evolve out of bargaining relationships under affirmatively stated but general statutory language relating to “wages, hours, and other terms and conditions of employment,” as in the private sector and in most states with comprehensive public employee relations laws. The statement of the choice in terms of “need be” or “should be” is intended to make the point. The “management reserved rights doctrine” would indicate that since the source of management’s rights is independent of rights clauses, the choice must be made on some other basis. As a practical matter, the choice pretty much revolves around one’s perception of differences between the public and private sectors and a determination as to how much credence should be given to the security needs of public management (both in relation to the general public and the employee organizations involved) at any particular time in the evolution of public employee relations—a matter to be discussed further below.

Useful as the “management reserved rights doctrine” may be in shedding light on scope of bargaining issues that revolve around management rights and mission-type questions, the doctrine falls short of providing an adequate framework for dealing with the confusion and controversy that surrounds other determinants of the scope of negotiations. Management rights constitute only one dimension of potential limitations on what may or may not be included in the scope of negotiations. An equally important dimension is the extent to which legal frameworks for public employee relations limit scope by giving priority or concurrent recognition to alternative methods of determining terms and conditions of employment. The latter constraints include statutory provisions which preserve the authority of civil service systems and which establish the priority over collective bargaining of other procedures for establishing terms and conditions of employment contained in city and county charters and other laws.

There is an important difference between these latter kinds of limitations on scope and those which stem from rights and prerogatives reserved to management. Insofar as their impacts on the scope of negotiations are concerned, these other kinds of limitations are frequently beyond the pale of public management’s direct influence and are generally responsive only to legislative decisions and to the exercise of political power, whereas management rights limitations are directly responsive to the evolution of bargaining relationships. Yet this essential difference can be easily obscured in charges and counter-charges by labor and management over scope issues. Furthermore, the line-up of the parties is not always consistent when arguing scope issues. Employee organizations typically push to make inroads against management authority, but this may not be the case where conditions won through procedures competitive with collective bargaining are deemed to be superior as is often the case with “prevailing rates.” It may not be unusual for an employee organization to push for greater bilateral authority in areas of previously asserted management rights while simultaneously seeking to

¹²The “doctrine of management reserved rights” has been set forth explicitly by Paul Prasow and Edward Peters in *Scope of Bargaining in the Public Sector—Concepts and Problems*, pp. 10-28. It is summarized as follows: “The key to understanding the scope of negotiation concept lies in examining the doctrine of management reserved rights. This doctrine states that in the first instance (before collective bargaining), except as restricted by law, management’s authority is supreme in all matters affecting the employment relationship. Collective bargaining then introduces three broad restrictions on managerial authority: first, is the negotiated *written instrument*; second, is the employer’s *implied obligation* to maintain for the life of the agreement those employee benefits of long standing neither mentioned in written instrument nor discussed in negotiations; and finally, there is the rule of *reasonableness* whereby managerial action is subjected to the threefold test that it is neither arbitrary, capricious, nor discriminatory. To recapitulate: the reserved rights theory of management is the basic frame of reference for understanding the scope of negotiations concept, but the theory must be viewed in the light of the broad restrictions on managerial authority described above if it is not to be perilously oversimplified.

“It must be stressed that the doctrine of management reserved rights is separate and distinct from the management prerogative clauses usually found in statutes, executive orders, and collective agreements. The prerogative clause does not confer on management any reserved rights; such rights exist independently and apart from the bargaining contract.” *Ibid.*, page 6. Elsewhere, it is pointed out that “...management does not look to the collective bargaining contract to ascertain its rights; it looks to the agreement to find out which and how many of its rights and powers it has conceded outright or agreed to share with the union.” p. 13.

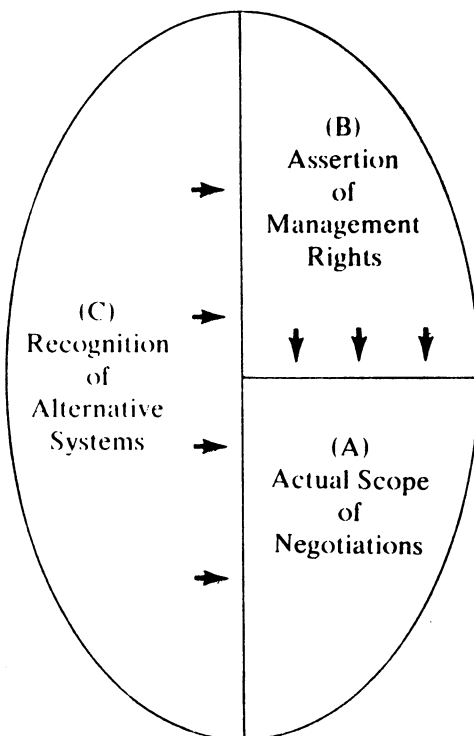
confine the scope of bargaining in areas where alternative methods are working well for the employee organizations.

Finally, in connection with these distinctions, it should be noted that impasses over the scope of negotiations related to management prerogatives are highly responsive to settlement through administrative boards established by public employee relations laws, whereas impasses over scope related to competitive systems of establishing terms and conditions of employment can often be settled only in the courts, when they are not handled legislatively or politically.

A Practical Framework for Segregating Scope Issues

The upshot of the above is to suggest that advocates in the field of public employee relations might benefit from a more comprehensive and functional framework for dealing with scope issues than is provided by the useful, but limited doctrine of reserved management rights. The author wishes to propose a framework in which the "actual scope of negotiations" is seen as the area of bilateral determination which falls within a broader area of *potential* bilateral decision-making (all employment issues). "Actual scope" is circumscribed by two forces: one is the assertion of management rights and "mission" authority of the agency; and the other is the concurrent recognition of (or priority given to) alternative or competing methods of determining terms and conditions of employment. The following diagram may be helpful in visualizing the operation of these two sets of constraints on the area of bilateral decision-making:

Diagram 1—Constraints on Scope
Total area = all employment issues

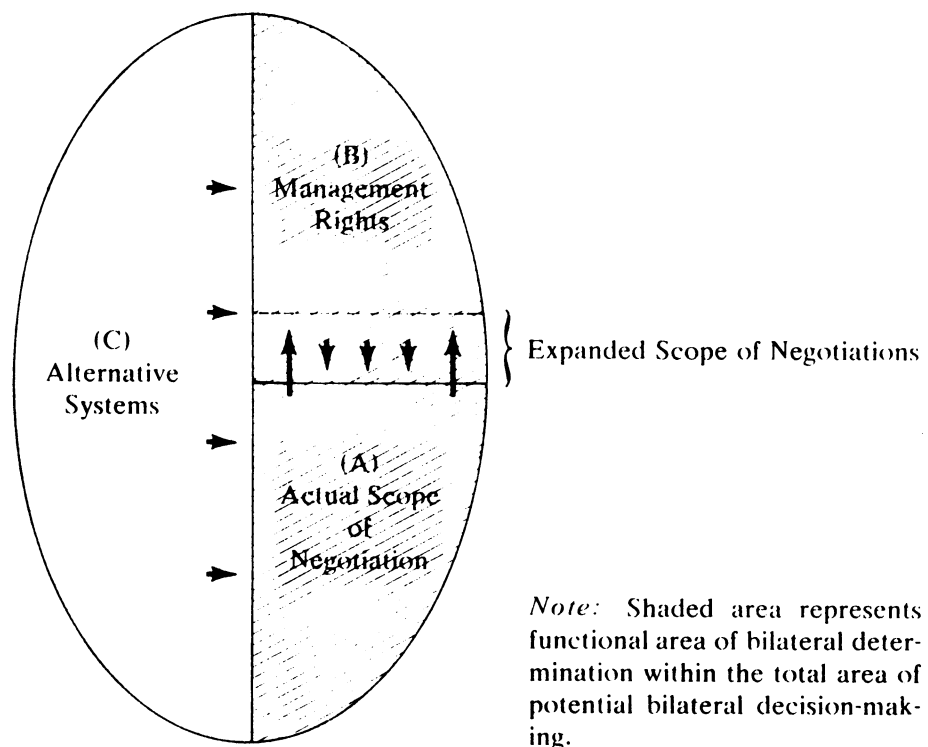


In Diagram 1, the oval itself represents the area of *potential* bilateral decision-making. Within the oval, Area A represents the actual scope of negotiations. The latter is constrained by two areas of decision-making which *potentially* are also areas of bilateral determination.

Area B represents the decision-making authority reserved to management through the assertion of management rights and the so-called "mission" authority of the agency. Area C represents the decision-making authority preserved for alternative or competing systems and methods of determining employment conditions, such as civil service systems and "prevailing rate" practices. The direction of the arrows indicates that the exercise of authority in both Areas B and C has the effect of circumscribing the actual scope of negotiations in Area A. The combined impact of these determines actual scope.

One way of delineating scope issues is to separate out "alternative systems," and think of Areas A (actual scope) and B (management rights) as the "functional" area of potential bilateral decision-making. Within the "functional" area (see Diagram 2), the "actual" scope of bargaining is determined by the horizontal line between Areas A and B. At the pressure points on the horizontal line, which may move up or down, the focus is on the restraining impact of agency authority and management rights. This is the scope of bargaining dimension that lends itself well to analysis within the doctrine of management reserved rights. It is also the dimension that is responsive to the evolution of bargaining relationships and to the kind of administrative machinery that is made available to help the parties resolve impasses over scope issues related to the assertion of management authority. As seen in Diagram 2, the actual scope of negotiations is expanded when inroads are made against management rights through the evolution of collective bargaining.

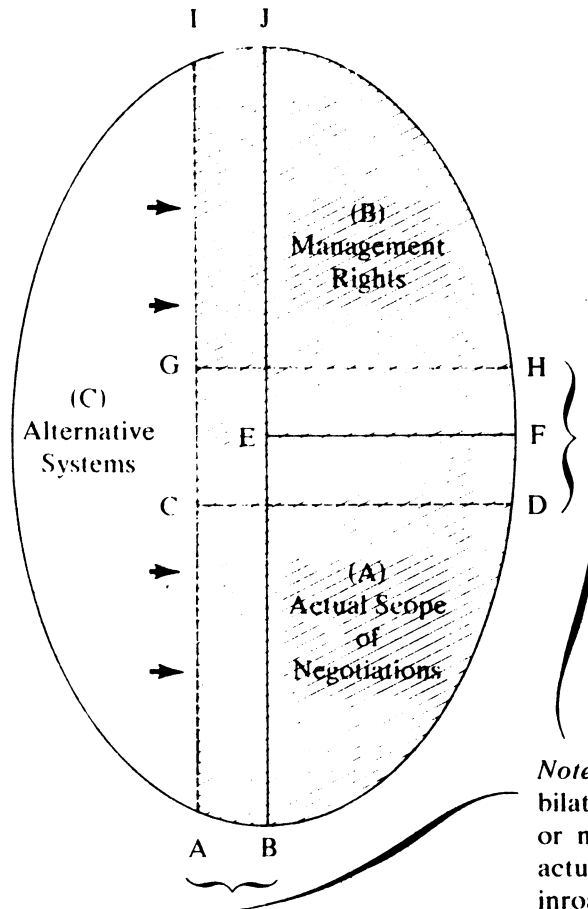
Diagram 2
Expansion of Scope Within Functional Area of Bilateral Determination



Limitations on scope that stem from alternative systems are considerably more complex. Diagrams 1 and 2 indicate that constraints from this source (shown by the pressure points of arrows along the vertical line) impinge on both the authority of management (Area B) and on the scope of negotiations (Area A). Although employee organizations tend to view the role of civil service systems in many areas of employee relations as an extension of the authority

of management, for example, it remains a fact that the area of authority of civil service commissions and personnel boards which extends to such considerations as merit and classification directly limits the authority of management as well as the scope of negotiations. The same is true of "prevailing rate" procedures established by charters and ordinances. They restrain management authority at the same time that they limit the scope of negotiations. Accordingly, when inroads are made against the constraining influence of authority preserved for alternative systems (by moving the vertical line to the left) it does not necessarily follow that the actual scope of negotiations is expanded. Diagram 3 illustrates the point.

Diagram 3
Expansion of Functional Area of Bilateral Determination



Note: New area of functional bilateral determination that may or may not be included in the actual scope of negotiations as inroads are made against constraints of alternative systems.

In the diagram, the area of functional bilateral determination to the right of the vertical line is expanded by shifting the vertical line to the left. The *new* area of functional bilateral determination that was formerly in the sphere of authority of alternative systems is represented by the area in the oval between the solid and broken vertical lines (ABJI). It is also represented to the right of the broken vertical line by the area between the two broken horizontal lines (CDHG). If the *new* area of functional bilateral determination is absorbed within the authority of management (Area B), the lower horizontal broken line and the broken vertical line circumscribe the actual scope of negotiations in Area A (now ACD). In such case, the actual scope of negotiations in Area A remains the same (i.e., BEF = ACD), while the area of management authority (Area B) is expanded (to ICD). On the other hand, if the *new* area of functional bilateral determination is actually brought within the scope of negotiations (instead of being

absorbed within the authority of management) then the upper horizontal broken line and the vertical broken line define the actual scope of negotiations in Area A (to AGH). In such case, the actual scope of negotiations in Area A is enlarged, while the area of management authority, Area B, remains the same.

It is possible of course (and likely) that the new area of functional bilateral determination may be distributed so that both the actual scope of negotiations and management authority are increased. Similarly (although the diagram does not show it), the functional area of bilateral determination may be decreased (shifting of the vertical line to the right) by inroads of alternative systems against management rights or actual scope of bargaining, or both. The latter may occur, for example, when prevailing rate procedures are established by law.

Obviously, the limiting forces (the assertion of management rights and the existence of alternative systems) which constrain the actual scope of negotiations are interrelated. It is nevertheless useful to separate the impact of alternative systems from that of management rights. To focus on the restraining effect of alternative systems (at the pressure points on the vertical line) is to focus on the dimension of scope that is generally beyond the direct influence of management, and largely beyond analysis within the doctrine of management reserved rights. This is also the dimension of scope that is *less* responsive to the nature of the relationship of the parties and to the kind of administrative machinery usually made available to help the parties resolve impasses and *more* responsive to legislative determination and the exercise of political power. The point here in delineating as much as possible the impact of alternative systems is to recognize as a practical matter that the constraints from this source at any given point in time are not likely to be altered significantly by the parties to incipient bilateral relationships without recourse to the legislative process and political action, and/or the courts. This, in turn, emphasizes again the primary purpose of developing a framework that attempts to distinguish between two related forces which operate to restrict the actual scope of negotiations. The proposed framework, if it is to serve advocates in the field of public employee relations, has its possible usefulness only as a method of segregating scope issues for further analysis, with an eye to the "forum" in which they might best be resolved.¹³

Applying the Framework to a Hypothetical Situation

The practical application of the above framework might be seen better in the use of a simplified hypothetical situation under the MMB Act. The example focuses *first* on the constraints on scope stemming from the assertion of management rights, and *secondly* on constraints stemming from alternative systems.

The legal framework assumed to exist for both purposes is as follows:

The City of Howard has adopted an implementing "meet and confer in good faith" ordinance which makes no provision for an administrative agency and which attempts to limit the scope of negotiations (meeting and conferring) in two ways: (a) by restricting the meaning of wages, hours and working conditions in the "scope of representation" to exclude items concerned with the "merits, necessity, and organization" of services provided by the City; and (b) by including a strong city rights clause aimed at securing the authority of management to direct employees, to hire and promote, etc., to take disciplinary action, to maintain efficiency and otherwise direct the work force of the City. Other provisions state that the ordinance does not supersede either the long-standing civil service system provided for in the City's Charter or any laws which establish other methods of administering employee relations, such as the "prevailing rate" procedures for craftsmen and mechanics established by City Ordinance under a Charter mandate. The authority of the Civil Service Commission to administer the City's merit system extends to other con-

¹³ A further word of caution may be in order, particularly for academicians who may come upon this article. The suggested framework is not intended to be a model which takes into account all of the possible variables that may influence the scope of negotiations. When the framework ceases to be useful to practitioners, it should be forgotten.

ditions of employment, such as wage and salary administration, including the positioning of classifications.

Within the legal framework, the scope of negotiations problem faced by the parties and the manner in which they dealt with it is as follows:

Under the Ordinance, the Union of City Workers (UCW) obtained recognition for a unit of clerical employees, which includes "Factfinder Workers" in the City's year-old Consumer Services and Protection Bureau. In addition to increases in wages and fringe benefits and improvements in working conditions generally, the Union demanded that a ceiling be placed on the workload of Factfinders in order both to ease some of the strain of the job and to permit Factfinder Workers to be more thorough in preparing cases for screening by the Bureau's attorneys, thereby improving services to aggrieved consumers. The City's negotiators refused to discuss the workload demand, because it involved a question of the "merits, necessity, and organization" of a City service and otherwise clearly fell within the prerogative of management to direct the work force and maintain its efficiency. The Factfinder Workers staged several demonstrations with the support of organized consumer groups in the City and conducted a three-day "sick-out" for purposes of medical checkups in order to make their point. Management never relented, and was able to negotiate a memorandum of understanding (approved by the City Council) without discussing the workload demand.

Following the negotiations, however, the Union indicated that it would not abandon the interests of either the Factfinders or the consumers of the City, and that it might go to court to obtain an order requiring the City to negotiate over workloads as an issue affecting the working conditions of the Factfinders. Moreover, the Union touched base with other recognized employee organizations with growing concerns about the assertion of management prerogatives at the bargaining table, and took the lead in mounting a coordinated union campaign to come to grips with the City's stance on scope of bargaining issues. In response, City officials indicated "off the record" that they would be willing to re-examine their position in view of the generally constructive relationships developed with the City's recognized unions, but that they felt somewhat constrained by the formation of a new group of Irate Taxpayers which had the conservative *Howard Daily News* carrying frequent articles about the "dangers" of city unions "undermining" the authority of elected city officials and negotiating bilateral agreements that affect the level and character of city services. Finally, although the building trades unions remained somewhat aloof from the growing controversy, the central labor council called the matter to the attention of the state labor body for possible state legislative action.

Given this set of circumstances, how might the suggested framework have helped the parties segregate the scope issues involved? First, it is clear that the union raised the workload issue in a manner that caused management to stand on its statutorily protected prerogatives and the exclusion of "mission" matters from the scope of negotiations. Despite demonstrations and work stoppages, the City weathered the storm at the expense of mounting discontent on the part of city unions over issues of negotiability. On reaching the memorandum of understanding, approved by the City Council, the actual scope of negotiations was effectively circumscribed by the assertion of management rights and the mission authority of the City. To the extent that these asserted rights and authority had a statutory base in the "meet-and-confer" ordinance of the City of Howard, the City's negotiators might have been fortified in their determination to maintain a non-negotiable stance on the issue. But the City could have listened to the union's arguments and preserved its negative position in any event, in keeping with the doctrine of management reserved rights.

On the one hand, confronted with the possibility of a court suit by the union within the context of a broader labor campaign to expand the scope of negotiations, and challenged on the other hand by a heightened public awareness of the issues as the result of the concerned Irate Taxpayers, the City might be interested in some alternatives for dealing with the scope problem involved. Within the suggested framework, the problem is delineated as involving the constraining impact of rights asserted by management on the scope of negotiations. Since the resolution of this type

of conflict is responsive to the evolution of bilateral relationships, the parties might direct their attention to the kind of assistance they would benefit from during the process of evolving their relationship. In lieu of court action, as threatened by the Union, consideration might be given to the creation of administrative board with authority to resolve impasses over the scope of negotiations.¹⁴ Focusing on the advisability of an administrative agency, in turn, may raise some questions about the advisability of attempting to assert management rights in a labor relations statute. In effect, statutory management rights restrictions seek to predetermine the outcome of the management reserved rights doctrine. The parties might be encouraged to discuss this issue in light of the desirability of creating administrative machinery to help the parties themselves resolve negotiability impasses.

In order to focus on the particular constraints that stem from alternative systems, the problem may be altered as follows:

Within the same legal framework, rather than demanding workload ceilings for Factfinder Workers, the Union proposed the creation of a new classification of "Field Assistants" to Factfinder Workers as a means of both reducing excessive workloads and improving the quality of consumer services. In this connection the Union also demanded that the Field Assistants be selected from among qualified members of active consumer groups in the City with experience in handling consumer grievances, and that the positioning of the new classification for pay purposes also be negotiated. Management responded to the Union's workload-classification demand by discussing it fully in a desire to reach a joint solution. However, after a hostile article appeared in the *Howard Daily News*, charging that the City's negotiators and Unions were trying to undercut the authority of the Civil Service Commission, management consulted the Chairman of the Commission. At the next negotiating session management reported to the Union that the establishment of qualifications for employment in a new classification, as well as the positioning of the new classification, were beyond the "meet and confer" relationship. A letter from the Civil Service Commission's Chairman was read to the effect that in "implementing the MMB Act, the City's policy makers had decided that the labor relations ordinance was not to supersede the authority of the Civil Service Commission, including its authority over classifications." While having no hangups about sharing management authority in the area of dispute, including the possibility of reaching agreement on the *need* for the new "Field Assistant" classification, the City's negotiators said their hands were tied by the position of the Civil Service Commission: "The meet and confer forum is the wrong place for determining qualifications for a new classification and for positioning the classification. The proper forum is the well established and traditional one whereby appropriate City officials meet with the Civil Service Commission and its staff to discuss the City's mission in establishing an agency like the new Consumer Services and Protection Bureau so that the Commission may design appropriate classifications to carry out the mission. The procedures of the Commission provide an open door for the union to participate in its decision-making forums." Again, negotiations were completed without resolving the negotiability of the workload-classification demand. (All the other circumstances remained the same.)

In this case, the authority asserted by the Civil Service Commission—an alternative and competing system—sealed off from negotiations a portion of the potential solution to a problem which management was otherwise willing to bring into the scope of negotiations. Focusing on this dimension of scope, however, raises some additional considerations which advocates in the field of public employee relations should examine in the process of seeking workable solutions to scope issues stemming from the recognition of alternative systems.

Under the altered circumstances, the City Workers Union may still threaten to go to court on the negotiability of the workload-classification issue, but the basis of the case may have to be

¹⁴ As an extension of this line of reasoning, the question as to whether an administrative agency would be more helpful to the parties in resolving negotiability impasses if the agency were state-based rather than locally based is also relevant. The City of Howard's management officials might consider the desirability of having negotiability impasses settled at a higher level in order to provide a "workable degree" of insulation of management officials, as distinct from elected officials, from the vicissitudes of community pressure groups.

modified to accommodate the new dimension of the negotiability question at issue. As an alternative to court action, a public employee relations board would have a more difficult time of resolving a negotiability impasse when the issue involves at least the concurrent jurisdiction or authority of a whole system of administering major phases of the employment relationship, especially when the law that the board must administer actually recognizes the authority of that system without reconciling potential conflicts or overlaps of authority. Perhaps the best that could be done by an administering board under the altered circumstances of the dispute (assuming one were to be created either at the state or city level) would be for such a board to try to work out procedural accommodations between the Civil Service System and the “meet-and-confer” system in dealing with classifications as a negotiability issue. Even so, the matter might still have to go to court if the priority of the Civil Service System over classification matters is asserted, if not by the Civil Service Commission or City officials, then perhaps by some “irate” taxpayers.

Should the City Workers Union decide on the basis of the constraints imposed on scope to mount a coordinated campaign to “trim the sails” of the Civil Service Commission, it might find the other City unions less responsive to the idea. There may be considerable disagreement over where or how much trimming should be done, if any, to bring the Civil Service System “in line” with the bilateral determination goals of respective unions. Some unions may feel that more experience is needed before the trimming starts. Others may want the whole Civil Service System to go. Still others may look to a permanent merit system to handle recruitment, examination and placement. The point again is that the nature of the controversy over scope may significantly alter the forum in which alternative solutions may be pursued. Should the City Workers Union in the altered hypothetical situation, for example, decide to seek major modification of the Civil Service Commission’s authority through a charter amendment, it might find the building trades unions more than a little concerned about what the implications of success would mean for maintaining their charter mandate concerning the payment of prevailing rates to its members. This is to recognize that the advantages and disadvantages of collective bargaining over political action (to obtain for public employees economic benefits normally obtained through collective bargaining in the private sector) are by no means settled among public employee organizations or within the labor movement. When matters of negotiability are tackled within the context of restraints imposed by alternative systems, the chances of working out tidy solutions are perhaps not as bright as when dealing with constraints on scope imposed by the assertion of management rights.

The Scope Problem in California: Management Rights Constraints

The first part of this article attempted to clarify the issues involved in determining scope of negotiations. A framework was developed to assist the parties in solving scope problems. Such a mechanism not only should be useful in hypothetical situations but also should be relevant to the times. Therefore, the following section is intended to relate experience in California under the MMB and Winton Acts to the two dimensions of scope—management rights and alternative systems.

MMB Act. Much of the experience with the MMB Act has been concerned with the meaning of statutory restrictions on scope that advance the so-called “mission” authority of governmental agencies and the rights reserved to management. The history of the MMB Act is instructive in this respect.

When the original Brown Act of 1961 was amended to incorporate the new “meet and confer in good faith” provisions of the MMB Act, the broad definition of scope of representation in the original Act, which extended to “all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment,” was restricted by the following language:

"...except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." (Section 3504 of Government Code)¹⁵

At the same time, Government Code Section 3507 left the implementation of the MMB Act to the local government agencies covered by it. The requirement that public agencies need only "consult" employee organizations in "good faith" prior to adopting "reasonable" implementing rules and regulations, left the public agencies pretty much in command of the situation in dealing with the scope of negotiations as well as other aspects of public employee relations.

For a variety of reasons, the implementing laws adopted by local governmental bodies reflected a strong tendency to incorporate statutory restrictions on the scope of negotiations (meeting and conferring, in the language of the MMB Act). In addition to reinforcing the above quoted exclusion in the MMB Act, the vast majority of ordinances attempted to spell out the reserved rights of the agency and/or management in either general or specific terms.¹⁶

Examples of restrictive statutory clauses are found in the ordinances of the City of San Jose and the County of Los Angeles:

City of San Jose:

Section 4. *City Rights*. The rights of the City include, but are not limited to, the exclusive right to determine the mission of its constituent departments, commissions and boards; set standards of service; determine the procedures and standards of selection for employment and promotion; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work.

County of Los Angeles:

Section 5. *County Rights*. It is the exclusive right of the County to determine the mission of each of its constituent departments, board, and commissions, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the exclusive right of the County to direct its employees, take disciplinary action for proper cause, relieve its employees from duty because of lack of work or for other legitimate reasons, and determine the methods, means and personnel by which the County's operations are to be conducted; provided, however, that the exercise of such rights does not preclude employees or their representatives from conferring or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment.

Such clauses are typically combined with other provisions which exempt the enumerated areas of reserved rights from mandatory negotiations or "meet-and-confer" requirements, and which provide for "consultation," as opposed to negotiations on such matters. In Los Angeles, however, county rights may be included in the scope of negotiations by "mutual agreement," in addition to being subject to "consultation." This is somewhat unusual in implementing ordinances. More common is the provision contained in the Los Angeles County rights clause which provides for "conferring" and the filing of grievances over the "practical consequences" of the exercise of county rights.

¹⁵ For some insight into how the restriction got into the law, see Joseph R. Grodin, "Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts," *Hastings Law Journal*, Vol. 23, Footnote 145, pp. 750-1.

¹⁶ See Marion Ross and Max DeGialluly, "Implementation of the Meyers-Milias-Brown Act by California's Counties and Larger Cities," *CPER* #8. The provisions of implementing laws are set forth in tabular form with an indication as to whether or not they contain management rights clauses.

Agency or management rights clauses vary, but the central point is that they have been inserted in *statutes*. In the private sector under the National Labor-Management Relations Act (and also as in a number of states with comprehensive public employee relations laws), the duty to bargain extends to wages, hours, and other terms and conditions of employment without reference to any reserved rights of management; the actual scope of bargaining is left to evolve out of the bilateral relationships of the parties under the administrative authority of the National Labor Relations Board. Over time, the NLRB has delineated (through court enforceable decisions on unfair labor practice charges) the subject areas of negotiation that are either mandatory, permissive, or prohibited. This private sector precedent, known as the trilogy, however, does not mean that management rights clauses do not abound in *negotiated* contracts in the private sector. Many private sector agreements set forth very detailed management rights, which in turn are substantially modified by the other terms and conditions contained in the bilateral agreement.¹⁷ As indicated previously, the management reserved rights doctrine holds that rights clauses, whether in statutes or contracts, have nothing to do with the source of management rights. But as a practical matter, the location of enumerated management rights may have a great deal to do with the actual scope of bargaining in the *public* sector.

Employee organizations seeking the development of bilateral relationships with public agencies are quick to point out that statutory clauses are additional barriers to overcome when management asserts them to preclude negotiations on items deemed basic to working conditions. If the employee organization lacks the "clout" to resolve the impasse, it must go to court for redress where there is no administrative agency with the authority to resolve such impasses.¹⁸

Where employee organizations have sued under the MMB Act, however, state courts have given a broad interpretation to the duty to meet and confer in good faith over wages, hours, and other terms and conditions of employment.¹⁹ For example, the duty to bargain has been held in a county hospital dispute to include the "contracting-out of food services" (San Mateo County Employee's Association v. County of San Mateo, No. 142834, San Mateo Superior Court, February 27, 1969). More recently, in a court case bearing directly on the effect of restrictive statutory language on the scope of negotiations, the Solano County Superior Court held that firefighter demands involving personnel reductions, vacancies and promotions, hours scheduling, and a constant manning procedure are "related to wages, hours, and conditions of employment," and are therefore within the scope of representation and subject to compulsory arbitration under the City of Vallejo's Charter provisions implementing the MMB Act.²⁰

The Los Angeles County Employee Relations Ordinance is one of the few local ordinances that vests the authority to settle scope impasses in an Employee Relations Commission (ER-COM). Operating without precedents, the Commission ruled in its first scope case that the County was required under the terms of the Ordinance to negotiate on the subject of caseloads

¹⁷ Management rights clauses contained in negotiated agreements frequently assert rights that go to the core of working conditions, which are the guts of collective bargaining. Prasow and Peters (*op cit.*, p. 15) ask "why then...are management prerogative clauses now a standard feature of collective bargaining contracts?" They suggest that the answer lies in the widespread adoption of these clauses at the time of the great surge of labor in the 1930's. "Management not only felt the need to spell out exclusions from the scope of negotiations but also to delineate on a broad canvas reserved powers it shared with the union which might be unduly undermined by persistent over-aggressive union activity. The management prerogative clause serves a psychological purpose as a continuing reminder to all concerned that no matter what restrictions are placed on its reserved rights, the leadership of the organization and ultimate responsibility for its proper function remain solely with management."

¹⁸ The authority of such agencies to enforce their decisions is another matter. See Reginald H. Alleyne, Jr., "The Administrative Agency in California Public Employee Relations: Purpose and Structure," *CPER* #14.

¹⁹ See Grodin, *op. cit.*, section on "The Scope of Representation," pp. 748-51. A similar section is found in "Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts," by Grodin in *CPER* #12, pp. 16-18.

²⁰ IAFF Local 1186 v. City of Vallejo, No. 53187, May 8, 1972. The memorandum of decision is contained in *CPER* #13, pp. 48-49, together with other documents related to the historic arbitration case.

for eligibility workers in the Department of Public Social Services.²¹ The County argued that the County Rights section of the Ordinance, quoted above, precluded bargaining over caseloads. In concluding that the specific duty to bargain over “wages, hours, and other terms and conditions of employment” governed the more general language of the County Rights clause, ERCOM relied heavily on the legislative history of the ordinance. It quoted from the Report of the Committee of Consultants that originally recommended the ordinance for adoption:

“Viewed in the abstract, the demand to negotiate over ‘the level of service to be provided’ for example would seem to be not negotiable except at the discretion of the County. In the context of a specific situation, however, a demand for a lower maximum caseload for social workers, for example, although theoretically related to the level of service to be provided, might be much more directly related to terms and conditions of employment.”

Under the Los Angeles Ordinance, ERCOM is without power to enforce its orders. The union sought enforcement in court and won a writ of mandate compelling the County to negotiate the subject of maximum caseloads for eligibility workers.²² Subsequently the Consultants’ Committee was reconvened to review experience with the Ordinance and agreed with the balance struck by the Commission in ordering the County to negotiate over the issue of workloads. More specifically, it restated and reaffirmed its early viewpoint expressed above.²³

Along similar lines, the San Diego County Employee Relations Panel has ruled that the workload of supervisory probationary officers (the number of employees supervised) is a negotiable item under the San Diego Ordinance. As summarized in *CPER*:

“The majority members of the Panel held that the main impact of the supervisory ratio is on working conditions, rather than on the merits, necessity or organization of the service or an exclusive management rights. The impact on working conditions is direct, whereas the impact on service is indirect.”²⁴

The above examples provide some insight into the effectiveness of statutory “management/agency rights” restrictions on the scope of negotiations under the MMB Act and implementing ordinances. Despite the statutory constraints, these decisions are clearly on the side of broadening the scope of negotiations, although they do not necessarily constitute a trend (especially in the vast majority of governmental units where there is no access to administrative agencies to resolve impasses over scope and court actions are few and far between).

Winton Act. When the Winton Act was passed in 1965, the primary advocate of taking school district employees out of the original George Brown Act of 1961 and placing them under a largely parallel act in the Education Code was the California Teachers Association. At the time, the CTA was still advancing “professionalism” as an alternative to bilateral determination through collective bargaining, as advocated by the American Federation of Teachers—the CTA’s chief rival. Professionalism, among other things, meant the advocacy of “professional standards” and the involvement of teachers as professionals in all phases of the operation of the schools and in the “delivery” of educational services to the community.

²¹ *In re* Joint Council of Los Angeles County Employees Association and Service Employees International Union, Local 535, *Decision, Opinion, and Order*, as printed in *CPER* #10, pp. 49-52. The Commission “...ordered that the County cease and desist from refusing to negotiate with the Union on the subject of maximum caseloads for Eligibility Workers; that the County negotiate with the Union in good faith on this subject in an effort to reach an agreement, and in the event that an agreement is reached, that it be reduced to writing and signed by the County and the Union.”

²² Reported in *CPER* #12, p. 40. As summarized in *CPER*, the judge “...Averred that (1) the subject of maximum caseloads for Eligibility Workers is a term and condition of employment within the meaning of the ordinance, (2) the County did in fact commit an unfair employee relations practice by refusing to negotiate on the subject, and (3) ERCOM has the jurisdiction to compel the County to negotiate on the matter and its order to that effect is valid and binding on the County.”

²³ “Proposed Revision of the Los Angeles County Ordinance,” submitted by Consultant Benjamin Aaron, as printed in *CPER* #14, pp. 12-13.

²⁴ *CPER* #11, p. 38.

In the context of the weak meet-and-confer requirements advanced in the Winton Act, this influence had its major impact on the scope of bargaining.

Section 13084 of the Winton Act defined the scope of representation (for certificated personnel as well as classified school employees) as including “all matters relating to employment conditions and employer-employee relations, including, but not limited to wages, hours and other terms and conditions of employment”—the conventional positive definition. For teachers, Section 13085 broadened the scope of “meeting and conferring” to include:

“...all matters relating to the definition of educational objectives, the determination of the content of courses and curricula, the selection of textbooks, and other aspects of the instructional program to the extent such matters are within the discretion of the public school employer or the governing board under the law.”²⁵

After the passage of the Act in 1965, the Teacher’s Association came to accept the concept of bilateral determination, not as an alternative to professionalism, but as the only effective way of achieving professionalism. Thus, both the CTA and AFT eventually found themselves working within the framework of a weak “meeting and conferring” statute to achieve professional goals through bilateral determination.

In this context, the California School Boards Association became the chief sponsor of a bill which amended the Winton Act in 1970.²⁶ While maintaining the character of the original Act, the amendments yielded somewhat to the pressures of teachers to strengthen the “meeting and conferring” process. To “meet and confer” was defined as imposing on the parties the “mutual obligation to exchange...proposals...and to make and consider recommendations... in a conscientious effort to reach agreement by written resolution, regulation, or policy of the governing board effectuating such recommendations.” (Education Code Section 13081 [d].) However, in an apparent effort to prevent this new definition from being interpreted as the acceptance of bilateral determination under the Act, another amendment added a proviso (making explicit what was implicit in the original Act) that nothing in the Winton Act shall be “construed as prohibiting a public school *employer* from making the *final decision* with regard to all matters specified [in the scope of representation].” (Section 13088, emphasis added.) Furthermore, the clause mandating meeting and conferring for teachers over a broad range of policy matters was amended to require negotiations only over procedures relating to such matters as the definition of educational objectives, course content, etc.²⁷

Despite management resistance, which has required teacher organizations in most instances to start virtually from zero in pressing for joint determination, many memoranda of understanding have evolved out of the limited meet-and-confer process of the Winton Act; some show a substantial degree of acceptance of negotiations over school policy and “mission-type” issues. A number of “comprehensive” agreements,²⁸ approaching a dozen, reflect a similar degree of acceptance of professional interest in a broad scope. But again, from the point of view of the professional’s attraction to the bilateralism of collective bargaining, that

²⁵ It has been suggested that perhaps the quid pro quo at the time might have been the exchange of a broad scope of bargaining for a weak “meeting and conferring” requirement that fell far short of embracing bilateral determination.

²⁶ The amendments are summarized and discussed in *CPER #17*, pp. 22-3.

²⁷ The meaning of this change in the scope of bargaining is conjectural. According to the California School Boards Association, the change merely clarified what was intended in the original Winton Act. Some representatives of the CTA, although they didn’t like the restriction, were inclined at the time to discount its importance by pointing out that procedures for policy making are often the most important element in determining the effectiveness of participation in policy making. See *CPER #7*, pp. 22-23.

²⁸ See David J. Bowen and M. W. Aussieker, Jr., “Teacher Negotiations in a Changing Environment,” *CPER #11*, pp. 2-16. Specific reference is made to comprehensive-type agreements as well as “item” agreements at pp. 7-9. A comprehensive agreement is distinguished from piecemeal or “item” agreements in that the former (1) contains a formal recognition clause, (2) is written for a specific duration, (3) includes a formal multi-step grievance procedure, (4) includes a pledge by the parties to live by the terms of the contract, changes to be made only by joint agreement, and (5) is written in formal legal terminology and appears in contractual form.

“progress” must be measured against the concept of a “zero” starting point in a new kind of ballgame.

The first of the “comprehensive” agreements was negotiated in Santa Maria in April 1970 by the high school Faculty Association and the Santa Maria High School Joint Unified School District. Although basically very general, it did go beyond binding arbitration of grievances by outside neutrals, procedures for pay adjustment, sabbatical leaves, freedom from non-teaching duties, for example, and included item agreements on student-teacher ratio, textbook selection, maintenance of summer school for all students who want classes, and other items that relate to school policy issues.²⁹

By far the most significant teacher agreement to date is the one negotiated between the Los Angeles School Board and the United Teachers of Los Angeles in the spring of 1970, which evolved out of a four-and-a-half-month strike, but which was struck down in court.³⁰ The importance of the agreement, insofar as the scope of issues covered by it are concerned, is indicated by one observer in *CPER* #6, p. 23:

“...the Los Angeles Agreement is most significant in the extent to which it calls for drastic changes in the administration of Los Angeles schools. UTLA will enjoy joint decision-making powers with administrators over everything from textbook selection and curricula to teacher promotions. In fact, because the contract is so pervasive, its implementation is unlikely to be easily and swiftly accomplished....”

When the School Board was prohibited by court order from signing the agreement—on grounds that Section 13088 of the Winton Act amendment of 1970, quoted above, did not permit such sharing of authority—it tried to go around the court order by simply adopting the terms of the agreement as official Board Rule 3700. However, the Board and UTLA were again thwarted by another round of court orders which led eventually to Superior Court Judge Charles C. Stratton’s precedent-setting decision (printed in *CPER* #7, pp. 49-57) declaring Rule 3700 unlawful. As reported in *CPER*, the court’s decision was straightforward in outlawing contracts as a clear violation of the unilateral authority reserved to the Board in Section 13088 of the Winton Act. (Although the ruling was more circuitous regarding Board Rule 3700, the decision came to the same end.) In citing several sections of the Education Code, the Administrative Code, and relevant case law imposing duties and responsibilities on school boards, the court specifically referred to as unlawful those negotiated provisions incorporated in Rule 3700 that went to the “mission” of the schools. For example, Judge Stratton objected to sections of the agreement which permitted “designated school representatives” named by UTLA to meet with school administrators and “...in mutual good faith seek to establish procedures...” relating to teacher assignments, teacher evaluations, textbook selection, pupil discipline, and “any other matter that may affect the conditions of the teachers or the welfare of the students of the school” (*CPER* #7, p. 24). Moreover, Judge Stratton specifically concluded that the School Board is without “express statutory authority” under the Winton Act, “or necessary implied authority, to enter into a binding bilateral agreement” on the broad range of items enumerated in Section 13085 concerning the definition of educational objectives, course content, etc.

However, the significance of events surrounding the historic Los Angeles decision goes far beyond legal considerations. A conservative community organization, not the school board, brought the key suit that knocked the agreement and then Rule 3700 out of the box. Despite such road blocks, the parties persisted in their efforts to build a successful bilateral relationship and subsequently worked out a one-year agreement which was approved by the School Board in December 1971.³¹

²⁹ The agreement and a commentary are contained in *CPER* #6, pp. 63-66 and 29-30, respectively.

³⁰ Detailed reporting on the strike, the process of reaching the agreement, and the various law suits, as well as the agreement itself are contained in *CPER* #6 and 7, pp. 19-23 and 52-63 of #6, and pp. 23-25 and pp. 49-57 of #7, respectively.

³¹ See *CPER* #12, p. 56.

Observations. Experience under the Winton Act is perhaps most significant in that it demonstrates the importance of the evolution of bilateral relationships to the sharing of authority when there is a restrictive labor relations law. MMB Act experience shows the potential usefulness of administrative agencies in resolving impasses over the negotiability of issues that involve management's reserved rights. More importantly, experience under MMB indicates that the rationale, propriety, and perhaps even the effectiveness³² of *statutory* restrictions on the scope of bargaining in the form of management or agency rights clauses are open to question.

More needs to be said about the statutory issue since it looms so large in legislative proposals before the State Legislature.³³ Statutory management and agency rights clauses tend to prejudge the ability of the parties to work out the scope of shared authority at the level of the agreement. In this sense, an administrative board with some means of securing court review and enforcement of decisions in the resolution of scope impasses provides an alternative to the statutory process. To reject this alternative is to suggest there may be some overriding consideration that justifies statutory management and agency rights clauses.

In support of such statutory restrictions on scope, public agencies often refer to basic differences between the public and private sectors. For example, it is argued that public agencies, unlike private employers, have specific and general responsibilities imposed upon them by law; they must be carried out in a "fish bowl" of democratic processes. Few would quarrel with the idea that public management and other government officials are often subject to external pressures that do not surface as readily in the private sector, e.g., the group that challenged the UTLA-Los Angeles School Board Agreement. But such pressures are not absent in the private sector, and they do surface on occasions, e.g., current attacks on "big labor" and "giant corporations" regarding possibly inflationary collective bargaining agreements.

In this connection, it should be noted that the Western Assembly on Collective Bargaining in American Government (1972) emphasized another aspect of the distinction between the public and private sectors in its consensus report:³⁴

"In government the basic policymaking 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...."

The report, however, ducked the question as to whether or not management or agency rights clauses should be included in its statutes. It simply concluded:

"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."

Finally, it might be helpful to look at out-of-state experience regarding the matter of inserting management/agency rights as restrictions on scope in state public employee rela-

³² It should be noted, however, that this article makes no pretense of having examined, with regard to scope issues, the actual content of memoranda of understandings negotiated under the MMB Act.

³³ See, for example, S.B. 1140 and A.B. 1850 of the 1972 session of the California Legislature, both of which had the support of the League of California Cities and the County Supervisors Association. These bills place strong management agency rights restrictions on the scope of negotiations within the framework of comprehensive legislation which provides for a state public employee relations board with authority to render court-enforceable decisions on unfair labor practices, including disputes over negotiability issues.

³⁴ Reprinted in *CPEER* #13, pp. 12-20.

tions laws. Professor Irving H. Sabghir has conducted a study of the "Scope of Bargaining in Public Sector Collective Bargaining" for the New York Public Employment Relations Board, which administers the New York Taylor Law (and which itself does not contain statutory restrictions relating to management or agency rights). Portions of his summary and conclusions are worthy of consideration by Californians.³⁵

"Provisions of the state laws and the recommendations of various study commissions have been reviewed. A sample of contracts in the various segments of the public sector has been examined, and a series of interviews with a cross section of public employer and employee representatives was conducted....

"The findings indicate that legislative exclusions from the scope of bargaining, either directly or through an enumeration of management rights, are the exception rather than the rule.

"The survey of state laws covering all public employees under a single statute showed that of 19 such laws, 16 had no limitation on the scope of bargaining...."

The report strongly recommended against including in the Taylor Act "any substantive legislative exclusions from the scope of bargaining or the enactment of a set of managerial rights."

The Scope Problem in California: Alternative Systems Constraints

The extent to which the scope of negotiations is actually being restricted in California by the recognition given to alternative methods of determining the terms and conditions of employment is largely a matter of speculation at this time. And unfortunately, no systematic research effort has been made to determine where the parties stand on such restrictions in relation to their respective interests in bilateral determination. However, it is apparent that in comparison with constraints on scope related to the assertion of management or agency rights, this dimension of scope has all the attributes of a "can of worms." Figuratively speaking, the "can of worms" was opened up by the state's basic public employee relations laws, and no one seems quite satisfied that enough fishing has been done in the sea of public sector labor relations to determine when or how the can might be resealed.

To varying extents, the original Brown Act, the MMB Act, and the Winton Act move in the direction of some form of bilateral determination in the context of "meet-and-confer" relationships. At the same time, however, adherence to traditional ways of dealing with employer-employee relations is reaffirmed. The statements of purpose in the three Acts contain nearly identical language:

Brown Act (Govt. Code Section 3525): "Nothing contained herein shall be deemed to supersede the provisions of existing state law which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations."

MMB Act (Govt. Code Section 3500): "Nothing contained herein shall be deemed to supersede the provisions of existing state law and charters, ordinances and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations."

Winton Act (Education Code Section 13080): "Nothing contained herein shall be deemed to supersede other provisions of this code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations."

The potential for conflict in advancing a largely competitive system of labor-management relations while reaffirming adherence to traditional methods of dealing with employment relations is reconciled (or rationalized) in the following, somewhat confusing declaration of intent in the three Acts:

³⁵ Irving H. Sabghir, *The Scope of Bargaining in Public Sector Collective Bargaining* (with special reference to experience under the Taylor Law), assisted by Leonard R. Kershaw. A report sponsored by the New York Public Employment Relations Board, October 1970. Summary and conclusions are found at pp. 112-125.

"This article [Chapter] is intended, instead to strengthen merit, civil service [tenure] and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communications between employees and the state [the public school employers or public agencies by which they are employed]." (Government Code Sections 3500 and 3525 and Education Code Section 13080.)

The dichotomy is carried forward under the MMB Act in the various implementing ordinances of local governmental agencies. Many of these ordinances simply adapt the above constraints on scope to their respective jurisdictions while simultaneously affirming the intent to avoid any conflicts with the MMB Act. Similar constraints also appear in the various ordinances in other forms. For example the Los Angeles County Ordinance, in Section 6 on the scope of negotiations, provides that "negotiations shall not be required on any subject pre-empted by Federal or State law, or by County Charter..." Another Section (16a) provides that the Ordinance shall not "be construed to deny any person or employee the rights granted by Federal and State Laws and the County Charter provisions." In San Diego, in addition to MMB-type constraints, the County Ordinance provides that a memorandum of understanding, "when necessary," shall also be presented "to the Civil Service Commission for appropriate action and recommendation" to the Board of Supervisors. The Santa Clara County Ordinance, which also reasserts the MMB restrictions quoted above, makes explicit a common method of handling grievances. Grievances falling outside the scope of the negotiated agreement must be "processed in accordance with the provisions of the grievance procedure as provided by the Merit System Rules." In Sacramento County, the Ordinance not only reaffirms the authority of the County Charter relating to "merit civil service and personnel administration," but specifically provides that "the civil service commission shall continue to exercise authority over classification of jobs, procedures and standards of selection for employment and promotion, and disciplinary appeals."

Among cities, Santa Monica, San Jose, and Los Angeles are examples of those which provide in their ordinances that good faith "meeting and conferring" are not required on any subject "pre-empted by Federal or State law or by the City Charter," in addition to areas sealed off by agency/management rights. Civil service and merit systems are also continued either by specific provisions in ordinances and personnel policies or by other explicit limitations on the scope of bargaining.³⁶ The effects of such provisions are particularly apparent in portions of ordinances and personnel policies which establish guidelines for negotiated grievance procedures. To the extent that scope of negotiations is limited by the operation of civil service and merit systems, grievances arising out of the operation of such systems—particularly those dealing with discharges, disciplinary actions, and performance evaluations—are typically deemed to fall outside the scope of negotiated grievance procedures and within the exclusive domain of appeals procedures operated under the authority of civil service commissions and personnel boards.³⁷

While variations on the above themes appear to be endless, the point to be borne in mind is that the exact impact of constraints imposed by recognition of alternative methods of determining the terms and conditions of employment is extremely difficult to identify. Unlike the assertion of management or agency rights at the negotiating table, restrictions on negotiations that have their base in alternative systems are largely external to the bargaining re-

³⁶ In this respect, it might be noted that Division 5 of the California Administrative Code relating to "Local Agency Personnel Standards" (designed to assure state conformity with applicable federal requirements) requires in Section 17330 that "Local Agency personnel plans shall include a statement that the maintenance of a system of personnel administration based on merit principles will be assured in the adoption of any formal or informal written agreement between employees and management." This requirement is derived from a federal standard which must be met by a local agency wishing to establish its own Approved Local Merit System for state and federally funded programs. (See Section 17010 of the California Administrative Code.)

³⁷ For a discussion of the differences between negotiated grievance procedures and civil service appeals procedures, see Norman E. Amundson, "Negotiated Grievance Procedures in California Public Employment: Controversy and Confusion," *CPER* #6.

lationship.³⁸ Statutes unrelated to public employee relations law have been invoked by the courts to support the conclusion that the "limited powers" of public agencies (which are derived only from those expressly delegated to the agency) may not be shared or diluted through the negotiating process. A case in point is the court decision (discussed in the previous section) which pulled the rug from under the agreement between the United Teachers of Los Angeles and the Los Angeles School Board. Irrespective of the willingness of the District to dilute its authority in the decision-making process, the Court determined that the powers delegated to the District by various laws could not be shared under the Winton Act.³⁹ In effect, the court decision left no room for bilateral decision-making except on a de facto basis outside the law.

Where the courts have proceeded on a different assumption, namely, that public agencies have the general authority under applicable bargaining laws to negotiate on matters not otherwise prohibited, decisions affecting scope have come down on the side of a broader range of negotiable items. Two circuit court decisions in Michigan illustrate the difference in approach.⁴⁰ In a 1969 case involving the Board of Education at Mt. Morris, the court held that the State's Public Employment Relations Act (as a general law requiring bargaining in the pattern of the private sector) takes precedence over such specific laws as the School Code of 1955 and Teachers Retirement Act. The decision overruled an opinion by Michigan's Attorney General that the specific laws in question prohibited the negotiation of agreements which provided for terminal leave, payment for accumulated sick leave, and reimbursement of tuition credits for graduate study. In the second case, the Wayne County Circuit Court held that the authority to make classification and position allocations in the classified service was no longer "exclusively" vested in Detroit's Civil Service Commission by the City's Charter. In curtailing the Commission's exclusive authority, the decision said that the determinations of the Commission were legally subject to the "process and restrictions" negotiated in a master agreement between the City and AFSCME, including the arbitration of grievances arising out of classification and position allocations.

These cases have limited application in California, however, since the Michigan Public Employee Relations Act, unlike California's laws, does not contain any statutory restrictions on the scope of negotiations (either in terms of management rights or the recognition of alternative systems of labor relations). Court decisions aside, California's experience with resolving issues of authority that arise out of overlapping systems of labor relations is instructive in other ways. In particular, the so-called Wilkiel case in Los Angeles indicates that an administrative agency established to implement a local public employee relations law may have only limited usefulness in handling such disputes.

In the Wilkiel case, in response to an unfair labor practices charge filed by AFSCME Local No. 119, the Los Angeles County Employee Relations Commission (ERCOM) ordered the County Engineer to correct a violation of the Ordinance that occurred when Wilkiel was given a rating of 75 on his Appraisal of Promotability rating because of his union activity.⁴¹ The County refused to do so on the basis that only the Civil Service Commission (CSC) has

³⁸ Constitutional limitations on scope fall into a separate category. See, for example, The 1972 Report of the Committee on State Labor Law of the American Bar Association, reprinted in Bureau of National Affairs, *Government Employee Relations Report*, Reference File, Supplement #50, September 11, 1972. The report summarized a series of cases dealing with the application of the Equal Protection Clause to public employee relations.

³⁹ Other court cases which embrace similar assumptions regarding the diluting of authority are reviewed by Jack L. Wells, Assistant City Attorney in Los Angeles in his remarks at a conference on "The Meyers-Milias-Brown and Winton Acts: Major Legal Issues in Public Employee Relations," sponsored by the Institute of Industrial Relations, University of California, Berkeley, January 21, 1971. See *Proceedings*, pp. 40-45.

⁴⁰ The cases are summarized in Bruce Poyer, "Good Faith in Collective Bargaining: Private Sector Experience With Some Emerging Public Sector Problems," *CPER* #2, pp. 3-4.

⁴¹ ERCOM's decision is reprinted in *CPER* #10, pp. 48-9, together with communications which describe the refusal of the County to recognize the authority of the Commission and the resignations of two Commissioners.

the legal authority to change an examination grade. It was apparent to all parties that an overlap existed in the jurisdictions of the CSC and ERCOM with respect to the specific act involved in the Wilkiel case, and perhaps in other areas as well. The County, however, took the position that where a conflict in jurisdictions occurred, the jurisdiction of the CSC was superior because its authority is derived from the County Charter, whereas ERCOM's authority is derived from an ordinance, which is inferior to the Charter.

Significantly, this dispute over jurisdiction was not resolved by the Union seeking court enforcement of ERCOM's order, but by the intervention of the Committee of Consultants which proposed the original Los Angeles County Employee Relations Ordinance. Through discussions with CSC, ERCOM, and representatives of County Government and County employee organizations, the Consultants secured an agreement in principle that the CSC and ERCOM should adopt corresponding regulations (not an amendment to the Employee Relations Ordinance) "which in effect, establish a policy of not hearing any part of a complaint that is within the jurisdiction of, and has been heard by, either an arbitrator or the other commission."¹²

The importance of the Wilkiel case is that the nature of the case permitted a solution to be found in a consensus of the parties involved. Had the issue come to a head before ERCOM in the form of an unfair labor practices charge that the county *refused to negotiate* over an issue deemed to fall within the authority of the CSC, and therefore beyond the scope of negotiation, a consensus solution might have been considerably more difficult to achieve. In such an event, going to court would bring forth a decision on the negotiability of the specific issue involved, but the decision itself might contribute very little to drawing a demarcation line between competing systems of labor relations which would be acceptable to the parties to a bilateral relationship.

Prevailing rate systems which predate the development of "meet-and-confer" or other bargaining relationships have had the effect of significantly circumscribing the area of functional bilateral determination regarding pay (just as the continued operation of civil service systems has constrained bilateral determination, for example, in the area of wage and salary administration). The implementation of prevailing rate procedures may leave some room for negotiations around issues of implementation, e.g., comparability criteria, design and execution of wage surveys, and survey interpretations, but even in these areas, public agencies may assert management rights clauses to further restrict the area of *actual* bilateral determination. Perhaps more important is the fact that these prevailing rate and pay comparability procedures were established through the exercise of political and legislative power prior to the relatively recent growth of bilateralism, and there is no evidence in California's recent experience to indicate that employee organizations are now ready to dump them. On the contrary, not only are such procedures being rigorously defended, there is evidence that some employee organizations are prepared through political and legislative action to shrink the area of functional bilateral determination at the very moment that they stand at the threshold of entering into bilateral relationships.

Numerous examples may be found throughout the state where recognized employee organ-

¹² See "Proposed Revision of Los Angeles County Ordinance," Consultants' Committee Report, *CPER #14*, p. 12. The Consultants were not persuaded by the argument of the County that the CSC's jurisdiction was superior to that of ERCOM. In seeking the above administrative solution by "corresponding regulations" the Consultants were guided by the following reasoning aimed at preventing an aggrieved employee from having "three bites of the apple": "Rather, it is our view that CSC and ERCOM exercise concurrent jurisdiction, and, on the other hand, it would have been pointless to include discrimination on account of union activity as an unfair employment relations practice in the Ordinance if it had not been intended to give ERCOM jurisdiction over such charges. The question, then, is not whether an aggrieved employee may bring a complaint before either CSC or ERCOM, for that is clearly permissible; the question is whether the aggrieved employee can bring a complaint before one of the two commissions and then, if dissatisfied with the result, bring the same complaint before the other. Indeed, problems of this kind may have a third dimension, because the collective agreement between the County and the employee representative may provide for voluntary arbitration of a grievance alleging discrimination on account of union activity. In such event, it is theoretically possible for an aggrieved employee to have three bites of the apple."

izations under the MMB Act are fending off attacks against charter provisions and ordinances which provide for prevailing rates or other wage comparability standards. It appears that attacks on such alternative systems (especially those which provide for prevailing private sector union contract rates for maintenance craftsmen, mechanics, and laborers in public employment) have increased with the growth of meet-and-confer relationships. Recently in Los Angeles County, for example, the huge LACEA Local 660 of the Service Employees International Union, AFL-CIO, and organized labor generally hailed as a major victory the rejection by the Board of Supervisors of a ballot proposition which would have repealed the prevailing rate clause in Section 47 of the County Charter.⁴³ Charges that management and other public officials are using meet-and-confer relationships as a "pretext" to support the efforts of community economy groups to knock down prevailing rate procedures are not unusual. The point is that in such situations the tables may become turned; management may seek to expand the area of functional bilateral determination while employee organizations may fight to maintain existing constraints on it. The political legislative climate is the determinant of the outcome.

San Francisco provides another example of where some unions are giving priority to existing alternative systems over collective negotiations in the area of wage determination. The City and County Charter contains a number of prevailing rate and benefits provisions favoring unions which have been able to flex some political and legislative muscle. These unions tend to be less interested in public employee collective bargaining than other employee organizations which have greater stakes in bilateral determination. It is interesting in this connection that the City and County, which is considered the "seat of unionism" in California, is the only major urban center which has yet to adopt an ordinance implementing the MMB Act. The omission is not unrelated to the perceptions of bilateral determination held in the public sector by unions which make up the political-legislative power base of organized labor in San Francisco.

The recent 10-week and 12-week strikes on the Berkeley and San Francisco campuses of the University of California, respectively, are still other examples of the kinds of problems that may grow out of the existence of alternative "prevailing rate" systems.⁴⁴ Since 1954 the University had maintained a policy (equivalent to a legislative act in local government) of paying prevailing construction rates to regular building trades employees of the University at Berkeley and San Francisco.⁴⁵ In effect, this policy (along with other wage comparability policies for other employees) might be viewed as the "purchase price" paid by the University for the non-collective bargaining posture which it has maintained down to the present.⁴⁶ When the University fell on hard times financially, the Administration at Berkeley and San Francisco, following unproductive meet-and-confer sessions, took unilateral steps under a change in policy authority by the Regents (sought by the Administration) to impose lower maintenance rates on regular craft classifications, but without accepting a collective bargaining policy. The legislative political climate had changed, and the building trades found it impossible to further stall implementation of the new maintenance rates; a strike resulted.

⁴³ *County Employee*, September 1, 1972. Official publication of SEIU Local 660 (AFL-CIO). "Fair wage guarantees for County Employees will remain in the County Charter without another challenge at the polls this November," the Union declared. At the same time, the Union hailed the defeat of another proposition which would have given the County broader authority to "contract out" for care of county patients in private hospitals. Other charter amendments approved for the ballot over the objection of the Union included: provisions spelling out in detail how layoffs and demotions could be accomplished for reasons of economy or lack of work; and granting authority to the county to contract out certain maintenance work in outlying areas.

⁴⁴ The chronology of events in the strikes, together with background information and settlement documents are contained in *CPIR #14*, pp. 23-28.

⁴⁵ *Ibid.*, p. 23. The prevailing rate policy was implemented differently at UCLA and the Davis campus. At other campuses, policies of paying maintenance rates were initiated long before the recent Berkeley and San Francisco campus strikes.

⁴⁶ For the University's current position regarding collective bargaining, see Statement of the University, submitted before the Assembly Advisory Council of Public Employee Relations Hearings, Los Angeles, August 10-11, 1972.

In the face of the University's posture, the building trades were able to muster the support of other campus unions through the central labor council in a wider strike (at Berkeley). The University entered into new talks which were referred to as "meet-and-confer" by it and as "bargaining" by the unions. In the end the University compromised its position on the method of implementing the maintenance rates (and other benefits were won for other unions), but maintenance rates were nevertheless imposed on the building trades. Despite the prolonged strike, the unions were unable to restore through bilateral determination the previous (substantially politically based) prevailing rate policy. The terms of the settlement at Berkeley became the basis for the subsequent settlement at San Francisco.

Also relevant to the scope issue is a decision of the California State Employees Association to qualify a "State Employer-Employee Relations" initiative constitutional amendment for the November (Proposition No. 15) 1972 ballot.⁴⁷ Out of frustration with the weak meet-and-confer requirements of the Brown Act and the Governor's Executive Order covering state employees, the CSEA went to the voters to establish in the state constitution an essentially bifurcated system of employer-employee relations for state employees (covering the University of California and the California State University and Colleges as well). Under the initiative (bearing in mind the suggested framework for delineating scope issues advanced earlier), the functional area of bilateral determination would be constrained by (a) the establishment of new pay-setting procedures based on "prevailing rates for comparable services in private business and public employment" (subject only to a two-thirds override by the legislature in passing on the state budget), and (b) excluding from the scope of negotiations not only pay matters but also civil service rules, regulations, and classification powers reserved to the State Personnel Board by Article XXIV of the State Constitution. (With respect to issues not excluded from the scope of negotiations, the initiative constitutional amendment mandated written agreements under employee relations legislation to be enacted by the legislature.)

What is significant here is that, while the CSEA itself is the sponsor of comprehensive collective bargaining legislation before the State Legislature (i.e., AB 2252 [Z'berg] at the 1972 Session), it did not propose such legislation to the voters. Instead, at a time when it would appear that the development of bilateralism may have reached a threshold for state employees, the Association advanced a system that would severely limit the area of functional bilateral determination and, accordingly, the actual scope of negotiations. To emphasize again the mixed political priorities of employee organizations when dealing with scope restraints related to alternative systems, it should be noted that the CSEA initiative was opposed by the California Labor Federation, AFL-CIO, and virtually all affiliated unions involved in the public sector.

In dealing specifically with the constraints of civil service systems on the scope of negotiations, a particularly vexing problem for advocates in the field is the relationship between collective bargaining on the one hand, and the "merit principle" or "merit system" on the other. The merit principle goes to the egalitarian base of civil service systems. It is a principle which holds that selection, assignment, promotion, and retention should be based on ability to perform duties satisfactorily rather than on such extraneous considerations as political affiliation, race, religion, etc. As the Advisory Commission on Intergovernmental Relations points out in its report on "Labor-Management Policies for State and Local Government":

"The 'merit system' seeks to implement this concept typically through the establishment of a civil service commission having rule-making authority over such personnel matters as recruiting, examination, selection, position classification, promotion, and discipline. Frequently, these commissions also perform personnel management functions not directly relevant to the

⁴⁷ The "State Employer-Employee Relations Initiative Measure" is analyzed by Marion Ross in *CPER #13*, pp. 7-11. Professor Ross' description of the initiative in the context of wage determination procedures existing for state employees in Michigan, Wisconsin, and New York sheds a great deal of light on scope of bargaining issues raised by the CSEA initiative. (This article is being written in October before the outcome of vote on the CSEA initiative is known.)

merit principle, such as grievance resolution, training, salary administration, attendance control, safety and morale.”⁴⁸

While the overlap into traditional areas of negotiations is apparent, the point emphasized throughout this article is that the search for clarifying solutions is likely to involve the parties in some rather treacherous political-legislative waters. Industrial relations specialists generally are of the viewpoint that “as collective bargaining expands in the public sector there will be undoubtedly a corresponding contraction in the role of civil service commissions. The transition will be gradual. Ultimately...the traditional civil service commission functions will probably be limited to recruitment, examination, placement, and perhaps some duties unrelated to the scope of negotiations.”⁴⁹ Such a view, however, does not directly affect consideration of comprehensive labor relations proposals before the legislature. Even if agreement can be reached that only Civil Service Commission functions related to recruitment, examination, and placement are essential to the preservation of the merit principle, it does not follow that employee organizations—affiliated and unaffiliated—will be eager to give up many current protections imbedded in civil service regulations. The protections of civil service appeals procedures in discharge and disciplinary cases, for example, are generally superior to those found in negotiated grievance procedures in the private sector. In the give and take that characterizes the functional area of bilateral determination in the private sector, management has been able generally to preserve its “right” to take disciplinary action *before* the grievance procedure goes into operation. In the public sector, employee organizations are aware that management may be eager to obtain more “before the fact” authority (as a management prerogative) in disciplinary cases, should civil service appeals procedures give way to negotiated procedures. The same is true in many other areas of civil service authority not essential to preservation of the merit principle.

Concluding Notes

The above analysis suggests that under the best of circumstances the problem of dealing with the degree of recognition to be given alternative systems in framing comprehensive public employee relations legislation will be a significantly more difficult one than that involving the constraints of management rights on the scope of negotiations. The latter problem can be more readily resolved in the context of balancing off the degree of recognition to be given to *statutory* management or agency rights clauses in relation to the authority of a public employee relations board to resolve impasses involving negotiability issues. The former remains a “can of worms.”

There are as many approaches to handling alternative systems as there are conflicting viewpoints regarding both the speed with which, and the extent to which, inroads should be made through collective bargaining against civil service, prevailing rate procedures and other alternative methods of establishing conditions of employment. Employee organizations, uncertain as to what can be achieved through public sector bargaining, are in no mood at this time to foreclose any of their political-legislative options (just as management is determined to prevent “end-runs” around whatever they may prefer to include in the actual scope of negotiations).

Among the possible approaches is to continue the present system of concurrent and conflicting recognition of alternative systems in the context of meet-and-confer requirements as currently provided in the state’s public employee relations laws. Another approach would be to follow the New York or Michigan models, which give free reign to bilateral determination

⁴⁸ *Op. cit.*, p. 77.

⁴⁹ Prasow and others, *op. cit.*, p. 57. The quote is from a section on “Scope of Negotiations vs. the Role of Civil Service Commissions,” prepared by Howard Block.

of wages, hours, and other terms and conditions of employment, without giving specific recognition to alternative systems. Under this approach, precedent court cases would begin to draw the line of demarcation between negotiable issues and those pre-empted by other laws and alternative systems. A third approach would be to follow the federal Canadian pattern of restructuring the civil service to limit its jurisdiction to examination, promotion, staffing, and career development of Canadian federal employees. Still another approach would be to examine the experience of Connecticut with respect to its municipal agreements in order to determine whether its methods of resolving possible conflicts between negotiated provisions and laws or regulations might be adapted to California. In Connecticut, the terms of a contract prevail, including terms which conflict with other municipal regulations such as civil service, if the appropriate legislative body approves the contract.⁵⁰ But whatever the approach or combination of approaches taken in California in dealing with constraints on scope of alternative systems, they will almost surely have to be taken without any clear-cut agreement on the part of the advocates in the field of public employee relations.

Finally, it should be noted that only casual reference has been made to what in the end may turn out to be the most significant restraining influence on the scope of negotiations in the public sector—namely, the interests of active publics in the evolution of bilateralism. In the course of delineating constraints on scope which stem from both the existence of alternative systems and the assertion of management rights, it was indicated that community groups might intervene, as in the case of the Los Angeles teachers agreement, to prevent dilution of existing systems or agency authority. It is obvious that organized low-income groups, and black, brown, and Asian communities also have interests which may be vitally affected by negotiated agreements when, for example, the “merits, necessity, or organization” of services are affected through bilateral determination of “professional standards,” or when negotiated agreements make inroads against the egalitarian base of civil service.

The tendency for labor-management disputes in the public sector to become enmeshed in broader community disputes involving the “mission” authority and other decision-making processes of governmental agencies is well known to the parties. Frequently, such entanglements revolve about what the scope of bilateral determination should be. Bilateral determination in labor relations, by its very nature, excludes third party groups from the decision-making process. Thus, it is logical that the involvement of such third party groups in community issues affected by collective bargaining decisions should have an important constraining influence on the actual scope of negotiations. In this sense, the extent to which employee organizations or public agencies and their management, or both, are able to make “common cause” with “third party” community groups may very well provide the margin of difference which determines whether or not an issue in controversy is to be included in the scope of negotiations.

⁵⁰ See Section 80(b) of the Connecticut labor relations law pertaining to municipal employees. Reprinted in BNA, *Government Employee Relations Report*, Reference File 51:1613.

ORDINANCE NO. 9646

An Ordinance relating to employee relations in the public service of the County of Los Angeles.

The Board of Supervisors of the County of Los Angeles do ordain as follows:

Section 1. TITLE OF ORDINANCE.

This Ordinance shall be known as the Employee Relations Ordinance of the County of Los Angeles.

Section 2. STATEMENT OF POLICY.

The Board of Supervisors of the County of Los Angeles declare that it is the public policy of the County and the purpose of this Ordinance to promote the improvement of personnel management and relations between the County of Los Angeles and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and services of County government. This policy is supplemented by provisions (a) recognizing and defining the rights of employees to join organizations of their own choosing for the purpose of representation on matters affecting employee relations or to represent themselves individually in dealing with the County, (b) establishing formal rules and procedures to provide for the orderly and systematic presentation, consideration and resolution of employee relations matters, and (c) creating an independent Employee Relations Commission to ensure that all County employees and their representatives are fairly treated, that their rights are maintained and that their requests are fairly heard, considered and resolved.

Section 3. DEFINITIONS

As used in this Ordinance, the following terms shall have the meanings indicated:

(a) **"Certified employee organizations"** or **"certified employee representative"** means an employee organization, or its duly authorized representative, that has been certified by the Employee Relations Commission as representing the majority of the employees in an appropriate employee representation unit.

(b) **"Commission"** means the Los Angeles County Employee Relations Commission established pursuant to Section 7.

(c) **"Confidential employee"** means an employee who is privy to decisions of County management affecting employee relations.

(d) **"Consult"** or **"Confer"** means to communicate verbally or in writing for the purpose of presenting and obtaining views or advising of intended actions.

(e) **"County"** means the County of Los Angeles, a body corporate and politic and political subdivision of the State of California, and where appropriate herein, **"County"** refers to the Board of Supervisors, the governing body of said County, or any duly authorized management representative as herein defined.

(f) **"Employee"** means any person employed by the County in a position in the classified Civil Service.

(g) **"Employee Organization"** means any lawful organization which includes employees of the County and which has as one of its primary purposes representing such employees in their employment relation with the County; provided, however, that said organization has no restriction on membership based on race, color, creed, sex or national origin.

(h) **"Employee Relations"** means the relationship between the County and its employees and their employee organizations, or when used in a general sense, the relationship between management and employees or employee organizations.

(i) **"Employee Representation Unit"** means a unit established pursuant to Section 8 of this Ordinance.

(j) **"Fact-Finding"** means identification of the major issues in a particular dispute, review of the positions of the parties, resolution of factual differences by one or more impartial fact-finders and, the making of recommendations for settlement when directed by the Commission.

(k) **"Impasse"** means a deadlock in negotiations between a certified employee organization and the County over any matters required to be negotiated, or over the scope of the subject matter of negotiations.

(l) **"Management Employee"** means any employee having significant responsibilities for formulating and administering County policies and programs, and includes the Chief Administrative Officer, department heads, and any other employees who are so designated by the Director of Personnel based upon the recommendation of the department head or department heads concerned. For the purpose of this Ordinance such persons shall not exceed 2% of the total number of full-time employees of the County.

(m) **"Management Representative"** means a department head as defined in Section 22.5 of Ordinance No. 4099, the Administrative Code of the County of Los Angeles, and includes the Chief Administrative Officer and the Director of Personnel, or any duly authorized representative of such department head or officer.

(n) **"Mediation"** means the efforts of an impartial third person, or persons, functioning as intermediaries, to assist the parties in reaching a voluntary resolution to an impasse.

(o) **"Negotiation"** means performance by duly authorized management representatives and duly authorized representatives of a certified employee organization of their mutual obligation to meet at reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment, and includes the mutual obligation to execute a written document incorporating any agreement reached. This obligation does not compel either party to agree to a proposal or to make a concession. Agreements concerning any matters within the exclusive jurisdiction of the Board of Supervisors or concerning any matters not otherwise delegated by the Board shall become binding when executed by the Board of Supervisors and affected certified employee organizations. Agreements concerning matters within the exclusive jurisdiction of management representatives, or otherwise delegated to them by the Board, shall become binding when executed by said affected management representatives and affected certified employee organizations.

(p) **"Ordinance"** means, unless otherwise specified herein, the Employee Relations Ordinance of the County of Los Angeles.

(q) **"Professional"** means (1) a classification of employees engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes; or (2) a classification of employees who (i) have completed the courses of specialized intellectual instruction and study in clause (iv) of item (1) of this paragraph, and (ii) are performing related work under the supervision of a professional person in order to qualify to become a professional employee as defined in item (1) of this paragraph.

(r) **"Supervisory employee"** means any employee, having authority to exercise independent judgment in the interest of the County, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or having the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 4. EMPLOYEE RIGHTS.

Employees of the County shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employee relations. Employees of the County also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the County. No employee shall be interfered with, intimidated, restrained, coerced or discriminated against because of his exercise of these rights.

Section 5. COUNTY RIGHTS.

It is the exclusive right of the County to determine the mission of each of its constituent departments, boards, and commissions, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the exclusive right of the County to direct its employees, take disciplinary action for proper cause, relieve its employees from duty because of lack of work or for other legitimate reasons, and determine the methods, means and personnel by which the County's operations are to be conducted; provided, however, that the exercise of such rights does not preclude employees or their representatives from conferring or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment.

Section 6. SCOPE OF CONSULTATION AND NEGOTIATION.

(a) All matters affecting employee relations, including those that are not subject to negotiations, are subject to consultation between management representatives and the duly authorized representatives of affected employee organizations. Every reasonable effort shall be made to have such consultation prior to effecting basic changes in any rule or procedure affecting employee relations.

(b) The scope of negotiation between management representatives and the representatives of certified employee organizations includes wages, hours, and other terms and conditions of employment within the employee representation unit.

(c) Negotiation shall not be required on any subject preempted by Federal or State law, or by County Charter, nor shall negotiation be required on Employee or Employer Rights as defined in Sections 4 and 5 above. Proposed amendments to this Ordinance are excluded from the scope of negotiation.

(d) Management representatives and representatives of certified employee organizations may, by mutual agreement, negotiate on matters of employment concerning which negotiation is neither required nor prohibited by this Ordinance.

Section 7. EMPLOYEE RELATIONS COMMISSION.

(a) There is hereby established a Los Angeles County Employee Relations Commission consisting of three members, appointed by the Board of Supervisors, which shall implement and administer the provisions of this Ordinance. The members of the

Commission shall have expertise in the field of employee relations, shall reside in Los Angeles County and shall possess the integrity and impartiality necessary to protect the public interest as well as the interest of the County and its employees.

(b) The members of the initial Commission shall be appointed by the Board of Supervisors from a list of seven nominees to be selected in the following manner:

- (1) The Committee of Consultants heretofore retained by the Board of Supervisors to draft a proposed Employee Relations Ordinance for the County of Los Angeles (*hereinafter referred to as Consultants*) shall, within seven calendar days after such Ordinance is adopted, submit to the Los Angeles County Management Council and to a committee representing employee organizations currently recognized by the County a list of seven nominees for membership on the Commission.
- (2) Each party (i.e., the Council and the employee organization committee) may strike a maximum of two names from the aforesaid list of nominees. By mutual agreement the parties may substitute nominees to replace any or all of the nominees whose names have been stricken from the list provided by the Consultants. The procedure set forth in this subparagraph (2) shall be completed within fourteen calendar days of the parties' receipt of the Consultants' list of nominees and the Consultants shall be advised of the results.
- (3) If the parties are unable to agree within the prescribed time limit on nominees to replace those whose names have been stricken as provided in subparagraph (2), the Consultants shall complete the list of seven nominees within seven calendar days thereafter.
- (4) The Consultants shall then submit to the Board of Supervisors the final list of seven nominees, from which the Board shall select the three initial Commission members, whose initial terms shall be three years, two years and one year, respectively. The Board shall designate the Chairman, who shall serve an initial term of three years; provided, however, that the election of a successor Chairman as provided for in Section 7 (e) hereof shall not be deemed to terminate or alter the initial Chairman's term of office as a Commission member. The terms of the other Commission members shall be determined by lot. Thereafter, the regular term of office for all members shall be three years. All members shall be eligible for reappointment.

(c) The procedure for filling a vacancy resulting from expiration of a Commission member's term of office shall be initiated at least thirty days prior to said expiration. Each member shall hold office until his successor is appointed. If a vacancy occurs during a term, the appointee to said vacancy shall hold office for the remainder of the term and until his successor is appointed.

(d) Each appointment to Commission membership, subsequent to the procedure set forth in Section 7(b) and pursuant to Section 7(c), shall be made from a list of three nominees, which list shall be:

- (1) Jointly submitted by the Los Angeles County Management Council and a committee composed of employee organizations, recognized by the County, within fourteen calendar days of the date of an unscheduled mid-term vacancy, or within fourteen calendar days from commencement of the thirty-day period prior to the expiration of a regular term, or
- (2) If the parties are unable to agree, within the prescribed time limit, on at least three nominees for each vacancy so occurring, the parties shall, by the last day of the prescribed period, jointly select a panel of three persons which shall select the necessary number of nominees, or

(3) If the parties are unable to agree, within the prescribed time limit, on at least three panel members, each party shall, by the last day of this prescribed period, select one panel member and the two panel members thus selected shall jointly select the third panel member within three calendar days. In the event either party fails to select one such panel member within the prescribed time period, or in the event the two aforementioned panel members are unable to jointly select the third panel member, the Board may select the necessary panel member or members required to bring the total number to three.

(4) The panel thus selected shall submit to the Board of Supervisors, within seven calendar days of appointment, at least three nominees for the vacancy involved. As soon thereafter as practical the Board shall fill the vacancy by selecting from among the three nominees so submitted to it.

(e) The Commission shall meet regularly at least once each month and shall meet at other times upon the call of the Chairman. Two members shall constitute a quorum and the votes of two members are required for action; provided, that at meetings held for the exclusive purpose of conducting mediation, fact-finding, or arbitration in connection with the resolution of disputes as provided in Sections 11 and 13 hereof or at meetings held for the exclusive purpose of investigating an unfair employee relations practice charge, that one member shall constitute a quorum and the vote of a majority of the members attending shall be required for action. Commencing in 1971, at its first meeting in July, the Chairman of the Commission shall be elected annually by the members of the Commission. (Amended Effective 5-21-71, Ordinance No. 10,250)

(f) A member of the Commission may be removed by the Board of Supervisors for continued neglect of duties or malfeasance in office. A member of the Commission may be removed only after he has first been given a copy of the charges against him at least ten days prior to action being taken on the charges and has had an opportunity to be heard in person and by counsel. If a member of the Commission is removed, a record of the proceedings, including the charges and action taken on them, shall be filed with the Clerk of the Board.

(g) The Commission shall have the following duties and powers:

- (1) To determine in disputed cases or otherwise to approve appropriate employee representative units.
- (2) To arrange for and supervise the determination of certified employee representatives for appropriate units by means of elections, or such other method as the Commission may approve with mutual consent of the parties involved. The results of such elections or other approved representation determination procedures shall be certified by the Commission.
- (3) To decide contested matters involving certification or decertification of employee organizations.
- (4) To act upon requests for mediation, fact-finding or arbitration of disputes as provided in Section 11 and 13 of this Ordinance.
- (5) To investigate charges of unfair employee relations practices or violations of this Ordinance, and to take such action as the Commission deems necessary to effectuate the policies of this Ordinance, including, but not limited to, the issuance of cease and desist orders.
- (6) To establish and maintain an adequate list of impartial mediators, fact-finders and arbitrators and to appoint same as provided for in Sections 11 and 13 of this Ordinance.

- (7) To conduct investigations, hear testimony, and take evidence under oath at hearings on any matter subject to its jurisdiction.
- (8) To administer oaths and to require the attendance of witnesses and the production of books and papers.
- (9) To consider and decide issues relating to rights, privileges, and duties of an employee organization in the event of a merger, amalgamation, or transfer of jurisdiction between two or more employee organizations.
- (10) To certify, in appropriate cases, a council of employee organizations as the majority representative of employees in an employee representation unit and to decide issues relating to such certifications.
- (11) To delegate to one or more Commission members, employees or agents the powers or duties it deems proper.
- (12) To make recommendations concerning any necessary or desirable revisions in this Ordinance.
- (13) To take such other actions as the Commission deems necessary to effectuate the policies of this Ordinance.

(h) The Commission is a separate agency of the County and is authorized, following notice and hearing, to adopt reasonable rules and procedures not inconsistent with the provisions of this or any other County ordinance and which are necessary in the performance of its duties under this Ordinance. The Commission shall appoint from Civil Service eligible lists such staff as it deems appropriate to fill those positions authorized by the Board of Supervisors.

(i) The County shall provide appropriate office facilities, reference periodicals and books, equipment and supplies for the Commission and such staff as it may appoint. The County also shall provide recording and transcription services for all public hearings conducted by the Commission.

(j) If at any time any matter comes before the Commission in which any member has any interest, direct or indirect, other than that of a taxpayer, said member shall publicly so state and his statement shall be recorded in the minutes of the meeting. He shall thereafter be disqualified from participating in the consideration of said matter.

Section 8. EMPLOYEE REPRESENTATION UNITS.

(a) A petition for certification as the majority representative of employees in an appropriate employee representation unit may be filed with the Commission by an employee organization. The Director of Personnel may file such a petition with the Commission in the event that two or more employee organizations formally claim to represent a majority of the employees in the same or overlapping employee representation units.

(b) In the determination of appropriate employee representation units the following factors, among others, are to be considered:

- (1) Which unit will assure employees the fullest freedom in the exercise of rights granted under this Ordinance.
- (2) The community of interest of the employees.
- (3) The history of employee relations in the unit, among other employees of the County, and in similar public employment.
- (4) The effect of the unit on the efficient operation of the public service and sound employee relations.

(5) Whether management officials at the level of the unit have the power to agree or make effective recommendations to other administrative authority or the Board of Supervisors with respect to wages, hours and other terms and conditions of employment subject to negotiation.

(6) The effect on the existing classification structure of dividing a single classification among two or more units.

(c) In the establishment of employee representation units, (i) professional employees shall not be included in a unit with non-professional employees unless a majority of such professional employees vote for inclusion in such unit; (ii) supervisory employees shall not be included in a unit with the nonsupervisory employees unless such supervisory employees are in the same classification with nonsupervisory employees, provided, however, that in such event, said supervisory employees shall not participate in the management of an employee organization as an officer of the organization or represent it in dealings with management representatives when such activity would result in a conflict of interest or otherwise be incompatible with law or the official duties of the employees; and (iii) management and confidential employees shall not be included in the same unit with nonmanagement or nonconfidential employees.

(d) The Commission shall conduct a hearing on each contested employee representation unit only after first giving the employee organizations concerned and the Director of Personnel reasonable notice of the time and place of such hearing. The Commission may require the parties concerned to submit such additional information or material as it deems proper and necessary. The Commission shall make the decision on the appropriate unit and issue the notice thereon.

(e) Agreement of the parties involved on the scope of any employee representation unit is subject to the Commission's concurrence that such unit is appropriate.

(f) The Commission shall determine any dispute concerning the relationship between existing employee representation units involving the addition of new classes to, or the deletion of classes from, the Salary Ordinance.

Section 9. CERTIFICATION OF EMPLOYEE ORGANIZATIONS.

Following notice and hearing, the Commission shall adopt rules and regulations governing the certification and decertification of employee organizations. Only employee organizations that have been certified as majority representatives of appropriate employee representation units shall be entitled to negotiate on wages, hours, and other terms and conditions of employment for such units. This shall not preclude other employee organizations, or individual employees, from conferring with management representatives on employee relations matters of concern to them.

Section 10. PROCEDURAL RIGHTS AND OBLIGATIONS.

(a) Subject to appeal to the Commission, the Director of Personnel shall have the right to promulgate rules and regulations governing the activity of certified employee organizations on County property, including procedures for conferring with management, use of bulletin boards and other County facilities, and solicitation of membership.

(b) Payroll deduction may be made for any membership dues to employee organizations in accordance with applicable law and County rules.

Section 11. GRIEVANCES.

(a) A grievance is any dispute concerning the interpretation or application of this Ordinance, or of a written agreement between the County and a certified employee organization, or of rules or regulations governing personnel practices or working conditions. A dispute over the terms of an initial or renewed collective agreement does not constitute a grievance.

(b) The County and any certified employee organization may negotiate a procedure for handling grievances arising within the unit for which such organization has been certified.

(c) The County and a certified employee organization may negotiate an agreement providing for final and binding arbitration of unresolved grievances, subject to such limitations on the scope of arbitrable grievances as the parties may deem appropriate or as may be required by law. Arbitrations conducted under such provisions shall be governed by the appropriate sections of the California Code of Civil Procedure. The fees and expenses of arbitrators shall be shared equally by the parties involved. The Commission shall establish rules for the selection of arbitrators. It shall also establish a standard rate of compensation for such arbitrators, subject to approval by the Board of Supervisors.

(d) Nothing in this section shall be deemed to supersede the authority of the Civil Service Commission. However, nothing contained herein shall preclude the Civil Service Commission from adopting rules permitting it, in its discretion, to decline jurisdiction over appeals by employees who have expressly consented to have their grievances resolved under a negotiated grievance or arbitration procedure.

Section 12. UNFAIR EMPLOYEE RELATIONS PRACTICES.

(a) It shall be an unfair employee relations practice for the County:

- (1) To interfere with, restrain, or coerce employees in the exercise of the rights recognized or granted in this Ordinance;
- (2) To dominate or interfere with the formation of any employee organization or contribute financial support to it, provided that the County may permit the use of County facilities, make dues deductions, and permit employees who are officers or representatives of employee organizations to confer with County officials during working hours without loss of time or pay, subject to applicable regulations;
- (3) To refuse to negotiate with representatives of certified employee organizations on negotiable matters.

(b) It shall be an unfair employee relations practice for employee organizations or their representatives or members:

- (1) To interfere with, restrain or coerce employees in the exercise of the rights recognized or granted in this Ordinance;
- (2) To refuse to negotiate with County officials on negotiable matters, when the employee organization involved has been certified as the majority representative.

(c) With respect to the impasse procedures set forth in Section 13 of this Ordinance, it shall be an unfair employee relations practice for either the County or a certified employee organization to fail or refuse to cooperate with the Commission or with any mediators or fact-finders designated by it.

(d) Charges of violations of this Section or of this Ordinance, or of applicable rules or regulations may be initiated by a management representative, by a representative of any employee organization, or by an individual employee or group of employees. Such charges shall be filed in writing with the Commission. Each charge so filed shall be processed in accordance with the rules and regulations of the Commission.

(e) If the Commission decides that the County has engaged in an unfair employee relations practice or has otherwise violated this Ordinance or any rule or regulation issued thereunder, the Commission shall direct the County to take appropriate corrective action.

- (1) Such order shall be binding on the County, unless it requires action by the Board of Supervisors to make appropriation adjustments, transfers, or revisions as provided by Sections 29000 et. seq. of the Government Code,

or the adoption of a County ordinance by the Board of Supervisors. If the County fails to take action to comply with a binding order of the Commission within such reasonable time as the Commission may specify, an aggrieved party may petition the Superior Court for a writ of mandate to enforce the order.

- (2) If the Commission's decision and order requires action by the Board of Supervisors as set forth above, the Director of Personnel shall submit the appropriate documents and materials to the Board of Supervisors to enable it to take such action. If the Board of Supervisors does not take action within such reasonable time as the Commission may specify, the Commission shall so notify the other parties. An aggrieved party may then seek judicial relief from the Superior Court for enforcement of the Commission's order to the extent that compliance with such order is required by State law, or by this Ordinance or any valid rule or regulation issued thereunder. Notwithstanding the failure of the Board of Supervisors to take such action, the Superior Court shall have jurisdiction to exercise its independent judgment on the evidence in light of the whole record and in its discretion to take additional evidence and to issue a writ of mandamus enforcing the Commission's order on a finding by the Superior Court that the County has committed an unfair employee relations practice in violation of State law, or this Ordinance. (Amended, Effective 7-5-75, Ordinance No. 11,155)

(f) If the decision is that an employee organization or its representatives or members have engaged in an unfair employee relations practice, or have otherwise violated this Ordinance or any rule or regulation issued thereunder, the Commission shall direct the offending party to take appropriate corrective action. If compliance with the Commission's decision is not obtained within the time specified by the Commission, it shall so notify the Director of Personnel, who may then take appropriate action, subject, however, to appeal to the Commission by the affected party.

Section 13. RESOLUTION OF IMPASSES ON AGREEMENT TERMS.

(a) If the appropriate management representatives and the representatives of a certified employee organization reach an impasse, the matter may be submitted to the Commission by either party.

(b) The Commission shall consider all requests for mediation, fact-finding, or arbitration under this Section. If the Commission concludes that there has been insufficient effort between the parties to resolve the impasse, it may deny the request and remand the matter to the parties for further consideration. If the Commission concludes that such further consideration would not result in settlement, it may in its discretion attempt to mediate the dispute or it may appoint one or more mediators or fact-finders to assist the parties. The Commission may institute mediation or fact-finding on its own motion. The Commission may invoke arbitration only by mutual consent of the parties.

(c) The following constitute the jurisdictional and procedural requirements for the implementation of mediation, fact-finding or arbitration:

- (1) Mediation, when requested by either party at interest or instituted by Commission initiative, prior to fact-finding, is authorized in connection with all disputed matters. All mediation proceedings shall be private. The mediator or mediators shall prepare and file a confidential report with the Commission.

(2) **Fact-Finding**, when requested by either party or instituted by Commission initiative, is authorized in connection with all disputed matters. The recommendations of the fact-finder or fact-finders shall be limited to the issues originally referred for dispute settlement. Fact-finding proceedings shall be public or private as determined by the Commission. The fact-finding report shall be filed with the Commission. The Commission shall, within five calendar days, transmit copies thereof to the parties in interest and may, in its discretion, make the report public.

(3) **Arbitration** of the terms of initial or renewed collective agreements shall be permitted only by written request of the parties to the dispute and the scope of such arbitration shall be subject to such limitations as may be set forth in said written request.

(d) The fees and expenses, if any, of mediators, fact-finders and arbitrators shall be shared equally by the parties involved. Standard rates of compensation for mediators, fact-finders and arbitrators shall be determined by the Commission, subject to approval by the Board of Supervisors. The County shall furnish meeting space and recording and transcribing services when requested for such proceedings.

Section 14. ADMINISTRATION.

It is the policy of the County to provide for the orderly, systematic and coordinated administration of all matters involving employee relations. In order to implement and coordinate the policies and procedures set forth in this Ordinance, the County shall have authority to adopt rules and regulations not inconsistent with law, including this or any other County ordinance, which shall be applicable to any or all departments, agencies or boards of the County in establishing and enforcing the employee relations program provided for herein. Nothing in this Ordinance shall prevent the Director of Personnel from promulgating regulations governing relations between the County and employee organizations not certified by the Commission.

Section 15. AVAILABILITY OF DATA.

(a) To facilitate negotiations, the County shall provide to certified employee organizations concerned the published data it regularly has available concerning subjects under negotiation, including data gathered concerning salaries and other terms and conditions of employment provided by comparable public and private employers, provided that when such data is gathered on a promise to keep its source confidential, the data may be provided in statistical summaries but the sources shall not be revealed.

(b) If an election for certification as the majority representative of the employees in an appropriate employee representation unit has been ordered, the Director of Personnel shall provide, upon request by an employee organization which has qualified to be included on the ballot, a list of the names and departments of employees in the unit. Said list shall be provided not later than fifteen days prior to the date of said election.

Section 16. CONSTRUCTION.

(a) Nothing contained in this Ordinance shall abrogate any written agreements between any employee organization and the County in effect on the effective date of this Ordinance. All such agreements shall continue in effect for the duration of the term specified therein unless modified or rescinded by mutual agreement of the parties thereto.

(b) Nothing in this Ordinance shall be construed to deny any person or employee the rights granted by Federal and State laws and the County Charter provisions.

(c) The rights, powers and authority of the Board of Supervisors in all matters, including the right to maintain any legal action, shall not be modified or restricted by this Ordinance.

(d) The enactment of this Ordinance shall not be constructed as making the provisions of Section 923 of the California Labor Code applicable to employees of the County.

(e) The provisions of this Ordinance are not intended to conflict with the provisions of Chapter 10, Division 4, Title 1 of the Government Code of the State of California (Sections 3500 et seq.) as amended.

Section 17. SEPARABILITY.

If any provision of this Ordinance, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Ordinance, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Section 18. This Ordinance shall be published in the Metropolitan News, a newspaper printed and published in the County of Los Angeles.

L.A. SEIU 660 Claims Law Requires CSC to Meet and Confer

Editor's note: Because of continuing statewide interest in the merit system versus bargaining problem, *CPER* staff thought readers would be interested in the new course of action being taken by Service Employees International Union Local 660 in Los Angeles County. The union is making the case that the Meyers-Milias-Brown Act requires the Los Angeles Civil Service Commission to comply with the meet-and-confer requirement before taking action on any matter within its jurisdiction which is also within the scope of negotiations. The CSC has refused to accept this argument and Local 660 will file an unfair practice charge with the Employee Relations Commission. If ERCOM upholds Local 660's interpretation and the county does not agree, the union plans to proceed to court. The county has issued no public statement on the matter, but Martin Weekes, Principal Deputy County Counsel, told *CPER*, "We are prepared to defend our position in court." The latter position is assumed by those close to the scene to be that negotiations are not required on matters which are vested by charter exclusively in the CSC. (The four-year fight in Los Angeles County over CSC jurisdiction and the scope of bargaining has been covered extensively in *CPER*. See especially No. 20, pp. 2-21, March 1974.)

September 25, 1974

Ernest E. Sanchez, Commissioner
Emmet M. Sullivan, Commissioner
Civil Service Commission
522 Hall of Administration
222 N. Grand Avenue
Los Angeles, California 90012

Re: Amendments to Rules of the County
of Los Angeles Civil Service Commission

Dear Commissioners Sanchez and Sullivan:

Pursuant to the request of the Civil Service Commission (Commission), we are submitting the following document in support of the proposal of LACEA, SEIU Local 660 for a change in Rules of the Commission. As will be made clear by this document, the nature of the proposed amendments makes the actual suggested wording of any proposed rule premature.

The Los Angeles County Civil Service Commission has, since the adoption of the County Charter in 1913, exercised the exclusive discretionary legislative power of the County over the classified civil service. In 1968, the State Legislature adopted the Meyers-Milias-Brown Act (MMB Act) requiring legislative bodies, boards, and commissions of all local public agencies to meet and confer in good faith with recognized employee organizations prior to taking any final action on matters affecting wages, hours and other terms and conditions of employment.

The unions and county management have, to date, been primarily occupied with establishing the basic framework within which the negotiations relative to economic matters takes place. For example, the County Board of Supervisors has had to exercise its legislative discretion under Charter Section 47, the prevailing wage section, only after satisfying the duty imposed by the MMB Act to first attempt in good faith to arrive at a voluntary agreement with the respective unions.

For the most part, the Commission remained relatively free of the negotiation process as to those matters within its exclusive legislative control. One indirect attempt was made to force negotiations with the Personnel Department on reclassifications. A majority of the Employee Relations Commission ruled that the Director of Personnel had a mandatory duty to "negotiate" reclassification actions with the interested labor unions. On appeal the Superior Court reversed on the ground that the Charter delegates to the Civil Service Commission the exclusive legislative authority over reclassification actions.

The decision by the Employee Relations Commission failed, not because reclassification actions are never negotiable, rather it failed because the wrong defendant was in Court. The Civil Service Commission, not the Director of Personnel, has the obligation to negotiate subject matter assigned to the Commission by the Charter. Thus, the Commission rather than the Director of Personnel should have been charged with an unfair labor practice.

It is clearly erroneous to assume that because the Charter assigns civil service rule-making power to the Commission that the Commission need not discharge a duty to meet and confer in good faith prior to exercising its rule-making power. The Charter just as explicitly assigns rule-making power to the Board of Supervisors with respect to compensation.

The time has come to provide for bilateral negotiations with respect to amending and adopting rules governing the civil service, as well as, substantive decisions requiring the exercise of discretionary legislative authority such as reclassification actions.

The County Board of Supervisors has already established the Employee Relations Commission whose authority extends to all Boards and Commissions of the County including the Civil Service Commission. All that remains is for the Civil Service Commission to comply with the requirement to negotiate with affected employee unions prior to exercising their discretionary authority over matters within the scope of negotiation.

Because of the magnitude of this proposal we believe it necessary and desirable to set forth in very detailed fashion our legal points and authorities for the proposition that the Civil Service Commission is subject to the jurisdiction of the Employee Relations Commission insofar as that Commission oversees the proper discharge of the duty to negotiate in good faith.

**THE BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES HAS
A DUTY TO ADOPT REASONABLE RULES AND REGULATIONS FOR THE
ADMINISTRATION OF EMPLOYER-EMPLOYEE RELATIONS FOR ALL
COUNTY BOARDS, COMMISSIONS, ADMINISTRATIVE OFFICERS OR OTHER
LAWFULLY DESIGNATED REPRESENTATIVES.**

Section 3507 of the Meyers-Milias-Brown Act specifically provides that:

A public agency may adopt reasonable rules and regulations... for the administration of employer-employee relations under this chapter (commencing with Section 3500).
[emphasis added]

Section 3501 (c) of the MMB Act defines a public agency as follows:

Except as otherwise provided in this subdivision 'public agency' means every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, *county*, city and county and municipal corporation, whether incorporated or not, and whether chartered or not... [emphasis added].

The Charter division of legislative power between the Board of Supervisors and the Civil Service Commission clearly grants to the Board of Supervisors the exclusive legislative authority to adopt the reasonable rules and regulations required by Section 3507 of the MMB Act. Article III, Section 10 of the County Charter provides as follows:

The Board of Supervisors shall have all the jurisdiction and power which are now or which may hereafter be granted by the Constitution and laws of the State of California or by this Charter.

The Civil Service Commission has no authority to adopt rules and regulations implementing Section 3507 since the Commission has no authority to legislate on behalf of the "public agency" with respect to non-civil service matters.

The MMB Act, however, requires all boards and commissions of a public agency to comply with the MMB Act [or the local rules] when such boards or commissions have the authority to legislate on matters affecting wages, hours and other terms and conditions of employment. Section 3504.5 of the MMB Act provides in pertinent part:

Except in cases of emergency as provided in this section, the governing body of a public agency, and *boards and commissions designated by law* or by such governing body, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or such boards and commissions and shall give such recognized employee organization the opportunity to meet with the governing body or such boards and *commissions*. [emphasis added]

Section 3505 of the MMB Act begins much the same way, as follows:

The governing body of a public agency, or such *boards, commissions, administrative officers or other representatives as may be properly designated by law* or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action... [emphasis added].

Based on the last two quoted sections of the MMB Act, there can be no question but that the Civil Service Commission must comply with the requirement of meeting and conferring prior to taking action on any matter within its jurisdiction that is also within the statutory definition of negotiable matters. Since the Board of Supervisors is the only authority authorized by the Charter to enact rules for the administration of employee relations for the County and its boards and commissions, once the Board of Supervisors has adopted a set of rules, the Civil Service Commission must abide by those rules.

The next issue is, of course, whether the Board of Supervisors has adopted rules governing the Civil Service Commission in the exercise of its duty to meet and confer in good faith on negotiable matters.

THE BOARD OF SUPERVISORS IN ADOPTING THE LOS ANGELES COUNTY EMPLOYEE RELATIONS ORDINANCE SET FORTH THE RULES UNDER WHICH THE CIVIL SERVICE COMMISSION MUST NEGOTIATE.

1. It is presumed that the Board of Supervisors did its duty.

Evidence Code Section 664 provides that "It is presumed that official duty has been regularly performed. . ." It has already been established that the Board of Supervisors had

the duty to enact rules and regulations for the entire County. When the Board adopted the Los Angeles County Employee Relations Ordinance, it must be presumed that the Board has adopted an ordinance which applies to all boards, commissions and other lawfully designated representatives of the county of Los Angeles.

2. The Board of Supervisors expressly declared that the Los Angeles County Employee Relations Ordinance was applicable to all agencies of the County.

Section 14 of the Employee Relations Ordinance, entitled "Administration of the Ordinance," provides as follows:

It is the policy of the County to provide for the orderly, systematic and coordinated administration of all matters involving employee relations. In order to implement and coordinate the policies and procedures set forth in this Ordinance, the County shall have authority to adopt rules and regulations not inconsistent with law, *including this or any other county ordinance, which shall be applicable to any or all departments, agencies or boards* of the County in establishing and enforcing the employee relations program provided for herein. Nothing in this ordinance shall prevent the Director of Personnel from promulgating regulations governing relations between the County and employee organizations not certified by the Commission. [emphasis added]

Based upon the presumption as well as the express statements of the Board of Supervisors in adopting the Employee Relations Ordinance, it seems clear that the Commission must answer to the Employee Relations Commission in terms of the procedures the Civil Service Commission follows for its conduct in adopting rules, classification actions, and other matters within its jurisdiction.

We propose that the Civil Service Commission adopt no rule changes or new rules without first discharging their duty to negotiate voluntary agreements with affected recognized unions. As civil service rules cut across all units, as do fringe benefits, it may be desirable to establish a joint negotiating council of affected unions. However, precedent for such a joint council has already been established with respect to such matters as fringe benefits. Unilateral action by the Commission on matters within the scope of negotiations in the future will inevitably lead to charges of unfair labor practices being filed against the Civil Service Commission with the Employee Relations Commission.

Respectfully submitted

LEMAIRE & FAUNCE

By: EDWARD L. FAUNCE
Attorneys for LACEA, SEIU
Local 660

**LOS ANGELES COUNTY
EMPLOYEE RELATIONS COMMISSION**

In the Matter of)	
LOS ANGELES COUNTY EMPLOYEES)	
ASSOCIATION, LOCAL 660, SEIU, AFL-CIO)	UFC 6.24
)	
Charging Party)	
)	
and)	
)	<u>DECISION AND ORDER</u>
COUNTY OF LOS ANGELES CIVIL SERVICE)	
COMMISSION)	
)	
Respondent)	

ISSUES

The charge in this case poses the question of whether or not the Los Angeles County Employee Relations Ordinance (hereinafter Ordinance) requires the County of Los Angeles Civil Service Commission to negotiate with employee representatives over changes in its rules. The petition fails to specify any particular rule or proposed change, resting upon the refusal of the Civil Service Commission to negotiate with respect to any of its rules. The arguments presented by counsel for the County and for the Union (Local 660, SEIU, AFL-CIO, with the endorsement of other certified employee organizations) have dealt primarily with the legal question of whether the Civil

Service Commission has been exempted from the operation of the Ordinance. Underlying the formalities of the proceeding, however, there has been a deep concern over how to resolve a confusing and disturbing overlap between the jurisdiction of the Employee Relations Commission and the Civil Service Commission.

STATUTES INVOLVED

The Ordinance (§2) declared that "to promote the improvement of personnel management" and employee relations and "to protect the public" in orderly and uninterrupted operations of County government, employees shall have the right to join organizations to represent them, "formal rules and procedures" shall "provide for the orderly and systematic presentation, consideration and resolution of employee relations matters" and an independent Employee Relations Commission shall insure that employee "requests are fairly heard, considered and resolved." To achieve those objectives, the Ordinance required agencies of the County government to negotiate with representatives of County employees on wages, hours and other terms and conditions of employment, and to confer with such representatives on all matters affecting employment relations, including those that are not subject to negotiations. The Employee Relations Commission was empowered by the Ordinance to hear charges that County agencies committed unfair employee relations practices by not following those mandates of the law and the Commission was authorized not only to order agencies to comply with those principles and procedures, but also "To take such other actions as the Commission deems

necessary to effectuate the policies of this Ordinance." (§7(g)(13))

When the Ordinance was enacted, it acknowledged the existence of the Civil Service Commission with the express provision that "Nothing in this section [on Grievances] shall be deemed to supersede the authority of the Civil Service Commission. However, nothing contained herein shall preclude the Civil Service Commission from adopting rules permitting it, in its discretion, to decline jurisdiction over appeals by employees who have expressly consented to have their grievances resolved under a negotiated grievance or arbitration procedure." (§11(d))

Essentially, while recognizing the existence and need for a merit system of employment, the Ordinance introduced into County government a new method for maintaining harmony and cooperation in employer-employee relations, namely a negotiation process between management officials and employee representatives on wages, hours and other terms and conditions of employment. This followed the policies promulgated by the State Legislature in the Meyers-Milias-Brown Act. That established a similar requirement for a meet-and-confer process between State and local governmental agencies and organizations of their employees. The interrelationship between the State law and the Ordinance and whether both are applicable to this case are legal questions raised in this proceeding.

Prior to the enactment of the Ordinance, the Civil Service Commission was created by the Los Angeles County Charter (hereinafter Charter), with positive responsibilities and powers in the field of public employment.

The Charter conferred upon the Civil Service Commission rule-making powers, specifically with respect to designated subjects and further "as may be necessary and proper for the enforcement of" the civil service. (ART. IX, §34(17))

Noteworthy among the specified subjects for Civil Service Commission rules are the classification of positions, the holding of competitive examinations, the creation of eligibility lists, probation, transfers, promotion, suspension, discharge, standards of efficiency, and procedures for evaluation of performance. These suggest many possibilities in which the rules of the Civil Service Commission may have a significant bearing upon wages, hours and other terms and conditions of employment. At one extreme, rules that are merely procedural or rules for the performance of ministerial or administrative functions do not have any substantive impact upon employer-employee relations. But other rules may relate directly to the benefits and burdens of employment, normally subsumed under the heading of wages, hours and working conditions. Of special interest to the Employee Relations Commission are the Civil Service Commission rules that refer to membership in a labor organization or union affiliation (such as Civil Service Commission Rules 16.05, 19.07, 19.09 and 26.01). These relate to the same subject matter as is dealt with by the Employee Relations Commission in its unfair employee relations practice cases.

PROCEDURAL OVERLAP

The rules of the Civil Service Commission as well as the rules of the Employee Relations Commission are protective of the rights of employees

and no evidence has been introduced in this proceeding showing a conflict in the principles enforced by the Employee Relations Commission and the Civil Service Commission. However, there is a clear, repeated and persistent confusion over the respective jurisdictions of the Commissions and a real possibility of differing interpretations of factual situations by the separate Commissions. This has invited controversy and disturbed harmonious employee relations in County employment.

Such confusion and dispute have manifested themselves in various ways. Employee organizations have filed charges with both Commissions simultaneously on the same grievance,^{1/} with consequent delay and an undermining of confidence in governmental process. The Employee Relations Commission has on occasion deferred action because of the pendency of charges before the Civil Service Commission, without a clear policy of its own.^{2/}

In one instance involving an employee's rating of promotability, the Employee Relations Commission's jurisdiction was challenged by a Deputy County Counsel, and after the Employee Relations Commission ordered an effective increase in the rating, the County department still refused or failed to revise

^{1/} Without attempting an exhaustive analysis of Employee Relations Commission records, the following 20 cases were noted as cases in which proceedings were initiated also with the Civil Service Commission: UFC 10.4, UFC 55.5, UFC 55.4, ARB 5-71, UFC 7.2, UFC 6.25, UFC 5.4, UFC 7.3, UFC 7.5, UFC 6.28, UFC 55.14, ARB 31-75, ARB 38-75, ARB 46-75, UFC 55.17, UFC 10.7, UFC 10.8, ARB 34-74, ARB 8-75, ARB 48-75.

^{2/} The files in the following cases indicate deferment of some Employee Relations Commission action because of proceedings pending before the Civil Service Commission: UFC 7.2, UFC 7.3, UFC 5.4, UFC 34-74, ARB 8-75.

its appraisal.^{3/} In practically every case brought before the Employee Relations Commission in which Civil Service Commission action might be undertaken, the Deputy County Counsel assigned to the advocate role for a respondent, has contested the jurisdiction of the Employee Relations Commission; and in a recent hearing on revision of Employee Relations Commission rules, a Personnel Department representative advocated the express relinquishment or abandonment of some of the Employee Relations Commission's jurisdiction to the Civil Service Commission. Such uncertainties and confusion call for clarification of policies. That may not be entirely possible or appropriate in this proceeding; but the issues in this case should not be disposed of without some attention to the broad underlying problem of how best to adjudicate disputes over employee relations practices.

ATTEMPTS AT COURT RESOLUTION

The court decisions on which the argument of counsel in this case has been centered are not conclusive of the specific charge or the basic problem presented herein. The Civil Service Commission has not been a party to the court actions and no case has dealt with its rules as such.

The decision relied upon principally by the County, in the case of AFSCME v. County of Los Angeles, Department of Personnel,^{4/} deals with the obligation of the County Personnel Department (the Director of which was appointed by the Civil Service Commission) to negotiate over the reclassifi-

^{3/} UFC 1.14

^{4/} 49 C.A.3d 356

cation of employees, and the Court of Appeal, Second Appellate District, Division Two, ruled that there was no such obligation because classification of positions was enumerated as a function of the Civil Service Commission by the Charter, and by the legal effect of the Charter and the language of the Ordinance, the Civil Service Commission was exempted from the operation of the Ordinance. Another Court of Appeal, for Division Three of the same District, in the case of L. A. Co. Firefighters v. City of Monrovia,^{5/} involved the obligation of a city to negotiate with a firefighters' union, despite its dealing with another inclusive employee organization, and held there was such an obligation under the Meyers-Milias-Brown Act even though that Act exempted from negotiation agencies with rules and policies providing other methods of administering employer-employee relations. The facts in these cases differ and the Appellate Court in the Second District expressly found the decision in the Third District not determinative of the issues before it.

The California Supreme Court, however, decided another case, also on a set of different facts, but with an enunciation of principles that at least raises serious question as to what it, the highest court in our State, would hold if the Second District case had been appealed to it, or what it would hold if the specific legal issues in this proceeding were placed before it. In Firefighters Union v. City of Vallejo,^{6/} the California Supreme Court ruled that the city was obligated to negotiate and arbitrate disputes over vacancies, promotions, constant manning procedure and reduction of staff under the Vallejo

^{5/} 24 C. A. 3d 289; 101 Cal. Rptr. 78

^{6/} 12 C. 3d 608, at 615, 622

Charter and the Meyers-Miliias-Brown Act even though that Charter and that Act exempted from the obligation to bargain over "wages, hours and working conditions" "the merits, necessity or organization of any service..." The Supreme Court reconciled "the seemingly overlapping phrases of the statute" with a result which it said "comports with the strong public policy in California favoring peaceful resolution of employment disputes by means of arbitration" and inferentially by means of negotiation.

The California Supreme Court in that case also cited and discussed with approval another Los Angeles County case dealing with the obligation of the County to negotiate over the size of the caseloads carried by social workers. In L. A. Co. Employees Association, Local 660 v. County of Los Angeles, ^{7/} Division Four of the Court of Appeal ruled that the Department of Public Social Services and the Department of Personnel were required by the Ordinance to negotiate caseloads even though the Ordinance states that "Negotiation shall not be required on any subject preempted by Federal or State law, or by County Charter" (§6(c)) Although the Civil Service Commission was not a party to that proceeding, Los Angeles County was and the effect of that decision was to require negotiation over a standard or level of performance even though the Civil Service Commission has express Charter authority to make rules "For the fixing of standards of efficiency and for procedures for the evaluation of the performance of employees" (Charter Art. IX, §34(15)).

Lower court decisions also have had similar implications. A Los

^{7/} 33 C.A.3d 1; 108 Cal. Rptr. 625

Angeles Superior Court upheld an order of the Employee Relations Commission in a dispute over the transfer of an employee, which is a specified subject for Civil Service Commission rules;^{8/} and a Superior Court in San Mateo County held in abeyance an effort to subcontract work, requiring first that the matter be negotiated with employee representatives.^{9/}

These decisions are not finally dispositive of the issues raised in this proceeding and it is doubtful whether any decision of this Commission would be deemed final and binding on the questions of law involved.

ATTEMPTS AT LEGISLATIVE RESOLUTION

Other attempts have been made to resolve the dilemma posed by the overlapping jurisdictions of the Employee Relations Commission and the Civil Service Commission. On November 9, 1971, the Board of Supervisors referred the matter to the Consultants' Committee that helped draft the Ordinance. That Committee found that the Employee Relations Commission and the Civil Service Commission had concurrent jurisdiction over personnel actions involving unfair employee relations practices and recommended the adoption of corresponding regulations by both Commissions establishing the policy not to hear any part of a complaint that has been heard by either an arbitrator or the other Commission.^{10/} That Committee had discussed the

^{8/} Patrick J. Davoren v. Constabulary Department, Superior Court, Los Angeles County, No. C 10471. Decided October 1971.

^{9/} San Mateo County Employees Assn. v. County of San Mateo, Superior Court San Mateo County, No. 142834. Decided February 27, 1969.

^{10/} Report of Consultants' Committee, Re: Amendment of Employee Relations Ordinance, June 7, 1972.

the matter with representatives of the Commissions and County management and employee organizations and it had obtained their approval; but the recommendations were not put into effect. Later, on December 5, 1972, the Board of Supervisors referred the same problem of overlapping jurisdictions to its Economy and Efficiency Commission. That Commission recommended that the Board of Supervisors place a Charter amendment on the ballot which would combine the Civil Service Commission and the Employee Relations Commission into a single commission to be known as the Los Angeles County Labor Relations Commission.^{11/} That was never done.

OPINION

The problem is still here as this proceeding and the symptoms enumerated above attest. The determination that this proceeding does not adequately refine the issues and should be dismissed is not to be considered a mere technical evasion or postponement of proper action. In dismissing this charge we are not relinquishing our jurisdiction in any matter involving an alleged unfair employee relations practice charge. We are convinced that the problems of overlap must be resolved.

We propose to dispose of this proceeding by a dismissal in order to clear the air for a more profound exploration and analysis of a possible reconciliation between an effective civil service merit system and sound management-labor negotiation on wages, hours and other terms and condi-

^{11/} Report of Civil Service-Employee Relations Task Force, Los Angeles County Citizens Economy and Efficiency Commission. December 1973.

tions of employment. To that end, we are hopeful that the Employee Relations Commission and the Civil Service Commission will act in concert in exploring solutions to the jurisdictional overlap above outlined and that the Commissions will then jointly submit recommendations to the Board of Supervisors for appropriate action.

This Commission is charged with the responsibility of taking affirmative action to effectuate harmonious employment relations, among other procedures through a system of negotiation on wages, hours and working conditions. Of equal importance is the preservation of a merit system of employment which we recognize to be the official responsibility of the Civil Service Commission. We believe our dismissal of the charge in this proceeding to be in the best interests of all parties concerned.

O R D E R

The charge in this proceeding is dismissed.

Dated: February 25, 1976


Lloyd H. Bailer, Chairman


William Levin, Commissioner


David Ziskind, Commissioner

IN ADVISORY ARBITRATION PROCEEDINGS PURSUANT TO SECTION 9.01 OF
THE MEMORANDUM OF UNDERSTANDING BETWEEN THE PARTIES

SAN JOSE FIRE FIGHTERS,)
LOCAL 873)
)
Complainant,)
)
and)
)
CITY OF SAN JOSE,)
)
Respondent,)
)
Promotional Examination)
Grievance.)
)
)
_____)

OPINION AND RECOMMENDATION

WILLIAM EATON
Arbitrator

APPEARANCES:

FOR THE UNION

DAVID W. LEAHY, Esq.
Wylie, Leahy, Blunt & McBride
101 Park Center Plaza, Suite 1001
San Jose, Calif. 95113

FOR THE CITY:

FRANK LeSUEUR, Employee Relations Officer
City of San Jose
801 N. First Street
San Jose, Calif. 95110

I. STATEMENT OF THE CASE

This is an arbitration to determine whether action of the Civil Service Commission of the City of San Jose violated the Memorandum of Understanding between the parties by abolishing seniority credits for promotional examinations. Hearing was held in the conference room of the City Manager at the San Jose City Hall on March 27 1975, at which time the parties were afforded the usual opportunity for presenting evidence and argument. The parties agreed to waive the provisions of Section 9.01, providing for an Advisory Grievance Board consisting of three members, and to submit the matter to a single arbitrator for recommendation. The dispute was submitted to the Arbitrator for decision upon presentation of oral argument by the parties at the close of the hearing.

For at least twenty years, and probably longer, fire fighters in the City of San Jose have been given one-half point credit on promotional examinations for each year of employment with the City. In 1971 this system was changed to allow the one-half point per year only for service in the class which qualifies an individual to take a promotional examination (JX 5). This change in policy is reflected in examination announcements issued prior and subsequent to the change (UX1).

On October 3 1974, pursuant to a request by Deputy City Manager Harold S. Rosen, speaking for the Executive Staff of the City (UX 2), the Civil Service Commission voted to abolish all seniority points for promotional examinations, giving rise to the present dispute.

The following provisions of the current Memorandum of Understanding between the parties are relevant to this dispute:

(Introductory Paragraph)

The parties hereto have reached an understanding concerning the proposed

hours, wages and working conditions for the employees of Unit 2 described in Memorandum of Understanding attached hereto and it is understood that the San Jose Fire Fighters, Local 873 will recommend acceptance thereof.

1.00 Recognition Clause*

Pursuant to the provisions of Resolution No. 39367 of the Council of the City of San Jose and applicable state law, the San Jose Firefighters Association, Local 873 (hereinafter referred to as the "Employee Organization") is recognized by Management as the certified majority representative of the employees in the above-mentioned unit. The term "employee" or "employees" as used in this Memorandum of Understanding, shall refer only to employees employed by the City in those classifications included in said unit. Attached is Exhibit "A" consisting of the present listing of the employee classifications covered by this Memorandum and constituting such unit.

2.00 Purpose It is the purpose of this Memorandum of Understanding to promote and provide for harmonious relations, cooperation and understanding between Management, the employees covered by this Memorandum and the Employee Organization to assure an orderly and equitable means of resolving any misunderstandings or differences which may arise under this Memorandum of Understanding; and to set forth the full and entire understanding of the parties reached as a result of meeting and conferring regarding the wages, hours and other terms and conditions of employment of the employees covered by this Memorandum of Understanding, which understanding the parties intend jointly to submit and recommend for approval and implementation to the City Council for determination.

4.01 Management Rights The parties agree that no provision of the Memorandum of Understanding shall be construed so as to ~~recommend~~ mean that any right

vested in the City Council or in Management of the City by Law, by the City Charter or inherent in the obligation to manage an enterprise be abrogated, suspended, or impaired and more specifically including but not limited to the following:

- a. The right to determine the organization and mission of the City, its Departments, agencies, and units.
- b. The right to determine the merits, necessity, or organization of any service or activity of the City.
- c. The right to assign, re-assign, revoke assignments of or withdraw assignments of City equipment, including motor vehicles, to or from employees during, after or before hours of duty without consultation or meeting and conferring.

6.00 Full Understanding, Modification, Waiver

- a. The parties jointly recommend to the City Council that this Memorandum of Understanding sets forth the full and entire understanding of the parties regarding the matters set forth herein, and any and all other prior or existing Memoranda of Understanding, understandings or and agreements, ~~regarding the matters set forth herein by the parties,~~ whether formal or informal, are hereby superseded or and terminated in their entirety.
- b. It is agreed by the parties that existing benefits provided by ordinance or resolution, of the Council or as provided in the San Jose Municipal Code shall be continued subject however to the terms thereof without change unless expressly modified, amended or changed subsequent to approval of and pursuant to ~~by~~ this Memorandum of Understanding.

- c. It is the intent of the parties that ordinances, resolutions, rules and regulations enacted pursuant to this Memorandum of Understanding be administered and observed in good faith.
- d. Except as specifically otherwise provided herein, it is agreed and understood that each party hereto voluntarily and unqualifiedly waives its right, and agrees that the other shall not be required, to meet and confer with respect to any subject or matter covered herein or with respect to any other matters within the scope of meeting and conferring, during the period of the term ~~for which the parties have met and conferred~~ of this Memorandum. The foregoing shall not preclude the parties hereto from ~~to~~ meeting and conferring at any time during the fiscal year 1974-75 with respect to any subject matter within the scope of meeting and conferring for a proposed Memorandum of Understanding between the parties to be effective after the fiscal year 1974-75. (JX-1)

II. DISCUSSION

Additional Background Facts

Undisputed testimony was presented by Union witnesses as to the duration of the practice at issue. Fire Engineer Robert Meagher, a 19-year veteran of the service, stated that the one-half point had been granted "ever since I've ever applied to take a promotion", his first promotional examination having been in 1960. Captain John Diquisto, an 18-year veteran, testified

*Underlining indicates additions to the Memorandum, strikeouts indicate deletions.

that the one-half point per year has been granted ever since he has been in the department, and that his first promotional examination was also in 1960. Captain Frank Cuffaro, who has been with the department since 1947, and who took his first promotional examination in 1951, stated that the one-half point was granted then, and has been granted ever since.

This system applied not only to fire fighters, but to all employees of the City, and formerly, it appears, the rule was uniform that employees were granted the one-half point for each year of service with the City. The 1971 Resolution of the Civil Service Commission, changing this benefit to one-half point per year worked in the class that qualifies an individual to take a promotional examination, referred to above, applied only to the emergency service classes (JX 5). Subsequent to that time, therefore, various practices developed in different departments of the City government. It was a disparity in such practices affecting two employee groups other than fire fighters which led to the change underlying the present dispute.

Deputy City Manager Rosen stated that upon discovery of this disparity a recommendation was made to the Civil Service Commission to treat all employees equally in this regard. Further discussion led to the recommendation of Rosen that the granting of any seniority points appeared to be incompatible with the Civil Service system. He recommended abolition of the point system. Later, the additional question was raised as to the effect of granting such seniority points on the affirmative action program of the City.

Rosen testified that the fire fighters were not included in the original discussions for the reason that they were not originally affected, but also conceded that, when the final recommendation was made, affecting fire fighters as well, they were not consulted at that time either. It is agreed

that fire fighter representatives appeared at the October 3 1974 meeting, at which the Civil Service Commission voted to abolish the point system, and that the fire fighters informed the Commission at that time that they believed that the abolition of the practice affected a right protected under the meet and confer process. Rosen testified that the Commission had not previously been advised that any such conflict existed, because in the opinion of city officials, no meet and confer rights were affected.

It is stipulated by the parties that there are a number of practices in the fire department utilizing seniority which are not found in the Personnel Rules or in the Civil Service Rules, both of which are enacted by City Ordinance. Captain Diquisto, who was a member of the negotiating committee for the Union in 1972, when the present Memorandum was agreed to, testified that such practices were discussed during those negotiations.

The occasion to refer to these practices was the proposed adoption of a three year agreement, and the desire of the fire fighters to include in that agreement all such practices in a comprehensive fashion. Diquisto testified that the City replied to this request that, "It would take a book five inches thick" to include all such practices, so that it was agreed, as an alternative, that "existing benefits" were to remain during the term of the Agreement. Diquisto stated that the Union negotiators were assured that the "good faith" clause of Section 6.00c, as well as other provisions of Section 6.00 would assure this result.

Richard K. Karren, Assistant City Attorney, testified that while he did not participate directly in the 1972 negotiations, he was consulted in regard to changes made in Section 6.00b, and that it was at his suggestion that the changes made in that subsection, as indicated above, were made.

Karren stated, in explanation that he suggested the changes because of his concern that the previous wording did not recognize the right of the City to exercise discretion in amending Ordinances, Rules, and Regulations. Karren testified that, in his opinion, the revised wording assures the City retention of discretion in these matters.

Karren testified that there was no specific intent regarding the one-half point seniority practice at issue, but that in his mind the reserved discretion question was a general proposition. He did state, however, that the intent, and in his opinion the effect, was that the City is empowered to remove benefits where discretion is reserved. Karren stated that this intent was not communicated to the Union during the 1972 negotiations.

Captain Diquisto testified that there was no discussion during negotiations that the new language of Section 6.00b would negate the one-half point practice or any other unwritten practice. Similarly, attorney David Leahy, who was chief spokesman for the Union during the latter part of the 1972 negotiations, testified that there was a clear understanding that no "unilateral changes" would be made in accepted practices during the proposed three year term of the present Agreement. Leahy testified that this understanding arose out of the Union's agreement to forego a complete and comprehensive written agreement.

Union Argument

The Union contends that the one-half point seniority credit is a benefit under the Memorandum of Understanding, that it is within the scope of representation, and that it cannot therefore be unilaterally changed by the City.

The Union points to the stipulation of the parties that there are numerous unwritten practices which have been carried forward from one negotiating session to the next, and to its uncontradicted testimony that the City negotiator in the 1972 negotiations specifically stated that such practices would be recognized. The Union therefore agreed to a three year Memorandum on the assurance that the provisions of Section 6.00b "wrapped everything up", and that there was a mutual agreement that neither party would be required to meet and confer on such items during the term of the Agreement.

The City relies upon Section 2.005.14 of the Municipal Code entitled "Seniority Credit", as the basis of its argument. This provision, in its entirety, reads as follows: "The Commission may establish by resolution, standards and regulations for affording seniority credit for past City service that may be given in promotional examinations" (JX 6). The Union contends that this is a permissive power to establish seniority credits, and that the City's position that it equals the power to abolish such credits does not necessarily follow. If it did, according to the Union, all of the stipulated examples of unwritten practices could also be changed, contrary to the specific agreement of the parties during negotiations for the 1972-1975 agreement.

The Union also argues that the benefit at issue is not provided by Ordinance, but only by a resolution of the Civil Service Commission, pursuant to such Ordinance. The Civil Service Commission, the Union urges, has no authority to act contrary to the Memorandum of Understanding, and it is the Memorandum which the Arbitrator must interpret in the present dispute.

In regard to Section 6.00b, the Union also argues that the changed language was language proposed by the City, that it is ambiguous, and that it must therefore be interpreted, by accepted principles of contract law, adversely to the party proposing it.

Beyond this, the Union argues that there would have to be provisions for a specific and knowing waiver of existing benefits, which there is not, for the City's view to prevail.

In the alternative, the Union argues that Section 6.00b refers only to written benefits, as provided by Ordinance or Resolution, and that what we are dealing with is an unwritten benefit, so that the provisions of 6.00b do not apply. Rather, the determining provisions are found in Section 6.00d, covering matters within the scope of the meet and confer process.

The Union cites several authorities to support its argument that the granting of seniority points for promotional purposes is within the recognized scope of bargaining.

In an excerpt from a labor law text published by the American Bar Association, the Union refers the Arbitrator to the statement that, "Since seniority is so obviously a condition of employment -- and is a condition commonly existing under union contract, litigation questioning its mandatory status has been minimal." Among the few rulings noted is one holding that promotions within a bargaining unit are subject to negotiation.

Similarly, the California Supreme Court recently held in Fire Fighters Union Local 1186 v. City of Vallejo that vacancy and promotion questions concern job security and opportunities for advancement, and that they therefore relate to the terms and conditions of employment subject to the bargaining process.

As a final citation, the Arbitrator is referred to a recent arbitration decision involving interpretation of the same provisions of Section 6.00 that are involved in the present dispute. There arbitrator Emily Maloney held, in effect, that if the city had wished to reserve a right to make unilateral determinations concerning hours of work, it would have to have done so in the Memorandum

of Understanding. Having not done so, certain conditions mutually recognized by long practice were held to prevail against a claim by the City of authority to change them unilaterally.

Finally, the Union argues that, while it might have agreed to trade the one-half point seniority credit for some other benefit during meet and confer sessions, it had no intention to give up that benefit for nothing, and it did not do so.

City Argument

The City argues that the changes in Section 6.00b made in the current Memorandum of Understanding make the City's reservation of discretion clear and unmistakable. Hence, it is contended that under the authority of Section 2005.14 of the Municipal Code, set forth directly above, the unilateral change in seniority credit here at issue was proper.

The City argues that the state legislation under which the present Memorandum of Understanding is authorized was "at best a compromise piece of legislation", which did not intend to, and did not, establish full collective bargaining procedures, and that in its statement of purpose the legislation expresses the intent that nothing contained therein is designed to supersede rules and regulations of a civil service system.

Municipal Code Section 2005.14 was passed in 1968, since which there have been four meet and confer sessions, and four separate Memorandums of Understanding. The City urges that the changes in Section 6.00b which have ensued, and particularly those appearing in the present Memorandum, modify "existing benefits" in such a manner that the action of the Civil Service Commission at issue in this dispute is pursuant to the authority thereby reserved by the City.

Moreover, the City argues that the changes indicated in the most recent version of Section 6.00b "have to mean something", and that under the interpretation advanced by the Union, they "would have no meaning."

Although agreeing that Ordinance Section 2005.14 of itself is a "generally enabling action", and that the benefit at issue is not incorporated in the Ordinance, the City nevertheless contends that the most logical interpretation is to attach this Ordinance Section to the Memorandum as though incorporated therein. It would then follow, according to the City, that Civil Service Commission action pursuant thereto would also be within the terms of the Memorandum of Understanding.

Thus, the City relies upon the Management Rights clause of the Memorandum of Understanding, and concludes that, "the right of the City to determine the procedures of administration and evaluation of examinations, including the discretion of granting or not granting seniority credits are strictly a governmental function necessary to carry out municipal affairs and are not subject to the meet and confer process." By this reasoning, it is argued that the term "existing benefits", as used in Section 6.00b, "refers only to wages, hours and working conditions, and not to management rights." The City therefore concludes that the type of action now at issue would not offend the "existing benefit" clause.

III. CONCLUSIONS

The first question to be determined in the resolution of this dispute is whether the dispute is controlled by the provisions of Section 6.00b of the Memorandum of Understanding. The key phrase in making this determination is not the phrase "existing benefits", but the modifying phrase "provided by ordinance or resolution." This subsection clearly refers to written benefits, formally

provided for by action of the City Council. That is not the type of benefit at issue in this dispute, and there is nothing in 6.00b to refer to the type of unwritten benefits which is at issue.

Having reached this conclusion, the arguments of the City which are directed toward interpretation of 6.00b must be put aside as irrelevant in determining the dispute. The remaining question is whether or not the seniority credits are benefits under the Memorandum of Understanding subject to the meet and confer process.

In this regard, the management rights argument of the City does not withstand examination. It is axiomatic that a management rights clause, including the one contained in the present Memorandum of Understanding, reserves to management only such rights as have not been bargained away, or as remain vested by law in the City Government. There is ample and convincing authority that the type of benefit here at issue does not fall within the management rights provisions of the Memorandum of Understanding. This is clear not only from treatment of similar seniority rights under the National Labor Relations Act, it is equally clear from the Vallejo decision of the California Supreme Court cited above.

If there were any doubt remaining, that doubt would be resolved by the bargaining history presented by the Union, and uncontested by the City. This history indicates that the Union was specifically informed by the negotiator for the City in the 1972 negotiations that the type of unwritten practice here at issue would continued under the provisions of Section 6.00. It was on the basis of this assurance that the Union signed a three year Memorandum, and in so doing dropped its insistence that the Memorandum be made into a comprehensive agreement covering such practices.

Whatever the desirability of uniform treatment of all City employees may be, or however the granting of seniority credits to fire fighters on promotional examinations might affect other programs of the City, the sole issue in this arbitration is whether unilateral change of such rights violates the Memorandum of Understanding between the City and the fire fighters. We must conclude that it does.

RECOMMENDED DECISION

For the reasons set forth in the foregoing Opinion, the Arbitrator finds and recommends as follows:

1. The granting of one-half point seniority credit for each year of service in the qualifying class to fire fighters taking promotional examinations is a benefit subject to the meet and confer process.
2. Unilateral withdrawal of this benefit by the City is in violation of the introductory clause of the Memorandum of Understanding, of Section 1.00, of Section 2.00, and, in particular, in violation of Section 6.00d as understood and interpreted by the parties during the negotiations which led to the adoption of the present Memorandum of Understanding.
3. The practice of granting one-half point on promotional examinations as described above should be reinstated to comply with the provisions of the Memorandum of Understanding.

(Signed) WILLIAM EATON

April 22 1975

D

TAB D

MANAGEMENT RIGHTS AND PUBLIC SECTOR COLLECTIVE BARGAINING

What Are Management Rights?

Public Sector Model

In the private sector, assertion of management rights is the primary constraining influence on the scope of bargaining. The extent to which authority is shared between the parties is an indication of the nature of the bilateral relationship--the degree to which the parties themselves accept the concept of formal bilateral decision-making within their relative "power" positions. The NLRA extends the duty to bargain to wages, hours, and other terms and conditions of employment, without stipulating any express statutory restrictions relating to rights reserved to management.¹ Under this affirmative mandate, the actual scope of bargaining is left to evolve out of the bilateral relationship, subject to the administrative authority of the NLRB. Over time, through decisions dealing with the duty to bargain,² the NLRB and the courts have delineated areas subject to negotiation that are either mandatory, permitted, or prohibited.

Nationally, in states with comprehensive public sector laws and administrative agencies which operate with a minimum of statutory constraints on scope of bargaining, this private-sector model is being adapted to the public sector in respect of issues involving scope, particularly in connection with negotiability issues

relating to the assertion of management rights. In California, differences over scope of bargaining appear to be caught in the complexity of legal frameworks governing public employee relations at both the state and local levels of government. The mixed array of meet-and-confer statutes tends to restrain bargaining parties at various intermediate steps along a continuum from unilateral to fully bilateral decision-making. As in the private sector, scope issues are affected by the degree to which authority is shared.

Theory of Management Reserved Rights

There is confusion regarding the relevance of management rights clauses to the preservation of management and agency prerogatives in a bilateral relationship.

Management attempts to seal off areas in which it feels it has managerial discretion in the public sector (for example class size, social worker case load, police man-power problems, etc.). In order to fully understand the importance of this issue, one must have a good grasp of the theory of management rights and distinguish between those rights that are exclusive and non-exclusionary--those rights which are part of a management rights doctrine, and those enumerated in a simple management prerogative clause.

Exclusive Reserved Rights are areas of managerial decision-making not shared with the union. Areas sealed off from negotiations vary from

industry to industry and from one location to another, but ultimately depend essentially on the relative bargaining powers of the parties as well as the nature of their relationship.

Non-Exclusionary reserved rights are those shared with the union.

These rights are crucial to the collective bargaining relationship. They include the procedural right to direct a business or the right to exercise initiative necessary to operate an enterprise. Management must initiate an action or direct the work force. In other words, management assumes responsibility for the mission of the organization. Except in matters involving safety, health, or morals, employees are expected to carry out these orders. Such rights are shared, however, to the extent that employees may subsequently protest said orders through the negotiated grievance procedure.

The two part reserved rights doctrine discussed above is separate and distinct from the management prerogative clause. Management does not look to the collective agreement or prerogative clause for authority to exercise administrative initiative. This authority is an inherent reserved power based upon the function of management. The prerogative clause is an itemized statement added to the collective agreement by management to affirm the status quo or for educational or psychological reasons pertaining to the employees or employee organization. Administrative initiative is inherent and remains intact whether or not a specific prerogative clause is included in the negotiated agreement.

In sum, all of management's rights are reserved, but some, in a particular collective bargaining setting, may be sealed off from negotiations. They may be spelled out and affirmed by a management prerogative clause. Other management rights are subject to bilateral consideration. These may be called non-exclusive reserved rights.

In general, there are three forms of restrictions on these rights which may be introduced by the collective bargaining process and affirmed by the final execution of a collective agreement. They are:

- (a) written instruments - collective bargaining agreements memoranda of understanding, unilateral written government policies
- (b) implied employer obligations - employee benefits of long standing neither mentioned in written agreement nor discussed in negotiations. If not rescinded in negotiations these benefits are held to be binding practices and the employer thus has an implied obligation to maintain them for the term of the written instrument
- (c) rule of reasonableness - these are restrictions on managerial direction of the work force. The rule-of-reasonableness test is used in matters not mentioned at all in the written agreement or covered by language too general for practical interpretations.

Major Differences in the Public Sector

There are two major differences between the public and the private sector which, in effect, modify the reserved rights doctrine. First, public sector employees may be legally restricted or otherwise inhibited from using the strike weapon. Such restrictions impinge on the nature of the bargain, as it has been known in the private

sector, a quid pro quo in which employees exchange the valuable right to strike for acceptable contract guarantees. Nevertheless, University of Michigan Law Professor Russell Smith has stated that:

. . . evidence, up to this point, is that public sector unions will use the strike weapon either in its outright form or some variant, whatever the state of the law, in support of bargaining demands unless they are provided with an acceptable alternative. If this is so, what we have is a *de facto* recognition, or at least public tolerance, of strike action, within limits. 3

In short, there has been de facto sanction in some states or public tolerance of strike action within limits in the public sector.

Second, there are at least three factors that influence additional bargaining in the public sector: (1) the role and function of civil service as an alternative system and competing process to collective bargaining; (2) prevailing wage systems; and (3) salary ordinances and other legislation which affect scope of bargaining.⁴

Quite apart from the constraints imposed by an alternative system like civil service, statutory requirements affect management rights in the public sector and limit the theoretical flexibility of traditional management reserved rights.

Statutory Requirements on Management Rights in California

In California these statutory requirements on management rights are various. They limit the functional area of bilateral determination. They are separated here from requirements of the civil service system for purposes of this discussion.

Excluding statutes governing public education (K-14), there are at the state level, three statutory restrictions on management rights:

(a) George Brown Act (state employees)

As a limited meet-and-confer statute providing for little more than consultation rights, the George Brown Act defines the scope of representation to include "all matters relating to employment conditions and employer-employee relations, including but not limited to wages, hours, and other terms and conditions of employment..." (Government Code Section 3504). No restrictions are found in this statute, which falls far short of bilateral determination.

(b) Executive Order R-25-71 and Executive Order B-7-75

Executive Order R-25-71 and the following Policy memorandum 71-3 (February 23, 1971) provided for meeting and conferring in "good faith". The scope of the order extended to (1) the need for an amount of a general salary adjustment; (2) the total amount of any special inequity salary adjustment; and (3) general employee benefits.

Although these documents (see appendix) may have strengthened the meet and confer requirements of the George Brown Act, a host of items are excluded:

...working conditions, merit system and related matters such as the examination, selection, recruitment, hiring, appraisal, training, retention, promotion, assignment, disciplining or transfer of employees; directing, deploying, and utilizing the work force; classifications plan and salaried determination for individual classes; mission purposes, objectives, and organization of the state; and facilities, methods, means, and number of personnel required to conduct state programs.

A memo from James G. Stearns, then Secretary of the Agriculture Services Agency (December 1, 1972) facilitated the meet and confer procedure for all Agency Secretaries and Department Directors.

Executive Order No. B-7-75 (October 10, 1975) issued by Governor Edmund G. Brown, Jr. rescinds Executive Order R-25-71 and policy memorandum 71-3. (See appendix.) It establishes an Office of Employee Relations, administered by a director directly responsible to, and serving at the pleasure of, the Governor. It transfers employee relations functions formerly assigned to the Secretary, Agriculture and Services Agency under Executive Order R-25-71 to the new office and states, in addition, that the intent of the orders is not to modify the role of the State Personnel Board in reporting directly to the Governor. Subsequent to the 1975 Executive Order, the director of the newly established Office of Employee Relations issued a memorandum stating that Employer-Employee Relations Guidelines prepared in 1974 under the Reagan administration would serve as advisory papers on employee relations (see appendix), and the basic provisions under policy memorandum 71-3 would remain operable until a comprehensive review of state employee relations policies is completed and said policies and provisions of

policy memorandum 71-3 are revised or replaced. Therefore, the exclusions enumerated above under 71-3 remain in effect.

It should be noted that provisions requiring a meet and confer procedure are a part of the general system and environment in which state managers operate. While the Office of Employee Relations is a focus for state management, other offices and agencies affect management action. For example, the State Personnel Board administers the personnel system, the Board of Control's jurisdiction extends to items such as per diem expenditures, and the Public Employee Retirement System, is concerned with retirement matters.

Regarding the question of whether the governor can, by Executive Order, establish an employee relations system which differs from the Brown Act, the general opinion is that such a system can be established "only to the extent that such an order would be consistent with relevant statutes regarding employer-employee relations for state employees."⁵

(c) Meyers-Miliias-Brown Act (Local government employees)

When the MMBA amendments of 1968 strengthened the meet-and-confer requirements of the original George Brown Act of 1961, the broad scope of representation in the latter was restricted by excluding

"consideration of merits, necessity, or organization of any service or activity provided by law or executive order."

(Section 3504).

In the absence of any state administrative machinery for implementing the MMBA, Section 3507 gave covered local public agencies wide discretionary authority to deal with scope issues as well as with other aspects of public employee relations in implementing ordinances.*

(d) Local implementing ordinances

Local implementing ordinances show a strong tendency to incorporate statutory restrictions on the scope of meeting and conferring. In addition to reinforcing the "mission" exclusion of the MMBA, virtually all ordinances adopted at the local level attempt to spell out the reserved rights of the agency in either general or specific terms.

A few examples of local ordinances follow:

(1) City of Santa Monica

Section 2.04 City Rights. Management officials of the city have and will retain the exclusive right to manage and direct the performance of city services and the work forces performing such services, including but not limited to:

- (a) The exclusive right to determine the processes, methods, means, manner, and personnel by which such services are to be performed.
- (b) The exclusive right to schedule and assign both the work to be performed and the work force or employees by which the work is to be completed.
- (c) The exclusive right to contract or sub-contract all or any part of the work to be performed and to make work and safety rules and regulations in order to maintain the efficiency and economy desirable in the performance of city services.

*On July 1, 1976 the Educational Employee Relations Act (Rodda Act) completely replaced the Winton Act in California Public Education, K-14.

- (d) The exclusive right, subject to compliance with the civil service provisions of the Santa Monica Municipal Code and the City Charter, to lay off employee members of the work force for lack of work, lack of funds, or for other legitimate reasons.
- (e) The exclusive right, subject to compliance with the civil service provisions of the Santa Monica Municipal Code and the City Charter, to appoint, promote, or transfer members of the work force and for just cause to suspend, demote, discharge, or take other disciplinary action against employee members of the work force.

Management, in exercising these functions, will not discriminate against any employee because of his or her membership or nonmembership in any employee organization.

(2) City of San Jose

Section 4. City Rights. The rights of the City include, but are not limited to, the exclusive right to determine the mission of its constituent departments, commissions and boards; set standards of service; determine the procedures and standards of selection for employment and promotion; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work.

- (3) Reserved-rights clauses are cast in more general terms in the Alameda County Employer-Employee Relations Ordinance, which provides in Section 7-4.01 as follows:

County may without meeting and conferring determine the nature, extent, merit, necessity, organization, and staffing of any service or activity of the county, and exercise any other rights, duties, or obligations conferred by law.

- (4) Santa Clara County is one of the few public agencies that does not provide any management-rights restrictions on the scope of bargaining. The right of recognized employee organizations to meet and confer in good faith is simply extended to "wages, hours, and other terms and conditions of employment."
- (5) The county-rights clause in the Los Angeles County Employee Relations Ordinance falls in between these extremes. It is of particular interest because the county ordinance was adopted immediately prior to the passage of the MMBA and was based on the recommendations of a committee of consultants headed by Professor Benjamin Aaron of the UCLA law school. The county ordinance is considered an implementing statute under the MMBA, and is one of three which provides for an administrative agency with authority to deal with impasses arising over scope-of-bargaining issues. The Los Angeles County rights are specified in Section 5:

Section 5. County Rights. It is the exclusive right of the County to determine the mission of each of its constituent departments, boards, and commissions, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the exclusive right of the County to direct its employees, take disciplinary action for proper cause, relieve its employees from duty because of lack of work or for other legitimate reasons, and determine the methods, means and personnel by which the County's operations are to be conducted; provided, however, that the exercise of such rights does not preclude employees or their representatives from conferring or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment.

The provision dealing with the right to confer or raise grievances about the "practical consequences" that management decisions may have on wages, hours, and other terms and conditions of employment is found in some implementing ordinances containing statutory rights clauses. Such clauses are combined with other provisions exempting areas of reserved rights from mandatory negotiations, while providing for "consultation" on such matters. The Los Angeles County Ordinance extends this provision and allows the designated county rights to be include in scope by "mutual consent," in addition to being subjected to consultation. Statutory management rights clauses, in their very nature, preclude the parties to a bilateral relationship from agreeing on the scope of bargaining. In this sense, they convert the reserved management rights doctrine from a flexible principle to a rigid dogma. The statutory approach to management should be distinguished from the alternative method of determining scope of bargaining, to wit an appeal to an administrative board for a decision on scope impasses. Those who support this alternative argue that it gives flexibility to help the parties resolve negotiability issues.

Administrative Impasse Resolutions

The Los Angeles County Employees Relations Commission (ERCOM), operating without precedents, ruled in its first scope case that the County was required under the terms of the Ordinance to negotiate on the subject of caseloads for eligibility workers in the Department of Public Social Services. The County argued that the County Rights section of the Ordinance, quoted above, precluded bargaining over

caseloads. In concluding that the specific duty to bargain over "wages, hours, and other terms and conditions of employment" governed the more general language of the County rights clause, ERCOM relied heavily on the legislative history of the Ordinance. It quoted from the Report of the Committee of Consultants who originally recommended the Ordinance for adoption:

Viewed in the abstract, the demand to negotiate over 'the level of service to be provided' for example would seem to be not negotiable except at the discretion of the County. In the context of a specific situation, however, a demand for a lower maximum caseload for social workers, for example, although theoretically related to the level of service to be provided, might be much more directly related to terms and conditions of employment.

Since ERCOM is without power to enforce its orders, the union itself sought enforcement in the courts, and won a writ of mandate compelling the County to negotiate over the issue of caseloads. The County lost on appeal. In a similar matter, the San Diego County Employee Relations Panel has ruled that the workload of supervisory probationary officers (or number of employees supervised) is a negotiable item under the San Diego Ordinance. A majority of the Panel held that the main impact of the supervisory ratio is on working conditions, rather than on the merits, necessity or organization of the service, or on an exclusive management right. The impact on working conditions is direct, whereas the impact on service is indirect.

These examples provide some insight into the area of statutory "management/agency rights" restrictions on the scope of negotiations under the Meyers-Miliias-Brown Act and implementing ordinances. Despite statutory constraints these decisions are clearly on the side of

broadening the scope of negotiations, but do not necessarily constitute a trend (especially in the vast majority of governmental units where there is no access to administrative agencies to resolve impasses over scope and where court actions are few and far between).⁶

The Vallejo Case

This case which arose between firefighters and the City of Vallejo, bears directly on the effect of restrictive statutory language. The Solano County Superior Court decision (affirmed by the California Supreme Court) held that firefighter demands involving personnel reductions, vacancy, promotions, scheduling of hours, and a constant manning procedure are "related to wages, hours, and conditions of employment," and are therefore within the scope of representation and subject to compulsory arbitration under the charter provisions of the City of Vallejo implementing the MMBA.⁷ Specifically at issue was the exclusionary phrase in Section 809 (a) of the Vallejo Charter, derived from the restrictive provision in Government Code Section 3504 of MMBA which excludes from scope of bargaining matters "involving methods, necessity, or organization of any service or activity provided by law." A few tentative conclusions on the effects of statutory restrictions on management reserved rights might be offered at this point. First, such statutory restrictions

are subject to challenge. In effect, the management reserved rights doctrine becomes an inflexible principle if such restrictions are incorporated into law. Second, the nature of the bargain in the public sector does not seem to be sufficiently different from that of the private sector to justify inclusion of management rights clauses in public employee relations statutes. Third, it is possible that requirements of management reserved rights on scope will be resolved at the bargaining table over time if bilateral relationships can evolve under comprehensive statutes which mandate strong public employee relations administrative boards. These boards would resolve impasses over negotiability subject to review by the courts.

MANAGEMENT RIGHTS AND ALTERNATIVE SYSTEMS

In California, the Meyers-Milias-Brown Act establishes a limited form of bilateral negotiation. As discussed above, local and county ordinances implementing the state legislation generally restrict scope by specifying management rights. In addition, Meyers-Milias-Brown specifies that

Nothing contained herein shall be deemed to supercede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed. (Section 3500)

This additional constraint affects the bargaining relationship. Administrative machinery with authority to resolve impasses over scope, then, is of limited effectiveness in California where the public employee relations law recognizes machinery or gives priority to alternative systems for determining several facets of employee relations. Clearly, present California statutes attempt to rationalize conflict between evolving collective bargaining agreements and alternative systems by according each a nearly co-equal position in employee relations. But the role of the civil service system may impinge on the position of the employee organization as well as on the authority of management. For instance, civil service commissions and personnel boards considering merit, classification, or transfer issues may directly limit the authority of public management in a given case, and therefore, the scope of bargaining.

Both management and the employee organization may attempt to use the collective bargaining process to modify civil service requirements. Public Management may use collective bargaining as a means of reducing the authority of the civil service in order to broaden its authority over the direction of the work force. Employee organizations tend to view the civil service system as an overall extension of the authority of management. In some cases, a hearing officer attached to the civil service may present the case for public management in bargaining procedures. As Jerry Wurf, President of the American Federation of State County and Municipal Employees, declared in a speech to the International City Managers Association in 1967:

...we should consider the whole system of civil service as just another management tool....At best, civil service systems become tools whereby you can classify and grade employees, but in terms of fixing wages and working conditions it is utterly impossible to expect a group of men who are appointed by a group of politicians to act fairly, impartially, and to find answers that workers expect to find in their day-to-day relationship with their employer.⁸

George Meany, took a less rigid position in his address to the President's Review Committee on Labor-Management Relations in the Federal Service (October 23, 1967):

We are not concerned with the mission of an agency, its budget, its organization, because these matters do not relate to personnel policies or working conditions. But we are concerned with the assignment of personnel and technology of performing work because both matters affect directly the jobs of the employees, particularly of those who are being displaced by automation or other technological changes.

We do not deny the right of an agency to assign personnel or to introduce new machines and working processes. But we want to assure the right of the union to negotiate protection for workers adversely affected by personnel policies, changing technology, and partial or entire closing of an installation⁹

Public employee organizations disagree on the extent to which alternative systems should be replaced or modified by collective bargaining. They may seek greater bilateral authority in areas of previously asserted management rights, but simultaneously may work to restrict scope of bargaining in areas in which the decisions from civil service rulings will be more advantageous to them.

In general public employee organizations accept the merit principle (as distinct from the merit system -- see Tab A) and do not seek to challenge it in the collective bargaining process. Great concern however, is shown about the impact on employees of the application of the merit principle in matters involving promotion. Employee organizations generally request the right to bargain or grieve in these matters.

An alternative acceptable to both parties might be that recommended at the National Governor's Conference Task Force (1967) emphasizing negotiated management rights clauses. A negotiated clause might exclude certain management decisions from negotiation, but provide that the consequences of such decisions be negotiable.

Possible Approaches to Accommodation between Collective Bargaining and Alternative Systems

Generally there are at least four possible approaches to accommodating the merit system to evolving collective bargaining relationships:

(1) Continue the present restrictive accommodation under Meyers-Miliias-Brown allowing for local ordinances to implement the collective bargaining relationship, and calling for the maintenance in toto of present merit and civil service systems. This option most likely would not foster the development of constructive bilateral relationships in the public sector. Management rights would be bound by statutory restrictions. Precedents on scope would be established piecemeal by both administrative agencies (where they are provided) and the courts.

(2) The Michigan Public Employee Relations Act and New York Taylor Act models which establish policy under a comprehensive act may be used. These Acts, however, do not alter conflicting alternative systems and laws in these states. No suggestions are given on how to resolve conflicts: resolutions in court have often been capricious and confusing, and it is somewhat questionable if litigation is the best means of arriving at final limits of scope.

(3) The Canadian pattern which creates separate legal and administrative frameworks for the resolution of conflicts might be considered. Under this pattern state laws would be revised to restrict civil service jurisdiction to matters appropriate to the merit principle. A collective bargaining law would be devised to give bargaining parties freedom to develop scope (including the limits of management rights) within a narrow framework of civil service functions.

(4) An evolutionary approach similar to the municipal alternative used in Connecticut may be instituted. In this approach terms of a negotiated agreement in the public sector would prevail over conflicting laws and regulations as well as civil service systems, with approval of the appropriate legislative body. This approach has the advantage of leaving the determination of shared management rights to the parties in each jurisdiction based on their unique needs and power relationship.*

*For a full discussion of possible approaches to accommodation see Aaron, Benjamin Final Report of the Assembly Advisory Council on Public Employee Relations. Prepared for the California State Assembly and submitted, March 15, 1973.

FOOTNOTES

1. NLRA Sec. 9(a), 29 U.S.C. Sec 159(a) (1970)
2. NLRA Secs. 8(a) (5) 8(b) (3) 8(d). 29 U.S.C. Secs. 158(a) 158(b) (3) 158(d) (1970); NLRB v. Wooster Division of Borg Warner Corp., 356 U.S. 342 (1958).
3. As in Paul Prasow, "The Theory of Management Rights Revisited", Institute of Industrial Relations, University of California, Los Angeles, 1974. Reprint no. 244.
4. For a full discussion of alternative constraints on collective bargaining in the public sector see: Don Vial "The Scope of Bargaining Controversy: Substantials Issues vs. Procedural Hangups," in California Public Employee Relations, (CPER) series No. 15, November 1972 (Berkeley, California, Institute of Industrial Relations pp. 1-26).
5. California Public Relations, CPER, no. 27, University of California, Berkeley, December, 1975, p.70.
6. For a consideration of issues confronting public education and discussion of the Winton and Rodda Acts, see The Rodda Act, University of California, Los Angeles, Institute of Industrial Relations, Policy and Practice Publication, 1976.
7. Full text of the California Supreme Court decision relating to Vallejo is included in the Appendix as well as a Symposium on the Vallejo decision excerpted from California Public Employee Relations, No. 24, March, 1975.
8. Government Employee Relations Report, Bureau of National Affairs, Washington, D.C., No. 215 (October 23, 1967), p. B-5.
9. "Management Rights in Bargaining, "Public Personnel Review, April, 1968. pp. 118-119. Attributed to a statement of George Meany by David Sullivan, then president of the Service Employees International Union, AFL-CIO.

APPENDIX TO TAB D

Executive Order Covering State
Employees No. R-25 - 71 (1971)
Governor's memorandum to Agency
Secretaries, Department Directors,
and Employee Organizations #71-3,
February 23, 1971.
Governor's Policy on State Employer-
Employee Relations
Memorandum from Agency Secretary,
Agriculture and Services Agency to
all Agency Secretaries and Depart-
ment Directors, December 1, 1972
Executive Order B-7-75, October 10,
1975
Governor's Memo, March 31, 1976
Supreme Court Decision on Fire Fighters
Union, Local 1186, International
Association of Firefighters, AFL-CIO
v. City of Vallejo.
Symposium on the Vallejo Decision

EXECUTIVE ORDER COVERING STATE EMPLOYEES

1971

EXECUTIVE ORDER NO. R-25-71

I, Ronald Reagan, Governor of the State of California, by virtue of the power and authority vested in me by the constitution and laws of this state do hereby initiate a procedure (Governor's Memo 71-3) whereby a representative of the Governor will meet and confer with employee organization representatives concerning salary and employee benefits on a more formal basis than has existed in the past.

The purpose of this policy shall be to strengthen employer-employee relations, enhance the general effectiveness of each departmental grievance procedure, and enhance mutual understanding. My representative will be the Secretary of the Agriculture and Services Agency or his designee.

It is not the intention of this Executive Order to modify in any way the role presently played by the State Personnel Board in reporting to me and the Legislature.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of California to be affixed hereto this 1st day of March, 1971.

/s/ RONALD REAGAN
Governor of California

Attest: /s/ EDMUND G. BROWN, JR.
Secretary of State

Memorandum

To : AGENCY SECRETARIES, DEPARTMENT DIRECTORS,
AND EMPLOYEE ORGANIZATIONS

Date : February 23, 1971

Subject: Policy on State
Employer-Employee Relations

From : Governor's Office

71-3

As both a citizen and Chief Executive of the State of California, I am gratified at the excellent reputation state employees have earned for themselves. The competence and sense of responsibility of California State employees are widely recognized.

A major factor in the high performance level of state employees is the relationship that exists between management and the employee. Cooperation is good among management, employees, and employee representatives in recognizing individual problems and resolving them at the lowest possible level. As a result, we have an atmosphere of cooperation rather than conflict.

To enhance this cooperative relationship, it is my desire to initiate a procedure whereby a representative of the Governor will meet and confer with employee organization representatives concerning salaries and employee benefits on a more formal basis than has existed in the past. I am issuing an Executive Order to initiate and implement such a procedure within the limits of current law and state organizational structure. It is my hope that the attached policy will result in a strengthening of employee relations in state government and a higher level of understanding by providing for full communication between representatives of the state and employee organizations on matters of mutual interest.

I firmly support all efforts to assure that employees receive fair and prompt consideration of their legitimate complaints.

The Executive Order and the attached policy amplifies the responsibility of departmental managers for creating a positive employee relations climate. As a part of this improved effort, each department should have well administered grievance procedures. Effective communications and prompt resolution of individual employee grievances contribute to a more satisfactory work environment.

Please post the attached document to insure that all personnel in your department are aware of this new policy.

Sincerely,


RONALD REAGAN
Governor

GOVERNOR'S POLICY ON STATE EMPLOYER-EMPLOYEE RELATIONS

By virtue of the authority vested in me as Governor of the State of California, I hereby proclaim the following Policy on State Employer-Employee Relations to be the official policy of the Executive Department of the State of California applicable to state civil service employees and nonacademic employees of the state colleges and University of California.

Declaration of Policy

It is the purpose of this Policy:

1. To strengthen employer-employee relations, to promote cooperative relationships, and to achieve mutual understandings by providing for full communication between representatives of the state and employee organizations on matters of mutual interest which affect employer-employee relations; and
2. To enhance the general effectiveness of each departmental grievance procedure as a means of identifying and resolving individual employee complaints within the discretion of departmental management.

It is not the intent of the Policy to modify in any way the role of the State Personnel Board in annually reporting to the Governor and the Legislature on the status of state employees' salaries and benefits. Nor is it intended to alter the relationship between the Personnel Board and employee organizations which represent their members in the board's annual salary review and recommendation process.

Meet-and-Confer Relationship

A representative of the Governor will meet and confer in good faith with representatives of employee organizations to arrive, if possible, at a mutual understanding on the following matters: (1) the need for and amount of a general salary adjustment; (2) the total amount of any special inequity salary adjustments; and (3) general employee benefits.

In meeting and conferring with employee organization representatives, the Governor's representative will be the Secretary, Agriculture and Services Agency, or his designee. He will be provided staff support services from other organizations, as needed.

To meet and confer in good faith connotes an open and mutually trusting approach in exchanging views and discussing alternatives. It also connotes a genuine effort on the part of both parties to attempt to reach a mutual understanding.

Matters excluded from this meet-and-confer in good faith relationship include working conditions; merit system and related matters such as the examination, selection, recruitment, hiring, appraisal, training, retention, promotion, assignment, disciplining or transfer of employees; directing, deploying, and utilizing the work force; classification plan and salary determination for individual classes; mission, purposes, objectives, and organization of the State; and facilities, methods, means, and number of personnel required to conduct state programs.

The appropriate appointing power will consult upon request with employee organization representatives in order to exchange information and views on salary matters and employee benefits limited to a particular organizational, occupational, professional, or other specific grouping of employees. The purpose of this consultation is solely to exchange views and discuss alternatives.

The Governor's representative will meet and confer in good faith upon request with official representatives of any employee organization which has complied with State Personnel Board rules on employer-employee relations. The amount of time and degree of effort expended to achieve a mutual understanding by the Governor's representative in meeting and conferring with employee representatives will be commensurate with the number of members and the diversity of membership of the employee organization involved.

A state employee who is an official representative of an employee organization may use a reasonable amount of state time, as determined by his appointing power, without loss of compensation or other benefits for formally meeting and conferring with the Governor's representative on matters within the scope of representation.

Mutual Understandings

If, as a result of meeting and conferring in good faith, the Governor's representative and employee organization representatives achieve a mutual understanding, a written memorandum of understanding shall be prepared. The Governor's representative shall present the memorandum of understanding for final approval by the Cabinet before signing the memorandum. Similarly, the employee organization representatives will provide appropriate assurance that the memorandum reflects the views of the organization's membership before signing the memorandum. As appropriate, matters included in these approved and signed memoranda shall be submitted to the Legislature either as part of the Governor's budget or as recommended legislation. The Governor will support before the Legislature those matters which have been recommended for adoption as a result of the memoranda of understanding.

If, after meeting and conferring in good faith, the Governor's representative and the employee organization representatives are unable to achieve a mutual understanding, the Governor's representative shall prepare a memorandum describing the areas and extent of difference between his position and that of the employee organization representatives. Such memoranda will be made available to interested groups and individuals.

Departmental Employer-Employee Relations

As a part of the general effort to enhance the employer-employee relations process in state service, every departmental director and all subordinate managers are encouraged to provide a favorable climate for effective employee representation within their particular organization. This entails a continuation of past practices as well as renewed efforts to facilitate and give meaning to the meet-and-confer process at all levels throughout each department. Managers must recognize that they are the focal point for effective employer-employee relations within the department. Managers must be alert to employee relations problems and seek a satisfactory solution which reflects the needs of the public, the employees, and the state.

As the immediate representative of management, the supervisor has a significant responsibility for employee relations in the day-by-day operations of the organization. It is this relationship between the supervisor and employee which is basic to the attainment of an overall suitable working climate. A supervisor's effectiveness in communicating with employees, in providing fair and equitable treatment to employees and their representatives, in establishing suitable working conditions, and

in recognizing and attempting to resolve employee complaints will make a positive contribution to maintaining good employee relations in his organization. Good employee relations make a significant contribution to employee job satisfaction and morale.

Concomitant with department management's accountability for employee relations is the responsibility for training of supervisory staff in this specific area. Departments should provide training for their supervisory staff on such subjects as interpersonal communication, motivation, leadership, and similar human relations skills as well as in the rights and obligations of management, employees, and employee organizations under applicable employer-employee relations law and rules.

GRIEVANCE PROCEDURE

For state civil service employees, formalized grievance procedures exist as a means of resolving problems which arise in the work situation. Supervisors and managers should view grievances, not as an irritant, but as an opportunity to deal with a complaint, real or imagined, of an employee. Moreover, grievances should be resolved at the lowest feasible level in the department and in the most expeditious manner possible.

For certain types of grievances, even though the employee elects to use the departmental grievance procedure and the appointing power denies the grievance, the employee currently has a right of appeal to the State Personnel Board. Illustrative of these appealable grievances are: position classification; layoff procedure; merit salary adjustment denial; sick leave denial; performance appraisal; and transfer.

For other types of grievances, the appointing power is currently the final level of review. Essentially, these are grievances over working conditions and related matters within the appointing power's discretion. In order to strengthen the grievance resolution process, a level of review beyond the appointing power is warranted under certain conditions.

This extradepartmental level of review will provide an independent review of the grievance, including a new assessment of the facts, as appropriate, of the particular situation. Accordingly, an employee who is not satisfied with the decision on his grievance by his appointing power may, within ten days after receiving such decision, request in

writing that the appropriate agency secretary review and act on his grievance. After reviewing the nature of the grievance, the agency secretary will determine if he should accept and decide the grievance. If he does not accept the grievance, he will so advise the employee in writing. In such case, the decision of the appointing power is final. If the agency secretary accepts the grievance he will issue a written decision within 20 days of receipt of such grievance.

Memorandum

To : ALL AGENCY SECRETARIES
AND DEPARTMENT DIRECTORS

Date: Dec. 1, 1972

No.:

From : Office of the Secretary

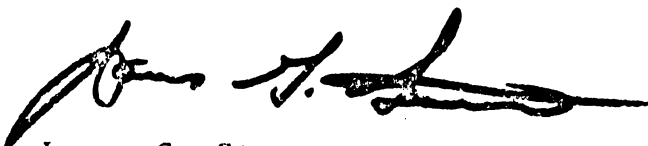
Subject: Policy on Employer-Employee Relations

The Cabinet recently approved a procedure which has as its purpose the strengthening of the Employer-Employee Meet and Confer Provisions (Government Code Section 3530) on those matters wholly within the discretion of Department Directors.

This Administration desires to facilitate this meet and confer relationship through positive action by Department Directors including, but not limited to, the following actions: (1) informing employee representatives on all matters within the scope of representation as appropriate; (2) giving reasonable written notice to employee representatives of any proposed changes to departmental practices or policies affecting employees' conditions of employment; (3) giving employee representatives an opportunity to respond to the proposed changes before implementation; (4) affording employees generally, through their employee representatives, genuine participation in decisions affecting their conditions of employment.

Department Directors shall meet and confer with representatives of employees on these matters in a good faith effort to reach consensus. The results of these discussions shall not be issued as signed memorandums of agreement but shall be reduced to writing and issued by the Director as Departmental policy directives.

This policy shall apply to those matters presently under discussion or to be discussed under the meet and confer process in the future. In order to coordinate these matters at the state level, each Department Director is required to advise the Secretary of Agriculture and Services of the subject matter to be discussed with employee representatives prior to the discussion and before the departmental policy directive is issued.



James G. Stearns
Agency Secretary

Executive Department

State of California

EXECUTIVE ORDER B-7-75

I, Edmund G. Brown Jr., Governor of the State of California, by virtue of the powers and authority vested in me by the Constitution and laws of this state, do hereby rescind Executive Order No. R-25-71 and Governor's Memo 71-3 and do hereby issue this order to become effective immediately:

1. The Office of Employee Relations is hereby established and shall be administered by a director who shall be directly responsible to, and hold office at the pleasure of, the Governor.
2. The Office shall be responsible for the functions assigned to the Secretary, Agriculture and Services Agency, under Executive Order R-25-71. The Office functions will include:
 - (a) Meeting and conferring with employee organizations' representatives concerning salary and benefits.
 - (b) Representing the Governor in all matters concerning state employee-employer relations.
 - (c) Development of future state policies and procedures designed to improve employee-employer relations.
3. It is not the intention of this Executive Order to modify in any way the role presently played by the State Personnel Board in reporting to me and the Legislature.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of California to be affixed hereto this 10th day of October, 1975.

Edmund G. Brown Jr.
GOVERNOR OF CALIFORNIA

ATTEST

March Fong Eu
SECRETARY OF STATE



Marjorie R. H. H. H.



State of California

GOVERNOR'S OFFICE

SACRAMENTO 95814

EDMUND G. BROWN JR.
GOVERNOR

916/445-1574

March 31, 1976

TO WHOM IT MAY CONCERN:

In October 1975, Governor Brown issued Executive Order B7-75 which rescinded Governor Reagan's Executive Order R25-71 and Governor's Memo 71-3. The new Executive Order established the Office of Employee Relations (OER) and set as one of its primary responsibilities the development of future State policies and procedures designed to improve employer-employee relations.

The attached Employer-Employee Relations Guidelines were prepared in October 1974 to reflect the consensus among State departments as to the employer-employee relations policies under the Reagan Administration.

During the coming months, the OER will be meeting with representatives of each Agency to review existing employee relations policies. These discussions may result in recommendations to update and/or revise current procedures and guidelines.

Until this review has been completed, the attached guidelines should be considered as only advisory in nature. In addition, the basic provisions of Governor's Memo 71-3 will also remain operable until they are revised or replaced.

We welcome any comments or suggestions you may have in regards to the attached guidelines.



Marty Morgenstern
Director, Governor's
Office of Employee Relations

Documents

Supreme Court Rules on Vallejo Arbitrability Case

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, IN BANK

FIRE FIGHTERS UNION, LOCAL 1186, INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO, Plaintiff and Appellant,

v.

CITY OF VALLEJO, et al., Defendants and Appellants. *

S.F. 23098

Super Ct. No. 53187

Filed: Oct. 2, 1974

In this case of first impression we must delineate the function of the court in interpreting a provision for arbitration in a city charter affecting public employees. Specifically we are asked, prior to the arbitration proceeding itself, to reconcile clauses which substantively overlap: a provision that grants city employees the right to bargain on "wages, hours and working conditions" but withholds that right as to matters involving the "merits, necessity or organization of any governmental service." As we shall explain, our attempt now to define the issues of arbitration so that they assume the shape of rigid categories would be to reach premature judgments without benefit of the factual foundations of an arbitral record and to impede the arbitration process itself. We therefore largely leave to the arbitrators the moulding and resolution of the issues, subject to the proviso that neither party may be bound by a decision in excess of the arbitrators' jurisdiction.

In 1971, during negotiations between representatives of the City of Vallejo and the Fire Fighters Union as to the terms of a new contract, the parties failed to agree on 28 issues. Pursuant to the process prescribed in the city charter, they submitted the disputed matters to mediation and fact finding. When these procedures failed to effect a resolution, the city agreed to submit 24 of the issues to arbitration but contended that four other issues, namely, "Personnel Reduction," "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedure," involved the "merits, necessity or organization" of the fire fighting service and did not come under the arbitrable provisions. The city refused to accept the recommendations of the fact finding panel with respect to these issues or to submit them to arbitration.

On December 22, 1971, prior to the scheduled hearing before the board of arbitrators, the Fire Fighters Union filed a complaint in the Solano Superior Court seeking mandate to compel the city to submit the four disputed issues to arbitration. The court found for the union on all the issues, stating: "[T]he evidence introduced here supports findings that the issues 'Reduction of Personnel,' 'Vacancies and Promotions,' 'Schedule of Hours' and 'Constant Manning Procedures,' are related to 'wages, hours and conditions of

employment' . . . [W]hile the issues might also apply to the exclusionary language 'but not on matters involving the merits, necessity or organization of any service or activity provided by law,' to so hold would be to defeat the overriding purpose of the Meyers-Milias-Brown Act and section 809 of the Vallejo charter, namely to provide peace and harmony with the city's public safety employees. The court cannot engage in judicial legislation and write into the Vallejo charter words or meaning that are not there." The court therefore ordered that a peremptory writ of mandate issue directing the city to proceed to arbitration on the disputed issues.¹ The city appeals.

The present controversy therefore involves an interpretation of the Vallejo City Charter provisions which govern public employee contract negotiations. The provisions for multi-level resolution of disputes at issue were drafted by a board of freeholders for incorporation in a new city charter in response to a strike by city police and fire fighters in July of 1969. These proposals, with the exception of a provision for final binding arbitration, were accepted by the city council and embodied in section 809 of the city charter. Section 809 sets up a "system of collective negotiating" and provides that city employees shall have the right to "negotiate on matters of wages, hours and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity provided by law. . . ." The section further provides that if the parties cannot reach agreement, they must submit successively to mediation and fact finding.²

The arbitration provisions rejected by the city council were submitted to the citizens of Vallejo in a referendum in 1970 and approved. The electorate added to the city charter section 810 which provides that if representatives of the city and its employees do not reach agreement after the report of the fact finding committee under section 809, the issues upon which they fail to agree shall be submitted to binding arbitration.³

The scope of bargaining provision in the Vallejo City Charter in large measure parallels that set out in the Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3510).⁴ Government Code section 3504 reads: "The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." Therefore, interpretation of the scope of bargaining language in the Vallejo charter necessarily bears upon the meaning of the same language in the Meyers-Milias-Brown Act.⁵

In the instant case, as we have stated, we are called upon to render a preliminary decision as to the scope of the arbitration. The arbitration process, however, is an ongoing one in which normally an arbitrator, rather than a court, will narrow and define the issues, rejecting those matters over which he cannot properly exercise jurisdiction because they fall exclusively within the rights of management. As Professor Grodin has observed: ". . . collective bargaining and issues arbitration are together a dynamic process, in which the positions of the parties and their interaction with the arbitrator is in a state of constant flux. Proposals get modified and non-

* 12 Cal. 3d 608 reprinted in CPEE, #23, California Public Employee Relations University of California, Berkeley, Dec., 1974.

negotiable positions become negotiable as the parties sort out their priorities, develop understanding of the implications of their positions, and perceive alternative solutions which they may not previously have considered. To determine what is arbitrable and what is not against this changing context is a bit like trying a balancing act in the middle of a rushing torrent." (Grodin, *California Public Employee Bargaining Revisited: The MMB Act in the Appellate Courts* (1974) Cal. Pub. Employee Rel. No. 21, p. 17.)

To a large extent the rendition of the definitions involved in this case will be welded by the facts developed in arbitration itself. We put the proposition in these words in *Butchers' Union Local 229 v. Cudahy Packing Co.* (1967) 66 Cal.2d 925, 938: "Because arbitration substitutes for economic warfare the peaceful adjudication of disputes, and because controversy takes on ephemeral shapes and unforeseeable forms, courts do not congeal arbitration provisions into fixed molds but give them dynamic sweep." We therefore must be careful not to restrict unduly the scope of the arbitration by an overbroad definition of "merits, necessity or organization." Nor does this cautious judicial approach expose the city to an excessive assertion of the arbitrators' jurisdiction; the city council after the rendition of the award may reject any award that invades its authority over matters involving "merits, necessity or organization" since the charter itself limits the scope of the arbitration decision to that which is "consistent with applicable law."⁶

With this caveat in mind, we approach the specific problem of reconciling the two vague, seemingly overlapping phrases of the statute: "wages, hours and working conditions," which, broadly read could encompass practically any conceivable bargaining proposal; and "merits, necessity or organization of any service" which, expansively interpreted, could swallow the whole provision for collective negotiation and relegate determination of all labor issues to the city's discretion.

In attempting to reconcile these provisions, we note that the phrase "wages, hours and other terms and conditions of employment" in the MMBA was taken directly from the National Labor Relations Act⁷ (hereinafter NLRA). (See Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts* (1972) 23 Hastings L.J. 719, 749.) The Vallejo charter only slightly changed the phrasing to "wages, hours and working conditions." A whole body of federal law has developed over a period of several decades interpreting the meaning of the federal act's "wages, hours and other terms and conditions of employment."

In the past we have frequently referred to such federal precedent in interpreting parallel language in state labor legislation. Thus, for example, in *England v. Chavez* (1972) 8 Cal.3d 572, 576, we determined the reach of the California Jurisdictional Strike Act in part by reference to judicial construction of similar language in the National Labor Relations Act. Similarly, in *Petri Cleaners, Inc. v. Automotive Employees, Etc., Local No. 88* (1960) 53 Cal.2d 455, 459, we referred to judicial interpretation of the "interfere with, restrain and coerce" language in section 8(a)(1) and (2) of the NLRA to aid us in interpreting the meaning of "interfered with, dominated or controlled" in Labor Code section 1117.

The origin and meaning of the second phrase -- excepting "merits, necessity or organization" from the scope of bargaining -- cannot claim so rich a background. Apparently the Legislature included the limiting language not to restrict bargaining on matters directly affecting employees' legitimate interests in wages, hours and working conditions but rather to forestall any expansion of the language of "wages, hours and working conditions" to include more general managerial policy decisions.

Although the NLRA does not contain specific wording comparable to the "merits, necessity or organization" terminology in the city charter and the state act, the underlying fear that generated this language -- that is, that wages, hours and working conditions could be expanded beyond reasonable boundaries to deprive an employer of his legitimate management prerogatives -- lies imbedded in the federal precedents under the NLRA. As a review of federal case law in this field demonstrates, the trepidation that the union would extend its province into matters that should properly remain in the hands of employers has been incorporated into the interpretation of the scope of "wages, hours and terms and conditions of employment."⁸ Thus, because the federal decisions effectively reflect the same interests as those that prompted the inclusion of the "merits, necessity or organization" bargaining limitation in the charter provision and state act, the federal precedents provide reliable if analogous authority on the issue.

The City of Vallejo objects to the use of NLRA precedents because of the alleged differences between employment relations in the public and private sectors. Although we recognize that there are certain basic differences between employment in the public and private sectors,⁹ the adoption of legislation providing for public employment negotiation on wages, hours and working conditions just as in the private sector demonstrates that the Legislature found public sector and private sector employment relations sufficiently similar to warrant similar bargaining provisions.¹⁰ We therefore conclude that the bargaining requirements of the National Labor Relations Act and cases interpreting them may properly be referred to for such enlightenment as they may render in our interpretation of the scope of bargaining under the Vallejo charter.

We now turn to an analysis of the specific bargaining proposals which are at issue here.

1. *Schedule of Hours*

The issue of Schedule of Hours by which the union proposed a maximum of 40 hours per week for fire fighters on 8-hour shifts and 56 hours per week for fire fighters on 24-hour shifts is clearly negotiable and arbitrable despite the city's argument that it involves the "organization" of the fire service. The Vallejo charter provides explicitly that city employees shall have the right to bargain on matter of wages, hours and working conditions; furthermore, working hours and work days have been held to be bargainable subjects under the National Labor Relations Act. In *Meat Cutters v. Jewel Tea* (1965) 381 U.S. 676, 691 the United States Supreme Court held that the limitation of butchers' work hours to the period of 9 a.m. to 6 p.m. was a mandatory

subject of bargaining. The city cites no authority to the contrary. Accordingly, we conclude that Schedule of Hours is a negotiable issue.

2. Vacancies and Promotions

The union's Vacancies and Promotions proposal concerns fire fighters' job security and opportunities for advancement and therefore relates to the terms and conditions of their employment. (Cf. District 50, United Mine Workers, Local 13942 v. N.L.R.B. (4th Cir. 1966) 358 F.2d 234.) Similar proposals for union hiring hall arrangements have been held to involve terms and conditions of employment under the National Labor Relations Act and to constitute mandatory subjects of bargaining. (N.L.R.B. v. Tom Joyce Floors, Inc. (9th Cir. 1965) 353 F.2d 768, 771.)

The city contends that this proposal may not apply to appointment or promotion to the position of deputy fire chief. Although the Vallejo charter does not contain any provision for determining the proper bargaining unit, supervisory or managerial employees are routinely excluded from the bargaining units under the National Labor Relations Act (N.L.R.B. v. Gold Spot Dairy, Inc. (10th Cir. 1970) 432 F.2d 125; see N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc. (1974) — U.S. — [94 S.Ct. 1757]; by analogy, we conclude that under the charter the union can claim no right to bargain as to supervisory positions.

We are presented with no facts which disclose whether the deputy fire chief's duties are supervisory; his title alone does not constitute a sufficient basis for excluding him from the bargaining unit. We therefore conclude that this issue should be submitted to the arbitrators who will hear the facts which will enable them to determine whether the deputy fire chief's duties are indeed supervisory. If so, the union's Vacancies and Promotions proposal does not apply to him or his position because he is not a member of the bargaining unit.

3. Constant Manning Procedure

An examination of this issue illustrates the wisdom of judicial self-restraint in attempting pre-arbitral definitions of the scope of arbitration. Apparently the union originally sought to add one engine company and to increase the personnel assigned to the existing engine companies. If these union demands required the building of a new fire house or the purchase of new equipment, they could very well intrude upon management's role of formulating policy. In view of the union's counterclaim that such a station and equipment were necessary for the safety of the men, this issue could have presented a complex problem. But the very flow of the proceedings washed away these questions because the union altered its position and accepted the recommendation of the fact finding committee "that the manning schedule presently in effect be continued without change during the term of the new Memorandum of Agreement." Hence we do not face the problem of whether the construction of a new fire house and the purchase of new equipment would intrude upon managerial prerogatives of policy making.

Although the city challenges even the limited status quo version of the manpower issue, contending that the fact finding ruling involves the "merits" and "organization" of the

fire department and is therefore excluded from the scope of bargaining, we cannot conclude at this stage that the manpower proposal is necessarily nonarbitrable.

The city argues that manpower level in the fire department is inevitably a matter of fire prevention policy, and as such lies solely within the province of management. If the relevant evidence demonstrates that the union's manpower proposal is indeed directed to the question of maintaining a particular standard of fire prevention within the community, the city's objection would be well taken.

The union asserts, however, that its current manpower proposal is not directed at general fire prevention policy, but instead involves a matter of workload and safety for employees, and accordingly falls within the scope of negotiation and arbitration. Because the tasks involved in fighting a fire cannot be reduced, the union argues that the number of persons manning the fire truck or comprising the engine company fixes and determines the amount of work each fire fighter must perform. Moreover, because of the hazardous nature of the job, the union also claims that the number of persons available to fight the fire directly affects the safety of each fire fighter.

Insofar as the manning proposal at issue does in fact relate to the questions of employee workload and safety, decisions under the National Labor Relations Act fully support the union's contention that the proposal is arbitrable. First, the federal authorities uniformly recognize "workload"¹¹ issues as mandatory subjects of bargaining whose determination may not be reserved to the sole discretion of the employer. (See, e.g., Gallencamp Stores Co. v. N.L.R.B. (9th Cir. 1968) 402 F.2d 525, 529, fn. 4.) Thus, for example, in Beacon Piece Dyeing & Finishing Co., Inc. (1958) 121 N.L.R.B. 953, 954, 956, the National Labor Relations Board held that an employer could not unilaterally increase an employee's workload by assigning to him the operation of an extra machine. Similarly, the courts have recognized rules and practices affecting employee safety as mandatory subjects of bargaining since they indirectly concern the terms and conditions of his employment. (N.L.R.B. v. Gulf Power Company (5th Cir. 1967) 384 F.2d 822.)

Moreover, a recent California public employment case, Los Angeles County Employees Assn. Local 660 v. County of Los Angeles (1973) 33 Cal.App.3d 1, affords additional support for the union's position. In interpreting the scope of bargaining language in the Meyers-Milius-Brown Act -- language which, as pointed out earlier, largely parallels the scope of negotiation provision under the Vallejo City Charter -- the *Los Angeles County Employees* court held that the county was required to negotiate with the union with respect to the size of the caseloads carried by social service eligibility workers. Because the caseload, i.e., "workload," of the social workers effectively determined the number of these workers needed to service the recipients of aid, bargaining over the size of caseloads in *Los Angeles County Employees* was in reality comparable to bargaining over "manning" levels.¹² In the case before us, the union claims that the fire fighters, like the Los Angeles social workers, are essentially demanding a particular workload but have framed their demand in terms of "manning," that is the number of people available to fight each fire.

Given the parties' divergent characterizations of the instant manpower proposal, either one of which may well be accurate, we believe the proper course must be to submit the issue to the arbitrators so that a factual record may be established. The nature of the evidence presented to the arbitrators should largely disclose whether the manpower issue primarily involves the workload and safety of the men ("wages, hours and working conditions") or the policy of fire prevention of the city ("merits, necessity or organization of any governmental service"). On the basis of such a record, the arbitrators can properly determine in the first instance whether or not, and to what extent, the present manpower proposal is arbitrable.

Furthermore, the parties themselves, or the arbitrators, in the ongoing process of arbitration, might suggest alternative solutions for the manpower problem that might remove or transform the issue. Indeed, the union in the instant case has already abandoned one position and assumed another. These are the elements and considerations that argue against preliminary court rulings that would dam up the stream of arbitration by premature limitations upon the process, thwarting its potential destination of the resolution of the the issues. Hence we hold that the charter provision as to "merits, necessity or organization" of the service does not at this time preclude the arbitration of the union proposal that the manning schedule presently in effect be continued for the term of the new agreement.

4. Personnel Reduction

Finally, the union advanced a Personnel Reduction proposal which would require that the city bargain with the union with respect to any decision to reduce the number of fire fighters. Under the proposal, any reduction would be on a least-seniority basis, and no new employees could be hired until all those laid off were given an opportunity to return. The city objects to that part of the proposal requiring bargaining on a decision to reduce personnel and contends that any such matter is not negotiable because it involves the merits, necessity or organization of the fire fighting service.

A reduction of the entire fire fighting force based on the city's decision that as a matter of policy of fire prevention the force was too large would not be arbitrable in that it is an issue involving the organization of the service.

Thus cases under the NLRA indicate that an employer has the right unilaterally to decide that a layoff is necessary, although it must bargain about such matters as the *timing* of layoffs and the *number* and *identity* of the employees affected. (N.L.R.B. v. United Nuclear Corporation (10th Cir. 1967) 381 F. 2d 972.) In some situations, such as that in which a layoff results from a decision to subcontract out bargaining unit work, the decision to subcontract and lay off employees is subject to bargaining. (Fibreboard Corp. v. Labor Board (1964) 379 U.S. 203.) The fact, however, that the decision to lay off results in termination of one or more individuals' employment is not *alone* sufficient to render the decision itself a subject of bargaining. (N.L.R.B. v. Dixie Ohio Express Co. (6th Cir. 1969) 409 F.2d 10.)

On the other hand, because of the nature of fire fighting, a reduction of personnel may affect the fire fighters' working

conditions by increasing their workload and endangering their safety in the same way that general manning provisions affect workload and safety. To the extent, therefore, that the decision to lay off some employees affects the workload and safety of the remaining workers, it is subject to bargaining and arbitration for the same reasons indicated in the prior discussion of the manning proposal.

Our conclusion that the issues of Personnel Reduction, Vacancies and Promotions, Schedule of Hours and Constant Manning Procedure, except as limited above, involve the wages, hours or working conditions of fire fighters and are negotiable requires in the context of this suit that the City of Vallejo submit these issues to arbitration. We in no way evaluate the merit of the union proposals, but hold only that under the Vallejo charter they are arbitrable.

Such a result comports with the strong public policy in California favoring peaceful resolution of employment disputes by means of arbitration. We have declared that state policy in California "favors arbitration provisions in collective bargaining agreements and recognizes the important part they play in helping to promote industrial stabilization." (Posner V. Grunwald-Marx, Inc. (1961) 56 Cal.2d 169, 180.) In this case the voters of the City of Vallejo similarly declared that they consider arbitration to be the most appropriate means of resolving labor disputes. Through section 810 the citizens of Vallejo delegated to a board of arbitrators the power to render a final and binding decision in labor disputes "to the extent permitted by law" after considering "all factors relevant to the issues from the standpoint of both the employer and the employee, including the City's financial condition."¹³

At the same time Vallejo voters provided that any employee who participated in a strike against the city should be automatically terminated. (§ 810.) Thus, the employee's *quid pro quo* for this no-strike provision consisted of the arbitrability of all disputes (see *Boys Market v. Clerks Union* (1970) 398 U.S. 235); the arbitration and no-strike provisions were interdependent. Any interpretation of the Vallejo charter which improperly failed to require arbitration on the full range of negotiable issues would not only erroneously curtail arbitration but would invite the very labor strife which the charter provisions seek to prevent.

For the foregoing reasons we dispose of the issues as follows: (1) The Schedule of Hours proposal must be submitted to arbitration in full. (2) The proposal as to Vacancies and Promotions is arbitrable. The arbitrators shall additionally hear the facts to determine whether the position of deputy fire chief is a supervisory one and thus excluded from the bargaining unit. If so, the Vacancies and Promotions proposal cannot apply to the deputy fire chief position. (3) The proposal that the manning schedule presently in effect be continued without changes during the term of the new agreement is arbitrable to the extent that it affects the working conditions and safety of the employees. (4) As to Personnel Reduction the proposal to reduce personnel is arbitrable only insofar as it affects the working conditions and safety of the remaining employees. Matters of seniority and reinstatement included in the Personnel Reduction proposal are arbitrable.

We affirm the judgment as herein modified and remand the case to the superior court with directions to issue a writ of mandamus requiring the City of Vallejo to proceed to arbitrate the issues of "Reduction of Personnel," "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedure" in accordance with this opinion. Each party shall bear its own costs on appeal.

TOBRINER, J.

WE CONCUR:

WRIGHT, C.J.
McCOMB, J.
MOSK, J.
BURKE, J.
SULLIVAN, J.
CLARK, J.

¹The court rejected the union's contention that the California Arbitration Act, Code of Civil Procedure section 1280, et seq., applied to this dispute, holding that it had no jurisdiction under the arbitration act and could not issue an order to arbitrate. The court upheld the writ of mandate to compel the city to arbitrate, however, because the union had no other plain, speedy and adequate remedy. Since the union did not initially seek an order to arbitrate under section 1281.2 of the act, but proceeded in the superior court with a petition for writ of mandate, we need not resolve the issue of the applicability of the California Arbitration Act.

²Section 809 provides: "Consistent with applicable law, the City Council shall by ordinance provide a system of collective negotiating to include:

"a. It shall be the right of City employees individually or collectively to negotiate on matters of wages, hours, and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity provided by law, or on any matter arising out of Sections 803(n) or 803(o) of this Charter.

"b. The City Council shall direct the City Manager and/or his designated representative(s) to negotiate in good faith with recognized employee organizations.

"c. Agreements reached between City representatives authorized in (b) above and the representatives of recognized employee organizations shall be submitted in writing to the City Council for its approval, modification, or rejection.

"d. There shall be established a timetable for the total process of collective negotiations, including mediation and fact finding, as herein provided, which will, if successful, assure a final agreement between the parties no less than 45 days before the end of the current fiscal year.

"e. If, after a period of time to be set forth in the ordinance, no agreement can be reached between City representatives authorized in (b) above and the representatives of

recognized employee organizations or if the City Council refuses to ratify the agreement arrived at or modifies such agreement in any manner unacceptable to said employee organizations, the parties shall request the State Conciliation Service, or other available impartial third-party mediation service mutually acceptable to the parties, to provide a mediator in accordance with its usual procedures.

"f. If no agreement between the parties has been reached within 10 days after the date for start of mediation, a fact-finding committee of three shall be appointed to deal with the disputed issues. One member of the fact-finding committee shall be appointed by the City Council, one member shall be appointed by the recognized employee organization, and those two appointed shall name a third, who shall be the chairman. If they are unable to agree upon a third, they shall select the third member from a list of five names to be provided by the State Conciliation service. The fact-finding committee shall make public its report, with recommendations, within 30 days. The Council shall then promptly consider and act upon the report."

³Section 810 provides: "Consistent with applicable law, the ordinance adopted by the Council under Section 809 shall in addition include a requirement that if the parties do not reach agreement within 10 days after the report and recommendations of the fact-finding committee, the issues shall be submitted to arbitration. The Board of Arbitrators shall be composed of three persons; one appointed by the City Council, one appointed by the recognized employee organization, and those two appointed shall appoint a third, who shall be chairman. If they are unable to agree upon a third, they shall select the third member from a list of five names to be provided by the State Conciliation Service. No member of the fact-finding committee shall be a member of the Board of Arbitrators. The arbitrators shall consider all factors relevant to the issues from the standpoint of both the employer and the employee, including the City's financial condition. To the extent permitted by law, the decision of a majority of the Board of Arbitrators shall be final and binding upon the parties. The cost of arbitration shall be borne equally by all parties.

"The Council shall also provide in said ordinance that any employee who fails to report for work without good and just cause during negotiations or who participates in strike against the City of Vallejo will be considered to have terminated his employment with the City, and the Council shall have no power to provide, by reinstatement or otherwise, for the return or reentry of said employee into the City service except as a new employee who is employed in accordance with the regular employment practices of the City in effect for the particular position of employment."

⁴The Meyers-Milias-Brown Act [hereinafter MMBA] applies to all local government employees in California. It provides for negotiation ("meet and confer") and mediation but not fact-finding or binding arbitration. (Gov. Code, §§ 3505 and 3505.2.)

⁵The meaning of the scope of bargaining language in the Vallejo charter does not differ from the meaning of such language in the MMBA because of the existence of dispute resolution provisions in the charter not present in the MMBA. The essential difference between the bargaining rights afforded Vallejo employees and those afforded local government employees in general under the MMBA relates only to the remedies available when negotiation breaks down and not to the scope of negotiation required.

The charter provides that "[i]t shall be the right of City employees . . . to negotiate on matters of wages, hours and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity. . . ." (Emphasis added.) If no agreement is reached on these matters, they must be submitted to mediation, then fact-finding, then arbitration. The matters which are submitted to the three levels of dispute resolution are those upon which the parties negotiate but do not reach agreement. There is nothing in either section 809 or 810 which can be interpreted to exclude any matters which are subject to negotiation from subsequent submission to mediation, fact-finding and arbitration. Therefore interpretation of the scope of negotiation under the Vallejo charter is necessarily an interpretation of the scope of arbitration.

⁶California authorities establish that after an arbitration decision has been rendered, judicial review is available to determine whether the arbitrators have exceeded their powers. (See, e.g., *Morris v. Zuckerman* (1968) 69 Cal.2d 686, 691; *National Indemnity Co. v. Superior Court* (1972) 27 Cal.App. 3d 345, 349; *Firestone Tire & Rubber Co. v. United Rubber Workers* (1959) 168 Cal.App.2d 444, 449; *Flores v. Borman* (1955) 130 Cal.App.2d 282, 287; *Drake v. Steen* (1953) 116 Cal. App.2d 779, 785.)

⁷The NLRA provides that "to bargain collectively is . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." (29 U.S.C. 158(d)).

⁸Thus federal cases have held an employer need not bargain about a decision to shut down one of its plants for economic reasons (*N.L.R.B. v. Royal Plating & Polishing Co.* (3d Cir. 1965) 350 F.2d 191), nor about a decision based on economic considerations alone to terminate its business and reinvest its capital in a different enterprise in another location as a minority partner (*N.L.R.B. v. Transmarine Navigation Corp.* (9th Cir. 1967) 380 F.2d 933). Furthermore, a decision to relocate the employer's plant to another location for economic reasons has been held "clearly within the realm of managerial discretion" and not subject to bargaining on the union's demand (*N.L.R.B. v. Rapid Bindery, Inc.* (2d Cir. 1961) 293 F.2d 170, 176).

⁹See generally Shaw & Clark, *Practical Differences Between Public & Private Sector Collective Bargaining* (1972) 19 U.C. L.A.L.Rev. 867; Wellington & Winter, *The Limits of Collective Bargaining in Public Employment* (1969) 78 Yale L.J. 1107; Report of the Western Assembly on Collective

Bargaining in American Government (1972) pp. 4-5; *Project: Collective Bargaining and Politics in Public Employment* (1972) 19 U.C.L.A.L.Rev. 887.

¹⁰The Assembly Advisory Council on Public Employee Relations reached the same conclusion after studying arguments of alleged differences between the public and private sectors. (Final Rep., p. 139, March 15, 1973.) Furthermore, we applied private sector precedent in interpreting another aspect of the MMBA in *Social Workers' Union, Local 535 v. Alameda Welfare Dept.* (1974) 11 Cal. 3d 382.

¹¹In the private sector employees rarely seek higher "manning" levels but instead usually frame similar demands in terms of reducing "workload." In one case, however, a union did phrase its proposal in "manning" terms, demanding an increase in the number of employees assigned to operate a specific 10-inch mill. The National Labor Relations Board found the proposal to constitute a mandatory subject of bargaining. (*Timken Roller Bearing Co.* (1946) 70 N.L.R.B. 500, 504-505, revd. on other grounds /6th Cir. 1947) 161 F.2d 949.)

¹²The city argues that the *Los Angeles County Employees* case is distinguishable from the instant matter because it only concerned the "negotiability" of the caseload issue and not its "arbitrability." As noted above (see fn. 5, *supra*), however, under the charter provision at issue in this case, the scope of negotiation and the scope of arbitration are identical.

¹³An amicus has contended that the disputed issues are not arbitrable because submission of them to arbitration constitutes an unconstitutional delegation of legislative power. Arbitration of public employment disputes has been held constitutional by state supreme courts in *State v. City of Laramie* (Wyo. 1968) 437 P.2d 295 and *City of Warwick v. Warwick Regular Firemen's Ass'n* (R.I. 1969) 106 R.I. 109, 256 A.2d 206.

To the extent that the arbitrators do not proceed beyond the provisions of the Vallejo charter there is no unlawful delegation of legislative power.

A Symposium on the Supreme Court's Vallejo Decision

By Joseph R. Grodin, Michael J. Arnold, Bill Bean, Bert Glennon, Jr., Richard A. Liebes, Daniel A. Terry, Richard E. Watson, Alan C. Davis, John M. Powers

The state Supreme Court's *Vallejo* decision has stimulated much controversy. But, more important, it has **had the healthy effect of focusing serious statewide attention** on some of the most important aspects of a labor relations system. There appears to be general agreement that our present laws governing employee relations in the public sector need to be changed. However, there is little agreement and much confusion over what sort of legal structure would be most desirable.

In *Vallejo* the Court, with reference to both the MMB Act and the city charter, held that issues which the city considered to be non-negotiable were negotiable and arbitrable (with some limitations); it relied heavily on private sector precedent; it took a restrictive view of the scope of management rights. In so doing, it dealt directly or indirectly with four very closely linked questions which are of critical importance, particularly at a time when we are engaged in the process of attempting to revise our laws. How should the scope of bargaining be defined? Should management rights be defined; if so, how? What is the extent of the "public interest" in public sector bargaining and how should this interest be taken into account or represented? Is interest arbitration an appropriate method of resolving impasses?

Because of the interest in *Vallejo* and its implications, *CPER* decided to publish the following symposium. The principal attorneys involved in the case, John Powers and Alan Davis, kindly agreed to respond to the letters received. (The complete Supreme Court decision was reprinted in *CPER* No. 23; *Fire Fighters Union, Local 1186, IAFF, AFL-CIO, v. City of Vallejo* (1974), 12 Cal. 3d. 608.) —B.V.H.S.

From Joseph R. Grodin, Professor of Law at the University of California, Hastings College of the Law:

The precise question in the *City of Vallejo* case was whether the city was required by its charter to submit certain unresolved negotiating issues to arbitration, as against the city's contention that the issues were not arbitrable. Since provision for arbitration of interest disputes in California is rare, the court's affirmative answer to that narrow question is not likely to have immediate, widespread significance. As all of the following papers recognize, however, the court in the process of answering that question decided, or at least commented upon, a number of other substantial issues as well, including the extent to which private sector precedents may apply in interpreting provisions of a public sector labor relations statute; the meaning of the scope of bargaining language in the Meyers-Milias-Brown Act as applied to the issues in dispute; the status of supervisors under that statute; the constitutionality of arbitrating

interest disputes in the public sector; and the proper relationship of courts to the public sector arbitral process. Each of the papers undertakes to assess the significance of, and from differing perspectives to evaluate, the court's response with respect to one or more of these issues.

I would like to focus upon certain aspects of the decision as they relate to the probability that California will have new, perhaps strikingly different, public sector labor legislation in the near future.

First, the court has put the legislature on notice that to the extent a public sector labor relations statute borrows language from a private sector statute, that language is likely to be interpreted in light of private sector administrative and judicial precedents. This is not to say that there are no significant differences between the two sectors, nor that such differences may never be taken into account in interpreting statutory language, but only that when the legislature plucks out from the NLRA a term which has developed an historical meaning in that

context courts are likely to assume the legislature was aware of that meaning and intended it to carry over. This has bearing upon a number of the provisions of S.B. 275, for example.

Second, the court went out of its way to place its imprimatur on the constitutionality of public sector interest arbitration in such a manner as to leave little doubt as to its collective opinion on that question. The implication for the validity of legislation (such as that proposed in S.B. 275) which would accord finality to the decision of a neutral (whether the neutral be called an arbitrator or a factfinder) is obvious.

Third, the court expressed strong disinclination to entertain claims of non-arbitrability before arbitration has taken place. Viewing the scope of arbitration under Vallejo's charter as being congruent with the charter's (and the statute's) definition of the scope of bargaining, the court held certain issues (the schedule of hours and matters of seniority and reinstatement in connection with personnel reduction) to be arbitrable without qualification; one issue (vacancies and promotions) to be arbitrable subject to the arbitrator's determination as to the supervisory status of a classification in dispute; and the remaining key issues (manning and the right to bargain over personnel reduction) to be arbitrable insofar as those issues affect working conditions and safety of employees.

What is significant is that the court declined to determine in advance whether the union's proposals with respect to these key issues did or did not affect working conditions and safety to an extent sufficient to bring them within the scope of mandatory bargaining and therefore arbitration. Rather, it left that determination initially to the arbitrator for two stated reasons: one, because the determination involved questions of fact which could best be ascertained in the arbitral hearing; and two, because during the process of arbitration the arbitrator or the parties themselves might suggest alternative solutions which would remove or transform the issue. "These are the elements and considerations that argue against preliminary court rulings that would dam up the stream of arbitration by premature limitations upon the process, thwarting its potential destination of the resolution of the issues."

In view of the court's quotation from my own previously expressed views in the matter it will come as no surprise that I find this aspect of the opinion

particularly persuasive. What is important in terms of future legislation, I think, is that the policy considerations which the court articulated are applicable equally if not more forcefully to other forms of interest dispute resolution, including factfinding and mediation. That is to say, if a statute mandates mediation and/or factfinding, as S.B. 275 would do, then a court following *City of Vallejo* can be expected to balk at entertaining defenses to those procedures based upon the alleged non-bargainability of particular issues in dispute.

Fourth, the court made clear that *after* arbitration has taken place the courts would be available to hear any claim that the arbitrators exceeded their powers. This is consonant with the normal principles of judicial review of arbitration awards. I would suggest, however, that different considerations are involved in determining whether an arbitrator has exceeded his statutory jurisdiction than in determining whether he has exceeded the jurisdiction accorded him by contract. In the latter case the parties have bargained for the arbitrator's decision, and it is appropriate to allow the arbitrator broad discretion in interpreting the parameters of his own authority. Normally no public policy is involved in any particular interpretation. When it comes to legislatively compelled arbitration of public sector interest disputes (or, what amounts to the same thing, provision for converting the recommendations of a factfinder into a binding award, as in S.B. 275), the statutory definition of jurisdiction may reflect important policy judgments as to the appropriate balance between matters subject to the arbitral process and those subject to the normal political process. While the arbitrator's decision as to factual matters should be accorded great if not conclusive weight, his interpretation of the statute should be entitled to little if any weight in post-arbitral review. Review based upon the arbitrator's application of statutory criteria (in wage determination, for example) is another matter; here it is appropriate to allow the arbitrator broad discretion in applying the criteria so long as he takes them into critical account.

Finally, I come to the perennial issue of the scope of bargaining, and here my observations go beyond both the decision and the proposed statute. I think it is important to acknowledge that there are difficult problems in the public sector arising out of the impact of collective bargaining on the political process. For one thing, defining the scope of bargaining in a context in which the decision of a neutral may

is contained in a footnote at page 622, where the Court states as follows:

"An amicus has contended that the disputed issues are not arbitrable because submission of them to arbitration constitutes an unconstitutional delegation of legislative power. Arbitration of public employment disputes has been held constitutional by state supreme courts in *State v. City of Laramie*, (Wyo. 1968) 437 P. 2d 295 and *City of Warwick v. Warwick Regular Firemens' Association*, (R.I. 1969) 106 R.I. 109, 256 A.2d 206.

"To the extent that the arbitrators do not proceed beyond the provisions of the Vallejo Charter, there is no unlawful delegation of legislative power." (12 C.3d 608, 622)

We feel that this is a clear indication by the State Supreme Court that, if and when the State Legislature sees fit to pass legislation mandating binding arbitration as the ultimate impasse resolution procedure for disputes between public entities and their safety officers, the Court will uphold the constitutionality of carefully drawn law in that regard.

Secondly, we think the fact that the Court went out of its way to point out that the decision not only would affect interpretation of the Vallejo City Charter, but was also intended to clear up questions regarding the Meyers-Milias-Brown Act is extremely important. The Court, had it so desired, could have narrowly drawn the issues in the case and avoided any discussion of MMB questions, at least explicitly, thereby allowing the law to continue in its rather unsettled state.

Thirdly, we feel that the Court's reaffirmation of its past practice of referring to decisions under the National Labor Relations Act, over the objections of the City, is extremely important. There is a large body of law established under the NLRA upon which practitioners may now draw in their resolving disputes: this strong statement by the Court reaffirming the value of NLRA precedents will hopefully put to rest the constant statement by City Fathers that the vast differences between public and private employment vitiates the applicability of private sector precedents.

As far as the particular issues discussed in the case, the "Constant Manning Procedure" is probably the one which will have the greatest impact upon law enforcement. Work load and safety issues are extremely important to the working peace officer, and the issue often arises in areas which uniquely deal with the manner in which police protective services are performed. Two man patrol cars and departmental shooting policies, for example, are

issues which Police Associations have traditionally tried to negotiate upon, usually to no avail as the cities constantly claim that the issues involve the organization of the service and the merits and necessity of the department, and are therefore excluded from the scope of representation.

The portion of the opinion dealing with "Vacancies and Promotions" supports the ongoing contention of peace officers that minimum standards for promotional positions, educational requirements, length of service, and other proposals for increase in the minimum qualifications for promotional positions should be negotiable. Police Associations have taken an acute interest in the past several years in raising educational standards within the department; cities have steadfastly rejected attempts to negotiate an increase in the minimum qualifications for, let us say, the position of sergeant or lieutenant, on the grounds that these issues are not negotiable. I think the Supreme Court laid that contention to rest in the Vallejo case.

Lastly, the Court's thoughtful discussion of the manner in which an arbitration works, and the procedures by which the arbitrator determines his own jurisdiction, is heartwarming to say the least. The Court, without explicitly so stating, has appeared to adopt the same approach it uses in uninsured motorist cases involving arbitration, wherein the mere existence of an arbitration agreement is held sufficient to put all questions to the arbitrator, with the impartial third party allowed broad latitudes to determine his own jurisdiction. We have recently had the *Vallejo* case cited and relied upon by the Alameda County Superior Court in granting a Petition to Compel Arbitration of a discharge case involving the Berkeley Police Department, where the City claims that the Memorandum of Understanding between the Police Association and the City explicitly precluded arbitration of the issue. Judge Avakian of the Alameda County Superior Court, however, rejected the City's contention and ruled that he would leave it to the arbitrator to determine whether or not the grievance was in fact properly submitted to him. The Judge's entire reliance was solely upon the *Vallejo* case, and his decision was announced from the Bench.

There is only one explicitly disturbing portion of the case, and that deals with the Court's offhand assumption that the position of "Deputy Fire Chief", because it might be "supervisory", could be excluded from the representational unit. There is a great body of Superior Court law which has developed in California since 1969 which holds that peace officers,

under Government Code § 3508, and firefighters, under Labor Code §§ 1960-1963, have an absolute right to belong to, and be represented by an organization composed solely of either other peace officers or other firefighters, regardless of their ranks and regardless of the nature of their duties, be they supervisory, managerial, or otherwise. The Court's bland assumption that a "supervisory employee" is automatically excluded from representation under the Vallejo plan flies directly in the face of a ream of decisions on this particular subject and is disturbing to say the least. It may well be that the issue was never properly briefed or argued before the Court and that the Court simply made the assumption without seeking the views of the respective parties on the subject matter.

Finally, the general tenor of the entire decision (and the fact that it was unanimous, meaning that Justice Tobriner, who wrote the decision, was able to convince Justice Burke, former chief counsel for the League of California Cities, to accede to his views) is encouraging in the extreme. The actual utility of the decision, however, to jurisdictions which do not possess Vallejo's unique impasse resolution procedure is open to question. In those jurisdictions where the City Council retains the final decision (and this includes practically every city and county in the State of California, with the exception of Oakland for its police and fire departments, and Novato for its Fire Protection District, Vallejo, and the City and County of San Francisco for certain non-wage items), then the mere insurance that certain items are negotiable may lead to more frustrations on behalf of the employee organizations, who will discover once again that there is a world of difference between the *right* to negotiate and the *ability* to negotiate a *settlement*. Until such time as meaningful impasse resolution procedures are mandated by the Legislature, the actual benefits to be gleaned from the decision are more apparent than real.

From Bert Glennon, Jr., Deputy City Attorney,
City of Los Angeles:

In the case of *Firefighters Union, Local 1186, v. City of Vallejo* (1974), 12 Cal. 3d. 608, the Supreme Court of California addressed itself to

the threshold question of what role the Court should play in deciding the negotiability of issues where the additional ingredient of binding arbitration has been added to the system of impasse resolution. Indeed, the provision for binding arbitration of interest disputes in the Vallejo City Charter is innovative. The trend, however, toward an amendment of current state legislation or a complete renovation of the entire system of employer-employee relations in California public sector employment is clear. To the extent binding arbitration is included in future legislation there is much guidance to be gained from the Court's decision in *Vallejo*.

Professor Joseph R. Grodin has noted that, in previous decisions, the courts have recognized the overlap in issues affecting public employees and their rights to meet and confer with the agency and basic policy decision-making prerogatives vested in the governing body. As Professor Grodin has stated:

The Court's observation that there is an inevitable overlap and interrelationship between decisions affecting wages, hours, and working conditions on one hand and decisions affecting the quality and nature of mandated public service on the other provides a pragmatic approach to the dilemma posed by the exclusionary language of Section 3504. It suggests, accurately, that subject matter which is of natural interest to both parties cannot realistically be divided into rigid categories based upon *either* the description of what is bargainable or the description of what is not. Rather, these two descriptions must be taken as representing policies which may in a particular situation conflict with one another. When they do, it is up to the tribunal to reconcile them, not on the basis of abstract preconditions of bargainable categories, but rather on the basis of the particular facts on a weighing of the interests involved. (In "California Public Employee Bargaining Revisited: The MMB Act in the Appellate Courts," *CPER* No. 21, June 1974; the quote refers to *Los Angeles County Employees Association, Local 660, v. County of Los Angeles*, 33 Cal. App. 3d 1, 108 Cal. Rptr. 625 [1973]; the latter decision is reprinted in *CPER* No. 18.)

Where, as in the case of the City of Vallejo, the process of arbitration is present as part of the impasse resolution procedures, the Supreme Court indicated a reluctance to determine in advance whether specific matters are mandatory subjects for the meet and confer process. The Court, in its initial statement in the case, said:

As we shall explain, our attempt now to define the issues of arbitration so that they assume the shape of rigid categories would be to reach premature judgments without benefit of the factual foundations of an arbitral record and to impede the arbitration process itself.

Thus, absent specific legislative guidance, the Court

will exercise judicial restraint and look to the arbitral record. There is wisdom in this approach.

On the other hand, arbitration is the *terminal* stage of the process usually preceded by negotiations over a significant period, mediation and/or fact-finding. It is apparent that one must view cautiously the implication in the Court of Appeal decision in *Los Angeles County Employees Association v. County of Los Angeles*, supra, that the duty to "negotiate in good faith" imposes no real restraints on "governmental functions," and that there really is not any great harm in requiring "discussions" or "consultations" with employee organizations even on matters that lie within those areas defined by the legislature as "merits, necessity, or organization of any service."

The hard fact is that once a matter is determined to constitute a *mandatory* subject for such "good faith negotiations," the process is much more than simply sitting down for a cursory conversation with representatives of the affected employee organizations.

In fact, the whole nature of the decision-making process is then transferred to the now well-established, institutionalized process of "good faith negotiations" — structured bilateral negotiations, frequently lasting through numerous sessions; impasse resolution procedures if necessary, including mediation by an impartial third-party professional mediator and/or fact-finding conducted in a rather formalistic setting; and, ultimately, if agreement is reached or a compromise worked out, the reduction of that agreement to a written memorandum of understanding or written agreement. Further, as in the case of the *City of Vallejo*, once the question is transferred to the formal negotiation course, the end result is an agreement either agreed to by the parties or imposed by a third-party arbitrator, but with no further action left to the legislative body.

The most dramatic effect, of course, of the determination by an arbitrator or a court that a matter is a *mandatory* subject of "good faith negotiations," is to transfer the actual decision-making process out of the open legislative chambers of the governing body, and place it behind the closed doors of the bilateral negotiating arena. If agreement is ultimately reached, it is presumed, of course, consonant with the obligation of "good faith" in the negotiations, that the governing body has authorized its negotiator to make the commitments or agreements reached and

hence little decision making is left to be carried out in the public forum of the governing body.

Implicit in the Supreme Court's decision is the passing of the gauntlet to the legislature to determine whether the legislature itself, through specific "management rights" clauses in the legislation or professional arbitrators through the arbitral record, will in the future determine which matters are to remain in the public forum of representative government and which are to be made subject to the bilateral negotiation process. There are persuasive arguments for both positions.

The question was squarely addressed by Mr. Jay F. Atwood in his article included in the "Symposium on the Scope of Bargaining Problem," *CPER* No. 16 (1973), wherein he pointed out:

This pressure, it seems to me, raises a very fundamental question which bears on our representative form of government. Are such matters as these merely "management prerogatives" in the conventional industrial relations sense or are they actually public policy matters which should be reserved to the political decision making process?

In similar fashion, Professors Harry H. Wellington and Ralph K. Winter of Yale University have pointed out:

... one problem raised by public employee unionism is how to resolve issues which arise at the bargaining table but are also controversial political matters. This problem is difficult because it threatens to distort the political process and sometimes crops up in ways which place considerable stress on society — witness the New York decentralization dispute. Harry H. Wellington and Ralph K. Winter, Jr., "Structuring Collective Bargaining in the Public Sector," 79 *Yale Law Journal* 852 (1970).

One need only look to the recent newspapers chronologizing the economic hardships and layoffs of public employees in New York and elsewhere to realize the nature of the problem has not changed. The estimates by economists indicating a future softening of the economy in 1975-1976 makes forthcoming legislative decisions at the state level all the more critical.

The message of *Vallejo* is clear on this point. Absent specific legislative guidance, the Court will not determine the negotiability of specific issues where the arbitration process is present. How much of the decision-making process is to remain in the representative public forum may well be determined by this legislature when it views pending measures in

light of the *Vallejo* decision and the Court's view of the arbitration process.

From **Richard A. Liebes**, Research Director, Bay District Joint Council of Service Employees, SEIU-AFL-CIO:

The unanimous California Supreme Court decision in the Vallejo firemen's dispute not only settles the extended controversy in that city; it hopefully puts to rest a debate that has occupied participants in numerous forums around the state.

The clear word from the Court is that private sector precedents are the compelling determinants in public employment as well. Each of the specific bargaining proposals was disposed of on the basis of what the NLRB and the courts have done in similar industrial disputes.

Using *Vallejo* as a beacon to shed light upon the disposition of future public sector disputes in California, parties will be well-advised to search out more private industry patterns. It is not likely that anyone can shield himself in the future behind an assumption that differences in the public sector will be given controlling significance.

It is particularly interesting on this score to note the Court's remarks about supervisors. While Meyers-Milias-Brown imposes no restrictions upon supervisors' representation rights, and while supervisors are frequently included in public agency bargaining units, the Court here does not even refer to this. It simply finds that supervisors "are routinely excluded from the bargaining units under the National Labor Relations Act"; and "by analogy, we conclude that . . . the union can claim no right to bargain as to supervisory positions" (emphasis supplied). This rather cursory and incidental handling of an issue that has been the subject of so much argument in California public employee relations (see for example *CPER* No. 8) suggests that the Supreme Court from here on will look primarily to established labor policy as incorporated in NLRB and court precedents rather than to any factors that might distinguish the public sector as a separate and unique creature.

From **Daniel A. Terry**, President, Federated Fire Fighters of California, AFL-CIO:

On October 2, 1974, the California Supreme Court handed down what the fire fighters feel to be one of the most important decisions affecting public employees since the inception of the Meyers-Milias-Brown Act.

In the case involving the Vallejo Fire Fighters Local Union No. 1186 v. the City of Vallejo, the union was seeking a writ of mandate to compel the city to submit four (4) issues to arbitration, namely: Reduction of Personnel, Vacancies and Promotions, Schedule of Hours, and Constant Manning Procedures. The city contended that those issues were management prerogatives and therefore not subject to arbitration. A legacy was left to the public employees in California when the Court, in attempting to determine the scope of bargaining under the Vallejo City Charter, reached over and interpreted the analogous provisions of the Meyers-Milias-Brown Act and related both the Vallejo City Charter and the MMB Act to the National Labor Relations Act. The Court said, "The scope of bargaining provision in the Vallejo City Charter in large measure parallels that set out in the Meyers-Milias-Brown Act...Therefore, interpretation of the scope of bargaining language in the Vallejo charter necessarily bears upon the meaning of the same language in the Meyers-Milias-Brown Act... We note that the phrase 'wages, hours and other terms and conditions of employment' in the MMBA was taken directly from the National Labor Relations Act... The Vallejo charter only slightly changed the phrasing to 'wages, hours and working conditions.' "

The Court came to the rescue of the public employees by confirming what we have always contended by noting that "Apparently the Legislature included the limiting language not to restrict bargaining on matters directly affecting employees' legitimate interests in wages, hours and working conditions but rather to forestall any expansion of the language of 'wages, hours and working conditions' to include more general managerial policy decisions. Although the NLRA does not contain specific wording comparable to the 'merits, necessity or organization' terminology in the ...state act, the underlying fear that generated this language - that is, that

wages, hours and working conditions could be expanded beyond reasonable boundaries to deprive an employer of his legitimate management prerogatives — lies imbedded in the federal precedents under the NLRA.”

The Court carefully noted that there are definitely management prerogatives that are not bargainable but that the NLRA case law more than adequately delineates those prerogatives and emphasized their point by noting that, “Thus, because the federal decisions effectively reflect the same interests as those that prompted the inclusion of the ‘merits, necessity or organization’ bargaining limitation in the charter provision and state act, the federal precedents provide reliable if analogous authority on the issue.”

The Court acknowledged the City of Vallejo's allegations that there was a difference between employer-employee relations in the public and private sectors. However, the Court remained firm in its position that the differences were not significant when placed against the overriding purpose of the Meyers-Milias-Brown Act, namely, to provide peace and harmony, by observing that, "Although we recognize that there are certain basic differences between employment in the public and private sectors, the adoption of legislation providing for public employment negotiation on wages, hours and working conditions just as in the private sector demonstrates that the Legislature found public sector and private sector employment relations sufficiently similar to warrant similar bargaining provisions. We therefore conclude that the bargaining requirements of the NLRA and cases interpreting them may properly be referred to for such enlightenment as they may render in our interpretation of the scope of bargaining under the Vallejo charter."

The Court ruled in favor of the Union by directing the Superior Court to issue a Writ of Mandamus requiring the City of Vallejo to proceed to arbitrate the issues in dispute in accordance with its opinion, not because the Court determined the issues to be exclusive of management prerogatives but rather to avoid making premature judgments without the benefit of the factual foundations of an arbitral record. The Court chose to “leave to the arbitrators the moulding and resolution of the issues, subject to the proviso that neither party may be bound by a decision in excess of the arbitrators’ jurisdiction.”

In my opinion, the Court has done an admirable

job of preserving the delicate collective bargaining environment in which public sector labor relations can continue to develop into a viable process benefiting not only labor and management, but the public as well.

From **Richard E. Watson**, Executive Director,
County Supervisors Association of California:

On October 2, 1974, the Supreme Court of the State of California filed its decision in the case of the Firefighters Union, Local 1186, International Association of Firefighters, AFL-CIO, v. City of Vallejo.

The Court was asked to reconcile clauses in a city charter with substantive overlap. The provision granted city employees the right to negotiate on “wages, hours and working conditions” but withheld that right on matters involving the “merits, necessity or organization of any governmental service.”

However, the decision of the Court also determined the meaning and intent of the state Meyers-Milias-Brown Act, which applies to all local government employees in California, because the language of that Act on scope of negotiation largely parallels the language of the city charter. That Act (Govt. Code Section 3504) provided for negotiation on "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order."

Based on the exclusionary language, the City had sought to withhold four issues from arbitration (which was provided for in the city charter): "Personnel Reduction," "Vacancies and Promotions," "Schedule of Hours," and "Constant Manning Procedure." In this respect the city was not unlike many local agencies which declined to negotiate specific issues, claiming that such issues were "management rights" which were *prima facie* outside the scope of negotiations.

The unanimous Court decision requires the City

of Vallejo to proceed to arbitration of all four issues. The decision on these four issues, with its applicability to the scope of negotiations in all California local public agencies, has far-reaching ramifications not only on the art of labor relations as it exists today, but also as it will exist under the new state public collective bargaining legislation anticipated soon.

Immediate impact at the local level is that many issues, long withheld from negotiation by management, will automatically be subject to discussion at future bargaining sessions.

Immediate impact of the decision for state legislation is that the court definition of "wages, hours and working conditions" will carry over to any similar language adopted in future statutes.

As major as the decision may be for these four issues and for the many other issues which will now be subject to negotiation, it is perhaps even more significant in its delineation of the Court's attitudes and predispositions on public labor relations. Five points stand out in the decision as major indicators.

The first of these is the Court's heavy reliance on experience and precedent in private sector labor relations. The Court said that "...the adoption of legislation providing for public employment negotiation on wages, hours and working conditions just as in the private sector demonstrates that the Legislature found public sector and private sector employment relations sufficiently similar to warrant similar bargaining provisions" and therefore concluded that "...the bargaining requirements of the National Labor Relations Act and cases interpreting them may properly be referred to..." About the exclusionary language in the Meyers-Milias-Brown Act, the Court said that although the NLRA did not contain similar wording, the "underlying fear" that generated the exclusionary language "...lies imbedded in the federal precedents under the NLRA."

The Court thereby gives sweeping applicability of federal law and its interpretations to state public sector labor relations law. The Court says it recognizes "that there are certain basic differences between employment in the public and private sectors..." but fails to specify those differences and does not further address the differences in addressing the four issues.

Arguments that the unique nature of public employment especially affects the critical area of "scope

of negotiations" and calls for a different definition of "scope" are thereby disposed by the Court. On the one hand we shall probably see many issues on "working conditions" go to the bargaining table that have previously been withheld by management behind the shield of "public policy," while on the other hand we shall probably see many public policy issues negotiated and decided exclusively by public employees.

The second indicator of Court disposition is the reluctance, if not total aversion, to court definition of scope prior to arbitration. As the Court explains in its opening paragraph "...our attempt now to define the issues of arbitration so that they assume the shape of rigid categories would be to reach premature judgments without benefit of the factual foundations of an arbitral record and to impede the arbitration process itself." The Court goes on to affirm its faith in the dynamics of arbitration.

The Court does, however, cite its role after the arbitration award in rejecting any such award that exceeds the arbitrator's authority, i.e., that invades the local agency's authority over "merits, necessity or organization of any service or activity provided by law or executive order."

The effect of this explanation is to turn over the decision of what is public policy versus what are terms and conditions of employment to an arbitrator. The judiciary abdicates its predeterminate role. Nor is it consolation to local public agencies that the arbitrator's award may be subsequently rejected. Courts are very reluctant to review substantive decisions of arbitrators and state law very narrowly defines when such awards may be reviewed and rejected.

The third indicator lies in the Court's consideration of an issue brought up in an *amicus curiae* brief. The *amicus* contends that the four issues are not arbitrable because submission of them to arbitration is an unconstitutional delegation of legislative power. This contention is based on the state Constitutional requirement that the local elected body must determine the requirements of its agency's personnel. Under compulsory and binding arbitration, it is the arbitrator who sets these conditions.

The Court disposes of this issue in a footnote, citing State Supreme Court decisions concerning two relatively small cities in Wyoming and Rhode Island wherein arbitration of public employment disputes

had been held constitutional.

Whether this issue of unconstitutional delegation of power has been fully and ultimately resolved through the Court's "footnote" treatment is questionable. Perhaps the question will be moot if more local agencies find arbitration a useful and successful tool in resolving differences.

The fourth indicator of judicial direction is that the Court considers binding arbitration the *quid pro quo* for the strike prohibition. The Court reasoned that since the Vallejo charter provided for automatic termination of a striking employee, the employee's *quid pro quo* was "...the arbitrability of all disputes; ...the arbitration and no-strike provisions were interdependent."

Although the strike prohibition and the provision for binding arbitration often go hand in hand, and in general the two are considered trade-offs for one another, this is not necessarily the case. Arbitration has been provided for in some instances, most recently in Quebec, where the police-officers were dissatisfied with the arbitral award and went on strike. Further, the strike itself has been illegal in California but has repeatedly occurred. In short, when conditions demand, there is no substitute for concerted action.

Nonetheless, the Court consideration of the two as equals in impasse resolution will tend to support employees' demands to negotiate specific issues.

The fifth and final indicator of Court direction lies in its avoidance of the crux of the whole matter. Due to previous union acceptance of a factfinding recommendation, the Court said, "Hence, we do not face the problem of whether the construction of a new fire house and the purchase of new equipment would intrude upon managerial prerogatives of policy making."

This very problem typifies the difficulties ahead in public labor relations. The scope of negotiations in public agencies, no matter how it may be defined in future legislation, must yet be given form.

We should not anticipate that a clear-cut definition of scope will emerge from the Legislature, from a State Public Employee Relations Board, or from some future sweeping Court edict.

We can anticipate, however, an anguished emergence of such a definition from those sources over time — case by case, issue by issue, year by year — as public employees and public management in Cali-

fornia advance down the road of public labor relations.

THE INVOLVED ATTORNEYS RESPOND

From Alan C. Davis, Attorney for IAFF Local 1186, Davis, Cowell & Bowe, San Francisco:

Now that the rather unholy concept of a public employer's "management prerogatives" has been judicially divested of reverence, it is time for employer and employee organizations to seriously pursue the tools given us by the Supreme Court in Vallejo. Rather than revisit Vallejo, it is far more useful to examine what Vallejo has done for the future of collective bargaining in public employment. Having said that, a couple of reflections are necessary nevertheless.

First, with respect to the absurd phrase "merits, necessity, or organization of any service or activity...." That language displayed the total lack of understanding the framers of the Meyers-Milias-Brown Act had for collective bargaining. Judicial decisions had long established perimeters of bargaining within Meyers-Milias-Brown's "wages, hours, and other terms and conditions of employment" language. For those who know the National Labor Relations Act, those were words of limitation on an employer's bargaining responsibility. Neither "merits," nor "necessity," nor "organization of any service" by the very definition could add more of a bargaining limitation than had been imposed nearly forty years before by Federal law.

Secondly, the "quid pro quo" concept discussed by the Supreme Court is far more fundamental to the Court's decision than is presently understood. By *charter* the Vallejo City Council could *not* reinstate striking employees even if it chose to do so in order to settle a strike. Therefore, arbitration had to be invested with substance in those areas inextricably tied to a firefighter's conditions of employment if it was going to work at all.

"Manning" indisputably was an issue fundamentally interwoven with firefighters' conditions of employment.

In *Boy's Market, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, the United States Supreme Court established the concept of quid pro quo vis-a-vis arbitration and the right to strike. In so doing, the court went a long way in ensuring the viability of arbitration in the private sector. The California Supreme Court, equally concerned with the effectiveness of arbitration, cited *Boy's Market* and adopted the quid pro quo as a fundamental principle in public employer-employee arbitration.

Third, this writer agrees that the California Supreme Court erred in its discussion of the "Deputy Fire Chief" issue. First of all, a Deputy Fire Chief's classification had *never* been established in Vallejo. The classification dispute involved the Assistant Fire Chief, not a proposed Deputy Fire Chief classification.

However, as with the discussion of the "constitutionality" of arbitration — not an issue in Vallejo — the Court has lit a clear signal as to how it will rule when a classification issue ultimately reaches the Court. While Meyers-Miliars-Brown speaks of "managerial" employees — not supervisors — as excludable from bargaining rights, the Court is defining public employers' bargaining responsibilities on unit issues to include those employees for whom bargaining responsibilities are required under Federal law.

As it was a "non-issue," no damage was done in Vallejo. What the decision has accomplished is in the legislative arena in drawing the attention of all those involved in the development of a collective bargaining law to an issue with facets critically distinct from those in private industry. Any legislative conclusion must include bargaining rights for supervisory employees, as that term has been understood in private industry, for collective bargaining to be effective.

Artificial distinctions between classes of private employers would actually remove historically enjoyed de facto bargaining rights. Even in private industry permissive collective bargaining rights for supervisors exist either because they have historically existed¹ or because the inherent realities of the situation make it far more efficient to include the supervisors under the terms of a collective bargaining agreement.

We need, therefore, a State law which permits, and does not legislatively prohibit, bargaining rights for supervisors. Whether they are ultimately included in a unit together with other employees or

bargained with separately is a determination for the parties themselves, if they can agree, or for the state agency invested with the responsibility for making such decisions.

A former governor has recently been reminding us of the long existent fiction that public employees have job security benefits not enjoyed in the private sector, and that because of these guarantees public employees should not have collective bargaining rights. Aside from the obvious errors in logic, it was interesting to note a comment one of the other writers makes in this symposium about public employee layoffs in New York.

Like a broken record the argument is nevertheless repeated, though there is no job protection from layoffs; though promotional examinations with the attendant process of oral interviews remains one of the grossest systems of favoritism yet devised; and, finally, though there is no qualified impartial method of protesting discipline, discharge, or arbitrary treatment by an employer other than resort to the courts. Civil service systems with members who are qualified and impartial are rare indeed. Merit system grievance procedures are jokes and grievance arbitration where it is found exists by virtue of collective bargaining.

Rather than causing increased uncertainty, the California Supreme Court has stabilized public employer-employee negotiations as a result of the *Vallejo* decision. The door is by no means wide open to negotiations on any conceivable topic. Those topics that are reasonably related to an employee's working conditions will be covered, and the practitioner may look no further than *Fiberboard Paper Products v. NLRB* (1964) 379 U.S. 203, for comparative federal examples, or the recent California cases of *Los Angeles County Employees Assn., Local 660 v. County of Los Angeles* (1973) 33 C.A. 3d 1, and *Dublin Professional Fire Fighters Local 1885 v. Valley Community Services District, et al.* (1 Civil 35137) (February 6, 1975) — C.A.3d —. The *Los Angeles* case involved casework levels for social workers, and the *Dublin Fire Fighters* case involved unilateral assignment of overtime work to volunteer firefighters. Neither case implies, as an example, that firefighters have the right to bargain over such subjects as the need for an additional firehouse.

One additional problem relating to expediting the arbitration process will probably be remedied by an amendment to the California Civil Code of Procedure by the adoption of S.B. 275. Last year, A.B.

3666 (Dunlap), which amended the California Code of Civil Procedure to include all public employee arbitration charter provisions, ordinances, or resolutions, passed both houses and was vetoed by the Governor. S.B. 275 will accomplish the same goal and ensure stability to the arbitration process by prohibiting appeals until after an arbitration award. The problem exists not where there are arbitration agreements. The arbitration hearings in such circumstances have been expedited by Superior Court orders in several areas. The difficulty is with charter provisions, ordinances, or resolutions that do not specifically result from an agreement with an employee organization. The express terms of the California Arbitration Act do not here apply, and thus the statutory amendments have been required.

In conclusion, it appears to this writer that the future of collective bargaining has been enhanced for public employer and employee organization alike as a result of the *Vallejo* decision. *Vallejo's* impact will continue under any new collective bargaining law and operate as a cornerstone for a public employer's bargaining responsibilities.

¹ In the hotel industry in San Francisco and many other cities, executive chefs — who have full power to hire, fire, and discipline employees — have enjoyed collective bargaining rights under the same contract, *in the same unit* as other employees, for decades. No National Labor Relations Board decision has ever issued.

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From John M. Powers, City Attorney, Vallejo:

It is important to be mindful that the core issue of the *Vallejo* litigation revolved around what matters properly come within the terminology "wages, hours and working conditions", and which fall within the exclusionary language "the merits, necessity, or organization of any service or activity provided by law" reserved for management's sole determination. Because the dispute arose under City Charter provisions creating a labor impasse mechanism that requires binding arbitration as a final step for resolving the impasse, the Court had the opportunity to express itself on the use of arbitration in public sec-

tor employer-employee relations. The timing was quite opportune in view of the fact that this topic is currently the subject of much debate as the Legislature considers bills such as A.B. 119 and S.B. 275.

The main thrust of the City's argument in the litigation was that there are policy decisions which are basic to the governmental enterprise that can not or certainly should not as a matter of sound public policy be committed to resolution in bilateral labor negotiations. To do so would most assuredly dilute representative government. Elected representatives would no longer weigh and decide policy matters based on their own judgment of the public good, but rather policy as well as its impact upon working conditions, if any, would be determined by public employer and employee representatives most likely in private sessions who would then offer their agreement to the elected representatives for approval. This approach seems clearly at odds with the American system of government which calls for all segments of the community that have an interest in the matter to be heard, and their views considered and possibly acted upon in a favorable manner without being preconditioned by collective negotiations. The situation becomes especially acute when binding arbitration is introduced into the process because the decision is delegated to a private individual who isn't required to answer to the public for his decision.

As was noted by Presiding Justice Draper in his opinion for the Court of Appeal, although the Union nowhere directly asserted flatly that the exclusionary language was to be given no effect, that was the ultimate effect of its contention. The Trial Court had apparently accepted the Union's contention that any proposal it placed on the bargaining table had to be negotiated, and there would be no distinction or refinement separating out those elements of the proposal that involved more general managerial policy decisions, from those directly affecting employees' legitimate interests in wages, hours and working conditions. Fortunately, neither the Court of Appeal nor the Supreme Court would accept this contention.

The Supreme Court in its opinion very clearly acknowledged the distinction as it related to the crucial bargaining proposals on constant manning procedure and personnel reduction. With respect to the manning proposal, the Court made the following pertinent observation:

"If the relevant evidence demonstrates that the Union's manpower proposal is indeed directed to



the question of maintaining a particular standard of fire prevention within the community, the City's objection would be well taken." P. 619 of 12 C3d.

Again, with respect to the personnel reduction proposal, the Court stated:

"A reduction of the entire fire fighting force based on the City's decision that as a matter of policy of fire prevention the force was too large would not be arbitrable in that it is an issue involving the organization of the service." P. 621 of 12 C3d.

This was the point we were trying to get the Court to recognize, and I for one am quite pleased that it did. Using precedent established under the National Labor Relations Act was one means of reaching this result, and it is certainly understandable that the Court in trying to construe the two vague, seemingly overlapping statutory phrases (the exclusionary language being practically devoid of legislative history), would look to the body of federal law that had developed over a considerable period of time to resolve essentially the same kinds of problems, albeit for the private rather than the public sector.

By no means, in my opinion, does the Court's reliance upon federal precedent lay to rest all questions regarding scope of bargaining. Most perplexing is the question of the status of civil service and merit systems which by mandate of law have been assigned the task of protecting and preserving the integrity of public employment. Almost every decision made by a civil service commission or personnel board impacts in one way or another upon employee working conditions. Does this mean that these agencies are passe? Are they dead, or taking a thought from General MacArthur's famous speech to Congress "like old soldiers will they just fade away"? Indeed, many other duties and responsibilities which affect employee working conditions are specifically delegated to the public entity's governing body or its management by the constitution, or by statutory, charter, or ordinance provision. They direct a course of action which may or must be taken by the public entity. If the action impinges upon working conditions, however greatly or slightly, is it a proper subject of negotiations? It would seem that a legislative act could not be varied by negotiations. That seems incongruous. But does this factor preclude the employees from bargaining the effect or impact that implementing the particular law may have upon work-

ing conditions? There well may be no analogous precedent existing under the federal law, and it would seem in such instance that these questions will have to be answered by litigation on a case by case basis. Preferably the Legislature will clear the air.

There undoubtedly will be the very difficult problem for the factfinder or arbitrator who will be called upon to sift through the facts and argument made during the course of the factfinding or arbitration proceeding to determine whether a union or management proposal truly relates to policy, or rather directly relates to working conditions. It would seem that in many instances the issue will be anything but clear-cut. For instance, there appears to be a real blurring of where the line is to be drawn between negotiating the employee workload and safety aspects of the manning proposal, and yet not intruding into the City's prerogative to fix the level of fire service for the community. Under such circumstances, the answer forthcoming may well depend upon the factfinder's or arbitrator's personal philosophy and predilections about the matter. Hopefully, the experienced factfinder or arbitrator will be able to balance the competing interests, and resolve the dispute in a manner consistent with the Supreme Court's decision.

Although there may be public managers who visualize the Court's decision as disastrous, it would seem to me that such a view would have to be predicated on either shallow reasoning or basic ignorance of the labor relations process. After all, the kinds of clauses appearing in many, if not all labor agreements whether they be called a memorandum of understanding, labor contract, or otherwise, are the very same kinds of clauses that appear in private sector labor contracts. It really boils down to just how many and which clauses will be included. It seems a foregone conclusion that as public employees organize and gain bargaining strength, they will be demanding for one reason or another what they deem to be improved wages and working conditions. Obviously, to the full extent possible they will want these improved conditions guaranteed by contract. Common sense says that they as well as public employer negotiators will look to the private sector where this bargaining process has been evolving over some forty years. With the wealth of experience that can be drawn on from the private sector, the public sector will quickly catch up. As Mayor Pete Wilson of San Diego recently intimated, "There can be no doubt that California cities during the past 5-6



years have been engaged in collective bargaining with their employee representatives, although the process is called meeting and conferring." Without a legal right to apply economic pressure, or some viable alternative like binding arbitration, the effectiveness of the bargaining process from the employee's point of view has undoubtedly been limited.

The Court's decision has very definitely brought us out of no man's land, and will enable both union and management representatives to understand in large measure what the bargaining requirements are in California. This certainly is a great improvement over the condition of uncertainty that previously existed. The Court with the limited means available wisely struck a balance which enlightened leaders on both sides, I believe, know will result in a workable arrangement. Some matters still remain clouded, and they will be cleared either by legislative enactment or by the ponderous case by case litigation method.

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## TAB E

### DISPUTE RESOLUTION: GRIEVANCE SETTLEMENT, DISCIPLINE & DISCHARGE

Whether public employees are covered by a merit system or by a collective contract, conflicts may often arise involving the interpretation and application of the contract, the memorandum of understanding or civil service rules and regulations. That is, grievances will arise involving job-related problems.

Civil service systems and collective contracts usually establish various kinds of dispute resolution procedures for the settlement of grievances in a fair and consistent manner. The procedure generally defines who is responsible for taking action in a grievance; when such action can be taken; and the number of steps through which the complaint may be processed. The procedure usually is in the form of a written policy statement, and is known to all who are covered by it.<sup>1</sup>

#### Grievance Procedure in a Collective Bargaining Agreement

The grievance procedure established in a collective bargaining agreement generally consists of a series of steps, each taking the grievance to a higher level of the management and union hierarchy: (1) the employee takes the problem to his immediate supervisor, or he may choose to take it to his union representative and have the latter present it to the supervisor; (2) if the issue is not resolved, it is taken up at increasingly higher supervisory and managerial levels;

(3) if the grievance remains unresolved at the highest internal level, it is submitted to arbitration for final and binding decision by an impartial arbitrator. While the number of steps may vary from one contract to another, the pattern of appeals leading to arbitration is well-established as the preferred method of resolving grievances in the private sector and is now gaining increasing acceptance in the public sector.<sup>2</sup>

#### Grievance Procedure Under the Merit System

In the civil service, grievance settlement also may vary from one system to another, but again there is a basic pattern: (1) the employee first presents the grievance to his immediate supervisor; (2) if the matter is not resolved it is taken -- as under collective bargaining -- through higher steps of management; (3) a civil service commission or a board of appeals is designated to have final jurisdiction over the grievance.<sup>3</sup>

The negotiated grievance procedure is viewed as a continuation of the bargaining process. That is, the contract contains rules which must be applied and which, in cases of noncompliance, are interpreted through the grievance process. A grievance, particularly in the steps before arbitration, is considered a part of continuing negotiations.

Under civil service, the procedure is based on the concept of equal treatment and the employee's right to a fair hearing. Rather than

making the resolution of a complaint a part of the bargaining process, the employee presents his case and the commission or the board rules on its merits.

### Major Differences between Public and Private Sector

#### The Sovereignty Principle

A major difference in grievance settlement between the private and the public sector arises because of the so-called "sovereignty principle," according to which "government may not delegate its discretionary authority regarding its personnel, and that recognition and bargaining with unions constitutes such an illegal delegation."<sup>4</sup> That is, public employees are often viewed as owing their employer "extra loyalty" and therefore are not expected to negotiate separate grievance procedures. As Benjamin Aaron has observed: "...although not entirely dead, the sovereignty and 'extra loyalty' theories are certainly moribund."<sup>5</sup> While the sovereignty principle has led to advisory instead of binding arbitration in some instances, the trend in the public sector is definitely toward binding arbitration because of (1) the growing acceptance of collective bargaining; (2) the success of arbitration in the private sector; and (3) the numerous laws enacted at the state level which have mandated collective bargaining, some of which specifically permit the negotiation of binding grievance arbitration.<sup>6</sup>

Another difference between the merit system and collective bargaining is the way in which the grievance procedure is established. Under the merit system it is established unilaterally; that is, the Civil Service Commission or other relevant agency determines the procedure. The Commissioners may consult with the employee organization, but essentially the procedure is established unilaterally without major employee consultation.

The grievance procedure contained in a collective bargaining agreement, on the other hand, is the result of the same negotiations that determine wages, hours, and other conditions of employment. In other words, it has been established through the mutual consent of both parties to the agreement.

#### Representation of the Grievant

Under Civil Service, processing a grievance is usually an individual employee's concern, whereas under collective bargaining, a grievance becomes a union concern. The union processes the grievance to insure the employee's representation throughout the entire procedure at no additional cost. In some instances this process may politicize the grievance. Because the dispute pits the union rather than an individual employee against management, the stakes are higher, and more political pressure is likely to be present. This is particularly true in the public-sector because unions may pressure public officials as well as public management. Though political pressure is exerted infrequently, it exists as a potential weapon.<sup>7</sup>

In a collective bargaining setting the union not only has the right to represent grievances of its individual members, but under the collective agreement the union often has the right to submit grievances on its own behalf.

Though individual employees may benefit by union representation, there are also potential problems. In some cases, union-administered grievance procedures do not permit individuals to file their own grievances. Unions screen grievances because they are reluctant to spend time and money processing those which they deem to be without merit. Some unions have been accused of failing to properly represent members who are unpopular for one reason or another.<sup>8</sup>

Most public sector collective bargaining agreements allow the individual employee some leeway in filing a grievance if he feels he will not be fairly represented by the union. Nearly 80 percent of the public sector collective bargaining agreements, according to a study of the Bureau of Labor Statistics, allow the employee to process a grievance. However, fewer than 14 percent of these agreements permit the employee to select a non-union representative of his choice, and a union representative is generally entitled to be present at the hearing. The right of an employee to process his own grievance usually applies to all steps in the grievance procedure up to, but not including, arbitration. At this point the union generally has the right to decide whether to proceed to arbitration.<sup>9</sup>

Subject Areas

Traditionally, collective bargaining and civil service grievance procedures have covered different subject areas. A negotiated grievance generally covers employee-employer differences over wages, fringe benefits, and working conditions. Grievances arising under civil service rules may deal with problems regarding selection, appointment, promotions, discipline, discharges, or other personnel changes in the status of employees.

Even though collective bargaining procedures are wide-spread in the public sector, such matters as classification, promotion, discipline, and discharge covered by civil service rules are commonly excluded from the application of the negotiated grievance procedure. Grievances involving these subject areas are still processed through a civil service appeals system, but there is now some evidence that even "adverse action" cases are being increasingly decided in arbitration.<sup>10</sup>

Public sector employment gives rise to causes for disciplinary action which are not normally found in private sector employment. For example, in the public sector there may be restrictions on residency, political activity, moonlighting, or there may be situations of potential conflict of interest. Some of these restrictions may be affected by collective bargaining agreements, but statutory restrictions usually remain unchanged.



Ultimate Authority in Dispute Settlement

Under the merit system, the ultimate authority to decide a "rights" dispute rests with a Board or a Civil Service Commission. The Board is often perceived by employees as being management oriented. Under collective bargaining, the ultimate authority rests with an impartial arbitrator (or tripartite board) mutually selected by management and union. Whereas a Commission is ruling on its own rules and regulations, an arbitrator is, at least in theory, a disinterested party who had no part in establishing the rules or provisions of the agreement.

Many governmental agencies, even though they are not covered by a collective bargaining agreement, will not grant an outside party power to decide an internal dispute. The public agency cannot be required by an arbitrator to do anything beyond its mandated authority. Furthermore, the courts have been more disposed to declare public sector disputes non-arbitrable than they have private sector disputes. The courts have allowed public sector managers broader discretion and have upheld more management rights to regulate employment conditions.

### Common Elements in the Grievance Procedures

Although there are major differences between the procedures established under civil service systems and under a collective bargaining agreement, they also have elements in common. As noted earlier, both types of procedures rest on the concept of equal treatment of all grievants and of fair redress of grievances. Both kinds of procedures seek to resolve the problem at the lowest managerial or administrative level, and both kinds usually provide for the right to a fair hearing. In addition, there are many cases in which there is concurrent recourse to both kinds of procedures, and there are arrangements permitting the employee a choice between the negotiated procedure and the one established by the agency. However, a choice, once made, is final in almost all cases.<sup>11</sup>

### Impact and Trends of Negotiated Procedures

Studies have shown that the parties generally benefit from the establishment of a negotiated grievance procedure. For example, the cost to the grievant, who would have to hire private counsel in pursuing his grievance in the absence of a negotiated procedure, is greatly reduced. Employees may benefit further from improved industrial relations as management realizes the potential of increasing complaints.

Professor Aaron, in his paper "The Impact of Public Employment Grievance Settlement on the Labor Arbitration Process" summarized as follows the findings of a Bureau of Labor Statistics study on grievance and arbitration procedures in state and local agreements:

The most rapid and various development of grievance arbitration procedures in the public sector has, of course, taken place at the state, county, and municipal levels. As of September, 1975, some 28 states and the District of Columbia had included some form of grievance procedure in their statutes regulating public-employee labor relations.<sup>36</sup> These

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36. Not all of the laws cited are comprehensive; a number apply only to specified classifications of workers. The following states have one or more laws containing provisions relating to public-sector grievance and arbitration procedures: Alaska, Alaska State § 23.40.210 (1962) (public employees); California, Cal. Educ. Code § 13087.1 (West 1975) (teachers); Connecticut, Pub. Act No. 75-189 §§ 1, 2 (May 27, 1975, Jan. Sess.) amending Conn. Gen. Stat. Ann. § 7-470(a), (b) (1972), Pub. Act No. 75-570, § 5 (July 7, 1975, Jan. Sess.) repealing and substituting Conn. Gen. Stat. Ann. § 7-472 (1972) (municipal employees), Pub. Act No. 75-566 (July 7, 1975, Jan. Sess.) (state employees); Delaware, Del. Code Ann. tit. 14, § 4008(c) (1974) (certified public school employees); District of Columbia, Exec. Order No. 11616, 3 C.F.R. 202 (Comp. 1971) (employees of executive branch and agencies of the federal government); Florida, Fla. Stat. § 447.011 (1966) (public employees); Hawaii, Hawaii Rev. Stat. § 89-11 (Supp. 1974) (public employees); Iowa, Iowa Code Ann. § 20.18 (Supp. 1975-1976) (public employees); Kansas, Kan. Stat. Ann. § 75-4330 (1974 Supp. 75-109) (public employees); Kan. Stat. Ann. § 72-5424 (1972) (teachers); Maine, Me. Rev. Stat. Ann. tit. 26, § 979-K (1964), Me. Rev. Stat. Ann. tit. 5, § 752 (Supp. 1973) (state employees); Me. Rev. Stat. Ann. tit. 26, § 970 (1964) (municipal employees); Maryland, Md. Ann. Code art. 77, § 160(h)(2) (1975) (certified teachers); Md. Ann. Code art. 77, § 160-A(h)(2) (1975) (non-certified school employees); Massachusetts, Mass. Ann. Laws Ch. 150E, § 8 (Supp. 1975) (public employees); Michigan, Mich. Stat. Ann. § 17.455(7) (Supp. 1975) (public employees); Minnesota, Minn. Stat. Ann. § 179.70 Subd. 1, § 179.71 Subd. 5(i) (Supp. 1975-1976) (public employees); Montana, Mont. Rev. Codes Ann. § 59-1610(2) (Supp. 1973) (public employees); Nebraska, Neb. Rev. Stat. § 48-816 (1974) (public employees); Nevada, Nev. Rev. Stat. § 288.110 (1973) (local employees); New Hampshire, N. H. Rev. Stat. Ann. § 273-A:4 (2 CCH State Laws ¶ 47,051, p. 56,047 (1975)) (public employees); New Jersey, N.J. Stat. Ann. § 34:13A-5.3 (Supp. 1975-1976) amending N.J. Stat. Ann. § 34:13A-5 (1965) (public employees); New York, N.Y. Civ. Serv. § 204(2) (McKinney 1973) (public employees); North Dakota, N.D. Cent. Code §§ 34-11-02 to 34-11-04 (1972) (public employees); Oklahoma, Okla. Stat. Ann. tit. 11, § 548.12 (Supp. 1974-1975) (police and firefighters); Oregon, Ore. Rev. Stat. § 243.706 (1973) (public employees); Pennsylvania, Pa. Stat. Ann. tit. 43, § 1101.903 (Supp. 1975-1976) (public employees); Rhode Island, R.I. Gen. Laws Ann. § 36-11-3 (Supp. 1974), amending R.I. Gen. Laws Ann. § 36-11-3 (1956) (state employees); South Dakota, S.D. Compiled Laws Ann. §§ 3-18-15.1 to 3-18-15.3 (1974) (public employees); Vermont, Vt. Stat. Ann. tit. 3, § 926 (1972) (state employees); Washington, Wash. Rev. Code § 41.56.122 (1974) (public employees); and Wisconsin, Wis. Stat. Ann. §§ 111.90, 111.91(a), 111.91(2)(b) and 111.91(3) (1974) (state employees).

legislative enactments fall into two main groups: those which require binding arbitration of all unresolved grievances;<sup>37</sup> and those which permit, but do not require, the arbitration of grievances.<sup>38</sup> Three states have no specific policy on grievance settlement, but allow the parties to adopt any form they can agree upon;<sup>39</sup> and two states provide only for mediation of grievances.<sup>40</sup> One state specifically forbids decision-making by a third party.<sup>41</sup>

State laws which provide for mandatory, binding arbitration of grievances require either that if collective agreements between public employers and unions do not include a provision for final and binding arbitration, the parties must use the arbitration procedure already established by statute;<sup>42</sup> or that the government agency involved must promulgate procedures for the resolution of grievances, making any decision appealable to a higher authority, whose decision is binding.<sup>43</sup> It is significant that no state law which requires or permits the arbitration of grievances makes any reference to so-called advisory arbitration, a self-contradictory and inaccurate term denoting no more than fact-finding accompanied by recommendations.

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37. Alaska, Alaska Stat. § 23.40.210 (1962); Florida, Fla. Stat. § 447.011 (1966); and Pennsylvania, Pa. Stat. Ann. tit. 43, § 1101.903 (Supp. 1975-1976). New York City has a policy to the same effect, New York, N.Y. Charter and Administrative Code § 1173-8.0(f), 2 CCH State Laws ¶ 47,450, p. 56, 941-12 (1972).
  38. California, Cal. Educ. Code § 13087.1 (West 1975); Connecticut, Pub. Act No. 75-189 §§ 1, 2 (May 27, 1975, Jan. Sess.) amending Conn. Gen. Stat. Ann. § 7-470(a), (b) (1972), Pub. Act No. 75-570, § 5 (July 7, 1975, Jan. Sess.), repealing and substituting Conn. Gen. Stat. Ann. § 7-472 (1972), Pub. Act No. 75-566 (July 7, 1975, Jan. Sess.); District of Columbia, Exec. Order No. 11616, 3 C.F.R. 202 (Comp. 1971); Kansas, Kan. Stat. Ann. § 72-5424 (1972); Maine, Me. Rev. Stat. Ann. tit. 26, § 970 (1964); Maryland, Md. Ann. Code art. 77, § 160(h)(2) (1975), Md. Ann. Code art. 77, § 160-A(1)(2) (1975); Montana, Mont. Rev. Codes Ann. § 59-1610(2) (Supp. 1973); New Jersey, N.J. Stat. Ann. § 34:13A-5.3 (Supp. 1975-1976) amending N.J. Stat. Ann. § 34:13A-5 (1965); Oregon, Ore. Rev. Stat. § 243.706 (1973); Washington, Wash. Rev. Code § 41.56.122 (1974); and Wisconsin, Wis. Stat. Ann. §§ 111.90, 111.91(a), 111.91(2)(b) and 111.91(3) (1974).
  39. Nebraska, Neb. Rev. Stat. § 48-816 (1974); New Hampshire, N.H. Rev. Stat. Ann. § 273-A:4 (2 CCH State Laws ¶ 47,051, p. 56,047 (1975)); New York, N.Y. Civ. Serv. § 204(2) (McKinney 1973).
  40. Michigan, Mich. Stat. Ann. § 17.455(7) (Supp. 1975) and North Dakota, N.D. Cent. Code §§ 34-11-02 to 34-11-04 (1972).
  41. In respect of collective bargaining by public school employees Section 4008(c) of the Delaware Code, provides, "No contract or agreement executed between the two parties shall specify directly or indirectly binding arbitration or decision-making by a third party or parties. The rights of the public through their legally elected or appointed Board of Education in final policy making is not subject to negotiation."
  42. Hawaii, Hawaii Rev. Stat. § 89-11 (Supp. 1974); Iowa, Iowa Code Ann. § 20.18 (Supp. 1975-1976); Kansas, Kan. Stat. Ann. § 75-4330 (1974 Supp. 75-109); Maine, Me. Rev. Stat. Ann. tit. 26, § 979-K (1964), Me. Rev. Stat. Ann. tit. 5, § 752 (Supp. 1973); Massachusetts, Mass. Ann. Laws ch. 150E, § 8 (Supp. 1975); Minnesota, Minn. Stat. Ann. § 179.70 Subd. 1, § 179.71 Subd. 5(i) (Supp. 1975-1976) and Oklahoma, Okla. Stat. Ann. tit. 11, § 548.12 (Supp. 1974-1975).
  43. Nevada, Nev. Rev. Stat. § 288.110 (1973); South Dakota, S.D. Compiled Laws Ann. §§ 3-18-15.1 to 3-18-15.3 (1974) and Vermont, Vt. Stat. Ann. tit. 3, § 926 (1972). The Rhode Island statute declares it to be "the responsibility of supervisors at all levels to consider . . . and to take appropriate action promptly and fairly upon the grievances of their subordinates," R.I. Gen. Laws Ann. § 36-11-3 (Supp. 1974) amending R.I. Gen. Laws Ann. § 36-11-3 (1956).

Comprehensive data on grievance and arbitration procedures actually incorporated in collective agreements are usually difficult to obtain. Fortunately, the BLS published in 1975 a very informative analysis of 655 state and local collective agreements and related documents, each covering 50 or more employees.<sup>44</sup> The agreements covered 870,685 workers employed by various state, county, and municipal jurisdictions, as well as by school and other special districts and authorities, in 45 states and the District of Columbia. The study embraced, in addition to traditional collective agreements, memoranda of understanding or ordinances which clearly indicated that they were the result of bilateral negotiations.

Agreements negotiated with municipal governments constitute the largest group (almost two-fifths) covered by the study; they also include nearly one-third of total worker coverage. The next largest group of agreements (about one-quarter) were negotiated with special districts, primarily school districts; these agreements include about one-quarter of total worker coverage. The remaining agreements were negotiated at either the state or the county level; although state agreements are relatively few in number, they cover the second-largest group of workers in the sample.

Of the 655 agreements included in the study, 591 (9 out of 10) provide for the processing of employee and, in some cases, union<sup>45</sup> or employer grievances. The incidence of grievance procedures in public-sector agreements is thus below that in the private sector,<sup>46</sup> but substantially above the 82 percent found in collective agreements in the federal service.<sup>47</sup>

Nearly 84 percent of the 591 agreements having grievance procedures, covering 93 percent of the workers, include provisions for the settlement of grievances through third-party intervention by fact-finders, mediators, or arbitrators. Of the three forms of intervention, only arbitration is final and binding. Only 4 percent (21) of the agreements provide for the use of fact-finding (in most instances by a tripartite board) in resolving grievances. Similarly, only 5 percent (30) of the agreements provide for the use of mediation; about half specify that failure by the mediator to effect a settlement of the dispute will result in its referral to arbitration.

As one would expect, arbitration of grievances is provided for in much the largest number of agreements (467, or 79 percent). This figure is, of course, substantially below that in the private sector; but it can

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45. Throughout this discussion of grievance arbitration in the public sector the word "union" is used to include all types of employee organizations which engage in collective bargaining.

46. A 1974 BLS study of 1,339 private-sector agreements found that all but 13 contained grievance procedures. U.S. Bureau of Labor Statistics, Dep't. of Labor, Bull. No. 1822, *Characteristics of Agreements Covering 1,000 Workers or More* 64, Table 71 (1974).

47. U.S. Bureau of Labor Statistics, Dep't. of Labor, Bull. No. 1789, *Collective Bargaining Agreements in the Federal Service*. Late 1971, 71, Table 29 (1973).

be expected to increase rapidly as collective bargaining in the public sector continues to spread, and as traditional public management resistance to giving up its previously unchallenged prerogatives continues to wane.

It is significant that about two-fifths (134) of the arbitration provisions define the scope of the procedure, usually making it as broad as the grievance procedure. Moreover, as the BLS study points out,

It is safe to assume that the number of provisions in which the jurisdiction of grievance and arbitration arrangements is the same is much higher than shown. Agreements referring to arbitration but not to scope often state that grievances will move automatically to arbitration if not settled at the final step before arbitration. The implication of these clauses is that the scope of grievance and arbitration [procedures] is identical.<sup>48</sup>

Also of interest is that over two-fifths (198) of the agreements having arbitration clauses stipulate that either party may initiate arbitration proceedings. This suggests a lack of sophistication on the part of public management. Private management long ago learned that its contractual right to use the grievance and arbitration procedure is a bane rather than a blessing, and that it is better advised to act unilaterally and let the employee or union grieve if either is dissatisfied. Management access to the contractual grievance and arbitration procedure may be construed as a waiver by management of its right to act unilaterally instead of filing a grievance. Moreover, if the employee organization violates the agreement, management may be told that the appropriate forum in which to prove the violation and seek recovery of damages or other relief is arbitration rather than the courts.<sup>49</sup> One may expect, therefore, that the number of provisions in collective agreements specifically guaranteeing management's access to the grievance and arbitration procedure will diminish substantially over time.

The impact of private-sector labor law on the public sector can be seen in the incidence (174, or almost two-fifths) of arbitration provisions in the latter which permit the union, but not the aggrieved employee, to call for arbitration. This means that although a union may arbitrate without the grievant's consent, the reverse is not true; only about 10 percent (49) of the agreements providing for arbitration permit either the grievant, or the grievant together with the employee organization, to initiate arbitration.

48. BLS Bull. No. 1833, *supra* note 44, at 18.

49. *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers*, 370 U.S. 254 (1962).

Of equal importance, the union's right to represent members processing their individual grievances through the multistep procedure is provided for in 65 percent (385) of the 591 agreements having grievance procedures. Of these agreements, more than 30 percent (119) guarantee the union a dominant role in the processing of grievances; that is, the union assumes almost total responsibility and, in most cases, presents the grievance at all stages of the procedure. Generally, agreements acknowledge the union's right to decline to process an employee's grievance which it either determines to be without merit or resolves to its satisfaction. Finally, although nearly 80 percent (449) of the agreements having a grievance procedure allow an employee to process his own grievance, less than 14 percent (82) permit an employee to select a nonunion representative of his own choice; and in most instances a union representative is entitled to be present. In any case, the right of an employee to process his own grievance usually applies only up to the point of arbitration; thereafter, the union has the exclusive right to decide whether to proceed further.

Somewhat surprisingly, only about 23 percent (106) of agreements in the sample providing for arbitration specify a board (usually tripartite), whereas two-thirds (310) specify a single arbitrator. Given the prevailing attitude of public managers toward neutral arbitrators, which ranges from suspicion to open hostility, one would suppose that the tripartite board would be more popular with government jurisdictions; that procedure at least insures that a representative of each party will have an opportunity to forestall or to modify a decision or opinion by an arbitrator which either side finds unacceptable. Presumably, growing familiarity with the grievance arbitration process will tend to reassure public management about its net utility, and the desire to cut costs and speed up the time between the filing of a grievance and the issuance of an arbitration award may abort the tendency to move to tripartite arbitration boards which might otherwise develop.

A frequent reaction of public management obligated for the first time to negotiate a collective agreement or a memorandum of understanding, and confronted with a demand for final and binding arbitration, is to offer advisory arbitration as a counterproposal. Significantly, only about 10 percent (45) of the 439 agreements in the sample which refer specifically to the status of the grievance arbitrator's decision provide for advisory arbitration. As grievance arbitration becomes increasingly prevalent in the public sector, the percentage of such provisions to the total will certainly decline.

Many collective agreements in the private sector provide special procedures for handling designated types of grievances, typically those

involving discharges or issues of contract interpretation affecting large groups of workers raised by the union. The usual method is to skip earlier stages of the grievance procedure. In the public sector, however, special arrangements, which were found in almost 9 percent (58) of the 655 agreements studied by the BLS, more often provided for a separate hearing or appeal. In some cases the agreement specifies applicable laws or codes outside the grievance procedure available to the grievant;<sup>50</sup> in others, when disciplinary action is upheld, the grievant's right to seek a legal remedy is provided;<sup>51</sup> and in still others, any employee who elects to carry a grievance to arbitration is specifically declared to have waived his or her right to use other governmental forums of appeal.<sup>52</sup>

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- 50. *E.g.*, "Grievance, disputes, or disagreements involving removals, demotions, or suspensions shall be resolved as provided by the civil service provisions of the Santa Monica Municipal Code and the City Charter."
  - 51. *E.g.*, "Any person believing himself aggrieved by a penalty, or punishment of demotion in or dismissal from service or suspension without pay, or a fine imposed pursuant to the provisions of this Section, may appeal from such determination by an application to the New York Supreme Court in accordance with the provisions of Article 78 of the Civil Practice Law and Rules."
  - 52. *E.g.*, "Arbitration shall be initiated by a certified letter from the grievant, and bearing the written approval to proceed of the president of the [Teachers] Federation. . . . Such request can be honored only if the grievant . . . and the Federation waive the right, if any, in writing of said grievant . . . and the Federation to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award." But see the discussion of *Antinore v. State*, 79 Misc. 2d 8, 356 N.Y.W.2d 794 (Sup. Ct. 1974), *infra* note 151, and accompanying discussion in the text.



### Conclusion

Grievance procedures established under a civil service system and those resulting from a collective bargaining agreement have many elements in common.

However, collective bargaining does give the employee, through his union, a greater influence over the rules and procedures governing dispute resolution, disciplinary action, and discharge. That is, while the union may not immediately effect changes in such rules and procedures, it will, through collective bargaining, generally obtain some accommodation between the interests of employer and employee.

FOOTNOTES

1. For basic information on grievance procedures, see Paul Prasow, Individual and Group Grievances, in the appendix to this section. See also John Spitz, Grievance Handling and Preparing for Arbitration in the Public Sector, a training manual available from the Institute of Industrial Relations UCLA.
2. For an example of negotiated grievance procedure see chart "Outline of Typical Negotiated Grievance Procedure" and "Sample Contractual Grievance Procedure," in the appendix to this section.
3. For an example of such a procedure see appendix, City of Los Angeles, Department of Public Works, Grievance Procedure, Non-Represented Workers. For comparison with negotiated procedure, see appendix, Grievance Procedure for Represented Workers.
4. Eli Rock, The Neutral in Public Employment Disputes, 20th Annual Meeting National Academy of Arbitrators, 1967, pp. 260-297.
5. Benjamin Aaron, The Impact of Public Employment Grievance Settlement on the Labor Arbitration Process, Institute of Industrial Relations Reprint No. 255.
6. Rock, op. cit.
7. James P. Begin, "The Private Grievance Model in the Public Sector," Industrial Relations, Vol. 10, No. 1 (February 1971), pp. 21-35.
8. For more detail, see articles by Benjamin Aaron, appendix to this section.
9. For more detail, see Benjamin Aaron, appendix to this section.
10. Rock, op. cit. See also Bureau of Labor Statistics, "Grievance and Arbitration Procedures in State and Local Agreements," Bulletin 1833 (1975). And see David T. Stanley, "What are Unions doing to Merit Systems," Public Personnel Review, Vol. 31 (1970).
11. Bureau of Labor Statistics Bulletin, op. cit.

## APPENDIX TO TAB E

Individual and Group Grievances:  
Principles  
Outline of Typical Negotiated  
Grievance Procedure and Duties of  
the Parties  
City of Los Angeles Department of  
Public Works Grievance Procedure for  
Represented and Non-represented  
employees  
Sample Contract Provisions of a  
Negotiated Grievance Procedure  
Negotiated Grievance Procedures in  
California Public Employment:  
Controversy and Confusion  
Rights of Individual Employees  
Exclusivity of Contract Grievance and  
Arbitration Procedures

I.

Individual and Group Grievances: Principles

By

Paul Prasow

1. Objectives and Values Underlying Effective Grievance Procedures

The need for management (administration) in an organization is basic, and arises from the nature of the organization. The managers are specialists in, and responsible for, decision-making and actions with respect to efficient operations. The resulting decisions and actions may sometimes have an adverse effect on the relationship between the manager and his employees. Supervisors, being human, are at times less than perfect in dealing with subordinates; and subordinates, also being human, are at times less than perfect in interpreting and reacting to even the good-faith actions and decisions of supervisors. Furthermore, in carrying out their responsibilities, the welfare of the employee cannot always be the sole or primary concern of employees in responding to the exercise of managerial authority.

In order to meet the difficulty of balancing conflicting interests, grievance systems have been devised to permit the working out of effective and harmonious accommodations. The main function of such systems is to foster the cooperation of supervisors and subordinates in their common endeavors. As the late Professor Harry Shulman observed:

"A grievance procedure is to the human factor what maintenance is to the machine factor. It provides the lubricant to ease friction, the advance of inspection and care to avoid breakdowns, and the repair when repair becomes necessary. It facilitates the fair ascertainment of rights and duties as between supervisor and subordinate. It functions primarily to make the necessary adjustments which must be made if efficient operations are to be maintained."

The first requirement for an effective grievance procedure is that it have full, continuing and active support from the top management (administration) of an organization, and that its basic philosophy and purposes be adequately communicated from the highest levels to all supervisors and employees.

A second requirement is the positive acceptance of the grievance procedure at all levels of supervision below top management. Supervisors must understand and accept the idea that employees have the right to present a formal or informal grievance and that such action is not per

se an unfavorable reflection on supervisory abilities. Acceptance implies a willingness by supervisors to discuss any complaint or any issue, no matter how trivial or improper it may appear, with serious concern for the employee's interest and welfare. Acceptance means that supervisors recognize the value of an effective grievance procedure as a method of achieving efficient and orderly operations with a minimum of friction or resentment on the part of subordinates. Acceptance of the grievance procedure means that supervisors understand the dynamics of the management function and its impact upon employees.

A viable grievance procedure is as important to management as it is to the employee, in that it provides a clear channel for the expression of individual or group complaints. In a situation where someone exercises authority over others, there is always the possibility that conflicts of interest may arise. Conflicts are inherent because supervisors must give orders and subordinates must accept them. Perceptions of fairness and reasonableness in both the giving and taking of orders may differ widely. Furthermore, the relationship between supervisor and subordinate is never static; it is constantly undergoing change. It is fluid, evolving, and continuously affected by subtle and myriad variations in the factors that determine the nature and quality of the relationship at any particular time.

A third requirement of an effective grievance procedure is that employees must feel free to express their complaints with no fear of discrimination. They must be protected against reprisals whenever they raise questions about supervision or working conditions. This can be accomplished only if the highest authority makes clear to all concerned that any form of punitive action will not be tolerated, and if this basic policy is implemented by supervisors.

If the grievance procedure is adequately supported by the highest officials as well as accepted, understood, and properly administered by supervisors, it can serve as an invaluable asset to the entire organization. It can help management identify and eliminate legitimate causes for dissatisfaction; it can enable supervision to deal with these complaints promptly, thereby preventing minor problems from mushrooming into major explosions; it can provide a safety valve and a temperature chart with respect to employee feelings and morale; it can provide a fair procedure for handling disputes; and it can make a vital contribution to improving morale and efficiency.

## 2. Scope of the Grievance Procedure

- a. Contractual definition: Any controversy or difference between employer and employee or employee's representative

- (1) Interpretation or application of agreement

- (2) Any alleged violation of agreement
- (3) Any other grievance or dispute

b. "Interests" grievances vs. "rights" grievances

- (1) "Interests" disputes are concerned with the negotiation or modification of the terms of a collective agreement. They are unresolved issues in contract negotiations.
- (2) "Rights" disputes arise during the term of a written binding agreement and involve the interpretation and application of that agreement. The vast majority of arbitrations are over "rights" rather than "interests".

3. Purposes of Grievance Procedure

a. Explicit purpose

- (1) To interpret provisions of agreement
- (2) To apply agreement to new and changing aspect of day-to-day relations.
- (3) To protect rights of employees
- (4) To protect rights of management and employee's association/union

b. As a means of locating problem situations in the working relationship

- (1) Explicit grievance not to be taken at face value
- (2) Grievance seen as a symptom of some maladjustment
- (3) Aim is to seek out real and submerged difficulties

c. As a channel of communication

- (1) Information is channeled both ways between top and bottom levels of employer and association/union hierarchy
- (2) Management and association/union representatives use grievance procedure as a means of keeping in touch with developments at the level of the individual employee
- (3) Reliability as a channel of communication is generally good because grievances are subject to review at each step by higher levels within each organization, and grievance may be appealed to some form of impartial adjudication.

#### 4.. Types of Grievances

- a. Some grievances involve a conflict between two or more sections of the agreement. The association/union will point to one clause, and management to another.
- b. The agreement may be silent on the specific problem. The issue may clearly be within the scope of the agreement, but there is a gap on the particular issue.
- c. The grievance may raise the question of the applicability of a general rule to a particular case. The general rule may be "management has the right to discipline or discharge for just cause". The particular case may involve the discharge of an employee for infraction of a specific rule. The question of due process is often involved.
- d. Many grievances present no contract problem, but arise as a device to save face for one party or the other. Some grievances are political in nature, and arise because there are sharp interest differences among various groups within an employee organization that complicate the task of its leadership in contract administration. It is well known, for example, that the interests of senior personnel and junior employees are frequently in conflict

#### 5. Basic Principles of Grievance Adjustment

- a. Grievances should be adjusted promptly, preferably at the first step of the grievance procedure.
- b. Grievances should be adjusted on their merits.
- c. Grievance machinery should be easy to utilize, and well understood by the employee, union steward, and supervisor.
- d. Grievance decisions should be followed up to see that they are implemented.

#### 6. Steps in Grievance Handling

- a. The nature of the grievance should be defined as clearly and as fully as possible.

- b. All relevant facts about the issue should be gathered to explain when, how, where, to whom, and why the grievance occurred.
    - (1) Facts must be separated from opinion, conjecture, speculation, or assumption.
    - (2) Records are important, including payroll records, time cards, case load, inspection records, attendance records, performance evaluations, etc.
  - c. Establish tentative solutions or answers to the grievance. Tentative solutions provide the basis for gathering additional facts which may indicate the tentative solutions to be rejected, and the one to be accepted.
  - d. Gathering additional information to check validity of the tentative solution, to ascertain the best possible solution. This may involve checking personnel policy and contract provisions, studying how similar grievances have been settled, ascertaining past practice, determining administrative policy, and discussing problems with personnel staff.
  - e. Apply the solution. A definite stand must be taken one way or the other. This stand may be favorable or unfavorable to the grievant, and should be communicated to the employee and/or his representative clearly and unequivocally.
  - f. The matter should be followed up to determine whether it has been handled in a satisfactory manner, and the difficulty eliminated if the decision has been in favor of the employee.
7. Factors Considered by Arbitrators in Deciding Grievance Issues
- a. Language of agreement or policy statement
  - b. Mutual intent of the parties
  - c. Terms of submission agreement (Statement of the grievance)
  - d. Practice and custom
  - e. General standards of contract interpretation
    - (1) Clear vs. ambiguous language
    - (2) Specific vs. general language
    - (3) Normal vs. technical usage of terms
    - (4) No consideration given to compromise offers during grievance processing



## **8. Arbitration of Specific Grievances**

### **a. Discipline and Discharge**

- (1) Burden of proof**
- (2) Review of penalties imposed**
- (3) Factors in evaluating penalties**
  - (a) Nature of offense: discharge vs. corrective discipline**
  - (b) Due process considerations**
  - (c) Post-discharge conduct or charges**
  - (d) Grievant's past record**
  - (e) Length of service with Company**
  - (f) Knowledge of rules; previous warnings**
  - (g) Lax enforcement of rules**
  - (h) Unequal or discriminatory treatment**
  - (i) Management responsibility**

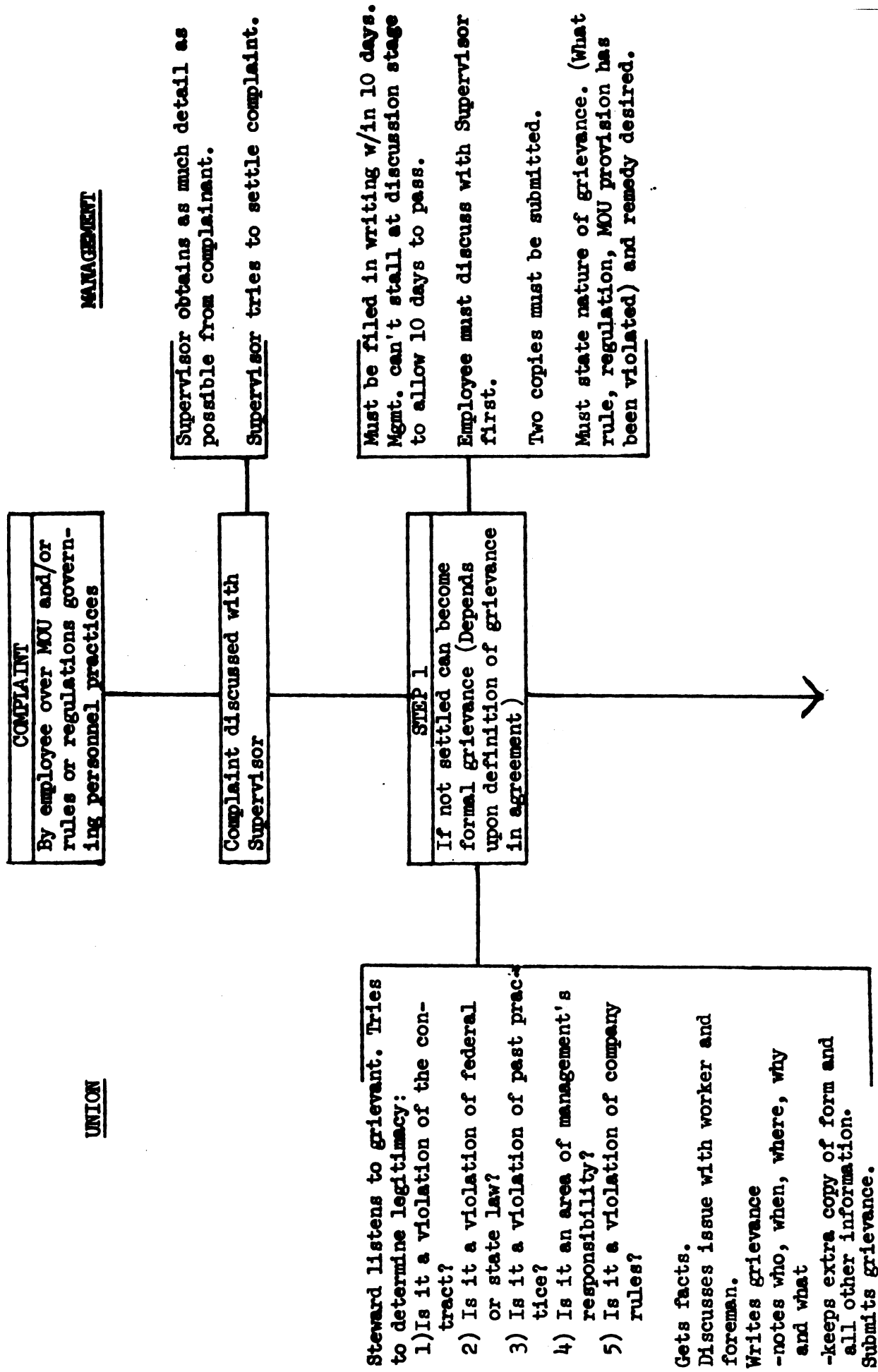
### **b. Seniority**

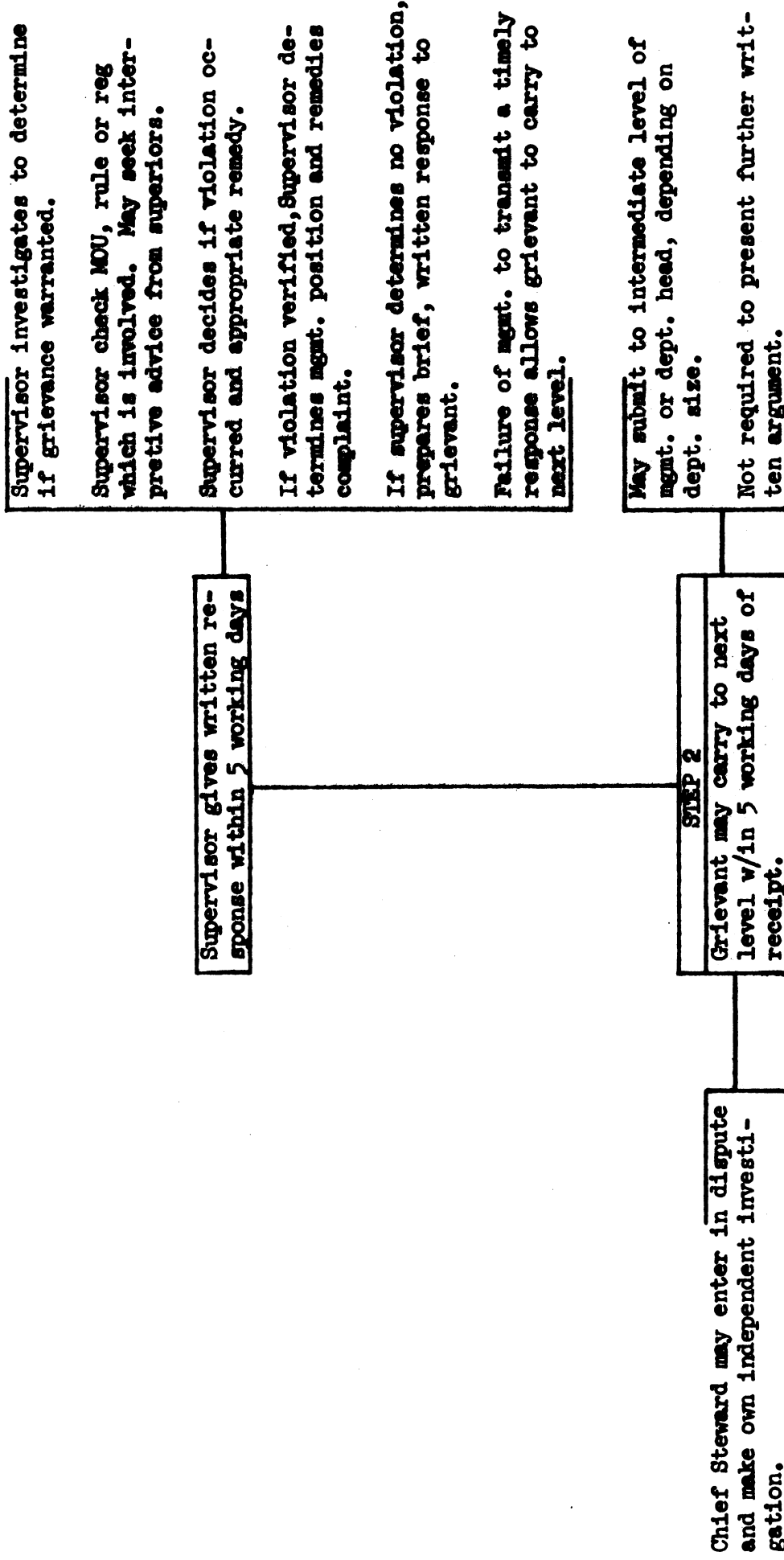
- (1) In promotions, transfers, layoffs, recall from layoffs**
- (2) Determination of fitness and ability**
- (3) Evidence and burden of proof**
- (4) Factors considered in determining fitness and ability**
  - (a) Tests**
  - (b) Experience**
  - (c) Training**
  - (d) Trial period**
  - (e) Supervisor's opinion**
  - (f) Production records**
  - (g) Attendance records**
  - (h) Disciplinary records**
  - (i) Physical ability**
  - (j) Mental stability**
  - (k) Personal characteristics**
  - (l) Age**

### **c. Assignment of Duties and Tasks**

- (1) Establishing, eliminating, and combining jobs and classifications**
- (2) Inter-job and inter-classification transfer of duties**
- (3) Unilateral employee determination vs. use of grievance procedure**
- (4) Refusal to perform assigned duties; question of insubordination or safety and health**

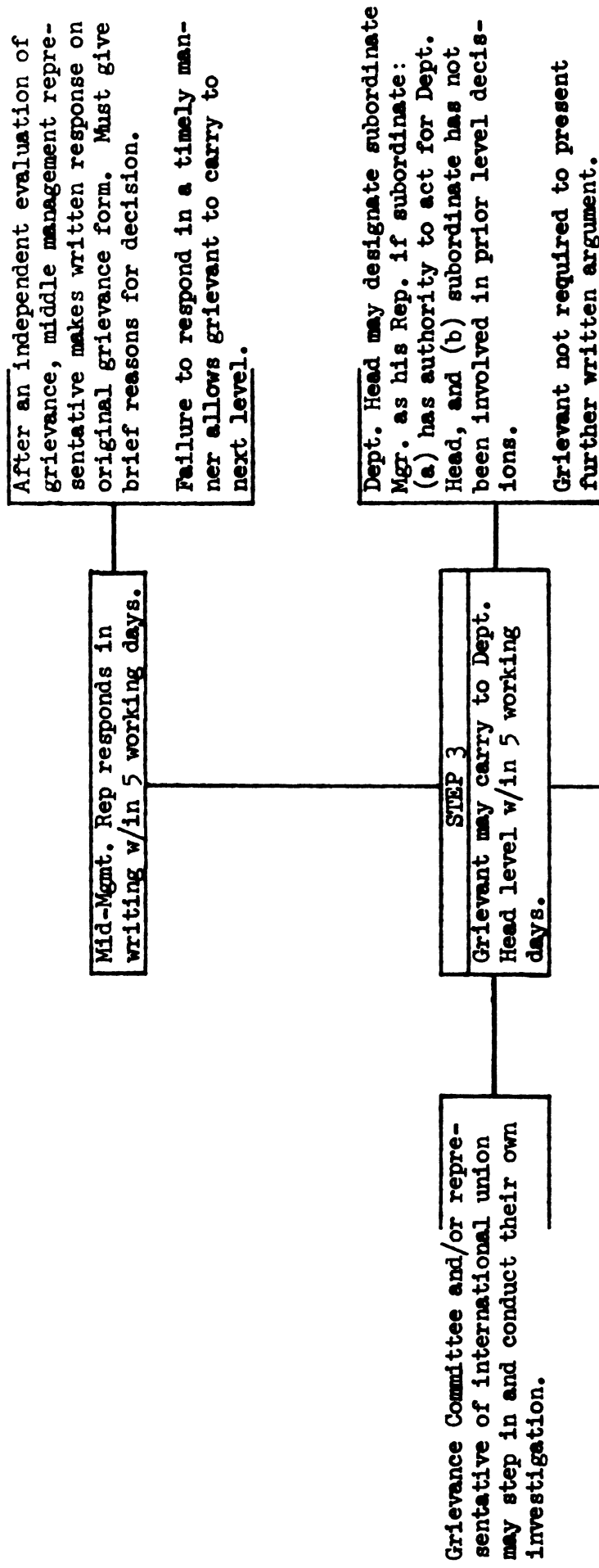
II.  
OUTLINE OF TYPICAL NEGOTIATED GRIEVANCE PROCEDURE  
AND  
DUTIES OF THE PARTIES





UNION

MANAGEMENT



UNION

MANAGEMENT

Dept. Head or Rep responds  
w/in 10 working days

May discuss issue with grievant.

Discusses issue with subordinate supervisor.

Makes independent investigation and evaluation of allegations.

May consult w/Employee Relations Administrator representing his department.

Meets w/parties and gives written decision including reasons, e.g. prior response appropriate.

Failure to respond in a timely manner grants grievant right to refer grievances involving agreement (MOU) to arbitration.

Within 10 days union (not employee) may submit matter for arbitration.

Department Head's decision is final on matters not subject to arbitration, i.e., do not involve application or interpretation of MOU.

END OF FORMAL GRIEVANCE PROCEDURE

CITY OF LOS ANGELES  
DEPARTMENT OF PUBLIC WORKS  
GRIEVANCE PROCEDURE

REPRESENTED EMPLOYEES

The following grievance procedure is intended for use by all employees of the Department of Public Works who are represented by recognized employee organizations having a Memorandum of Understanding with the City of Los Angeles but excluding employees represented by Engineers and Architects Association.

I. Definitions

A grievance is defined as any dispute concerning the interpretation or application of this written Memorandum of Understanding or departmental rules and regulations governing personnel practices or working conditions applicable to employees covered by this Memorandum of Understanding. An impasse in meeting and conferring upon the terms of a proposed Memorandum of Understanding is not a grievance.

II. Responsibilities and Rights

- A. Nothing in this grievance procedure shall be construed to apply to matters for which an administrative remedy is provided before the Civil Service Commission. Where a matter within the scope of this grievance procedure is alleged to be both a grievance and an unfair labor practice under the jurisdiction of the Employee Relations Board, the employee may elect to pursue the matter under either the grievance procedure herein provided, or by action before the Employee Relations Board. The employee's election of either procedure shall constitute a binding election of the remedy chosen and a waiver of the alternative remedy.
- B. No grievant shall lose his right to process his grievance because of Management-imposed limitations in scheduling meetings.
- C. The grievant has the responsibility to discuss his grievance informally with his immediate supervisor. The immediate supervisor will, upon request of a grievant, discuss the grievance with him at a mutually satisfactory time. The grievant may be represented by a representative of his choice in the informal discussion with his immediate supervisor, and in all formal review levels.

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Represented Employees**

- D. The time limits between steps of the grievance procedure provided herein may be extended by mutual agreement, or by mutual agreement, the grievant and Management may waive one level of review from this grievance procedure.
- E. Management shall notify the Union of any formal grievance filed that involves the interpretation and/or application of the provisions of this Memorandum of Understanding, and a full-time Union Staff Representative shall have the right to be present at any formal grievance meeting concerning such a grievance. If the full-time Union Staff Representative elects to attend said grievance meeting, he shall inform the Departmental Employee Relations Representative or the appropriate Bureau Employee Relations Representative of his intention. The Union will be notified of the resolution of all other formal grievances.
- F. The grievant and his representative may have a reasonable amount of paid time off for this purpose, however, the representative will receive paid time off only if he is a member of the same unit and same Union as the grievant and is employed by the Department of Public Works within a reasonable distance from the grievant's work location.

**III. Procedure**

The grievance procedure shall be as follows:

- A. Step 1 - Informal Discussion. The grievant shall discuss his grievance with his immediate supervisor on an informal basis in an effort to resolve the grievance within ten (10) calendar days following the day the grievable incident occurred. The immediate supervisor shall respond within five (5) calendar days following his meeting with the grievant.
- B. Step 2 - Immediate Supervisor. If the grievance is not settled at Step 1, the grievant may within seven (7) calendar days of his receipt of the oral grievance response reduce his grievance to writing and submit it to his immediate supervisor.

The supervisor, after meeting with the grievant, shall render to the grievant and his representative, if any, a written response within fifteen (15) calendar days of his receipt of the Grievance Initiation form.

Grievance Procedure  
Represented Employees

- C. Step 3 - Bureau Head. If the grievance is not settled at Step 2, the grievant may within seven (7) calendar days of his receipt of the written grievance response file a written appeal with the appropriate Bureau Head.

The Bureau Head or his designee, after meeting with the grievant, shall render to the grievant and his representative, if any, a written response within fifteen (15) calendar days of the Grievance Appeal form.

- D. Step 4 - Board of Public Works. If the grievance is not settled at Step 3, the grievant may within seven (7) calendar days file a written appeal with the Secretary Board of Public Works. The Secretary Board of Public Works shall forward a copy of the Grievance Appeal to the Grievance Commissioner for investigation of the merits of the grievance. This investigation may include a hearing at which the Grievance Commissioner or his designee will act as Hearing Officer and receive oral and/or written arguments on the merits of the grievance.

The Hearing Officer shall then prepare a written report containing recommendations for response to the grievance for submission to the Board of Public Works. The Board, if in agreement with the recommendations, will adopt the recommendations and authorize that an appropriate response be given to the grievant. The Board shall reserve the right to modify the Hearing Officer's recommendations as it deems necessary.

The Secretary Board of Public Works shall render to the grievant and his representative, if any, a written decision of the Board within thirty (30) calendar days from the date the hearing was held.

- E. Step 5 - Arbitration. If the written decision at Step 4 does not settle the grievance, the grievant may within seven (7) calendar days, following the date of service of the written decision of the Board of Public Works, file a written request for arbitration.

If such written notice is served, the parties shall meet for the purpose of selecting an arbitrator from a list of seven arbitrators furnished by the Employee Relations Board within seven (7) calendar days following receipt of said list.



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**Grievance Procedure  
Represented Employees**

1. Arbitration of a grievance hereunder shall be limited to the formal grievance as originally filed by the employee to the extent that said grievance has not been satisfactorily resolved. The proceedings shall be conducted in accordance with applicable rules and procedures adopted or specified by the Employee Relations Board, unless the parties hereto agree to other rules or procedures for the conduct of such arbitration. The fees and expenses of the arbitrator shall be shared equally by the parties involved, it being mutually understood that all other expenses including, but not limited to, fees for witnesses, transcripts, and similar costs incurred by the parties during such arbitration, will be the responsibility of the individual incurring same.
2. The decision of an arbitrator resulting from any arbitration of a grievance hereunder shall be final and binding.
3. The decision of an arbitrator resulting from any arbitration of grievances hereunder shall not add to, subtract from, or otherwise modify the terms and conditions of this Memorandum of Understanding.

The grievance forms will be as follows:

Grievance Initiation: Form General 162

Grievance Response: Form General 163

Grievance Appeal: Form General 164

Grievances not appealed within the prescribed time limits shall be considered waived. Grievances not answered within a prescribed time may be appealed to the next step.

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W. A. No. 5491

November 1, 1974  
(Revised 11-25-74)

PERSONNEL DIRECTIVE NO. 34

CITY OF LOS ANGELES  
DEPARTMENT OF PUBLIC WORKS  
GRIEVANCE PROCEDURE

NON - REPRESENTED EMPLOYEES

The following grievance procedure is intended for use by all employees of the Department of Public Works who are not represented by recognized employee organizations having a Memoranda of Understanding with the City of Los Angeles.

I. Definitions

A grievance is defined as any dispute concerning the application of Departmental rules and regulations governing personnel practices or working conditions over which the Board of Public Works has jurisdiction.

II. Responsibilities and Rights

- A. Nothing in this grievance procedure shall be construed to apply to matters for which an administrative remedy is provided before the Civil Service Commission. Where a matter within the scope of this grievance procedure is alleged to be both a grievance and an unfair labor practice under the jurisdiction of the Employee Relations Board, the employee may elect to pursue the matter under either the grievance procedure herein provided, or by action before the Employee Relations Board. The employee's election of either procedure shall constitute a binding election of the remedy chosen and a waiver of the alternative remedy.
- B. No grievant shall lose his right to process his grievance because of Management-imposed limitations in scheduling meetings.
- C. The grievant has the responsibility to discuss his grievance informally with his immediate supervisor. The immediate supervisor will, upon request of a grievant, discuss the grievance with him at a mutually satisfactory time. The grievant may be represented by a representative of his choice in the informal discussion with his immediate supervisor, and in all formal review levels.
- D. The time limits between steps of the grievance procedure provided herein may be extended by mutual agreement, or by mutual agreement, the grievant and Management may waive one level of review from this grievance procedure.

Grievance Procedure  
Non-Represented Employees

- E. The grievant and his representative may have a reasonable amount of paid time off for this purpose, however, the representative will receive paid time off only if he is employed by the Department of Public Works within a reasonable distance from the grievant's work location.

III. Procedure

The grievance procedure shall be as follows:

- A. Step 1 - Informal Discussion. The grievant shall discuss his grievance with his immediate supervisor on an informal basis in an effort to resolve the grievance and if not presented to immediate supervisor within ten (10) calendar days following the day the grievable incident occurred, it shall be considered waived. The immediate supervisor shall respond within five (5) calendar days following his meeting with the grievant.

- B. Step 2 - Immediate Supervisor. If the grievance is not settled at Step 1, the grievant may within seven (7) calendar days of his receipt of the oral grievance response reduce his grievance to writing and submit it to his immediate supervisor.

The supervisor, after meeting with the grievant, shall render to the grievant and his representative, if any, a written response within fifteen (15) calendar days of his receipt of the Grievance Initiation form.

- C. Step 3 - Bureau Head. If the grievance is not settled at Step 2, the grievant may within seven (7) calendar days of his receipt of the written grievance response file a written appeal with the appropriate Bureau Head.

The Bureau Head or his designee, after meeting with the grievant, shall render to the grievant and his representative, if any, a written response within fifteen (15) calendar days of the Grievance Appeal form.

- D. Step 4 - Board of Public Works. If the grievance is not settled at Step 3, the grievant may within seven (7) calendar days file a written appeal with the Secretary Board

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of Public Works. The Secretary Board of Public Works shall forward a copy of the Grievance Appeal to the Grievance Commissioner for investigation of the merits of the grievance. This investigation may include a hearing at which the Grievance Commissioner or his designee will act as Hearing Officer and receive oral and/or written arguments on the merits of the grievance.

The Hearing Officer shall then prepare a written report containing recommendations for response to the grievance for submission to the Board of Public Works. The Board, if in agreement with the recommendations, will adopt the recommendations and authorize that an appropriate response be given to the grievant. The Board shall reserve the right to modify the Hearing Officer's recommendations as it deems necessary.

The Secretary Board of Public Works shall render to the grievant and his representative, if any, a written decision of the Board within thirty (30) calendar days from the date the hearing was held. This decision shall be final and binding.

The grievance forms will be as follows:

Grievance Initiation: Form General 162

Grievance Response: Form General 163

Grievance Appeal: Form General 164

Grievances not appealed within the prescribed time limits shall be considered waived. Grievances not answered within a prescribed time may be appealed to the next step.

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W. A. No. 5491

## **SAMPLE CONTRACT PROVISIONS OF A NEGOTIATED GRIEVANCE PROCEDURE**

(Taken from the Memorandum of Understanding between  
the County of Los Angeles and the Building Custodians Representation Unit.)

### **Article 27 GRIEVANCE PROCEDURE**

#### **Section 1. Purpose**

The purpose of the grievance procedure is to provide a just and equitable method for the resolution of grievances without discrimination, coercion, restraint, or reprisal against any employee who may submit or be involved in a grievance.

#### **Section 2. Definitions**

1. "Grievance" means a complaint by an employee concerning the interpretation or application of the provisions of this Memorandum of Understanding or of rules or regulations governing personnel practices or conditions, which complaint has not been resolved satisfactorily in an informal manner between the employee and his immediate supervisor.
2. "Business Days" means calendar days exclusive of Saturdays, Sundays, and legal holidays.

#### **Section 3. Responsibilities**

1. Council agrees to encourage an employee to discuss his complaint with his immediate supervisor. The immediate supervisor will, upon request of an employee, discuss the employee's complaint with him at a mutually satisfactory time.
2. Departmental Management has the responsibility to:
  - A. Inform an employee of any limitation of the department's authority to fully resolve the grievance; and
  - B. Supply the employee with the neces-

sary information to process his grievance to the proper agency or authority.

#### **Section 4. Waivers and Time Limits**

1. Failure by Management to reply to the employee's grievance within the time limits specified automatically grants to the employee the right to process the grievance to the next level.
2. Any level of review, or any time limits established in this procedure, may be waived or extended by mutual agreement confirmed in writing.
3. If an employee fails to appeal from one level to the next level within the time limits established in this grievance procedure, the grievance shall be considered settled on the basis of the last decision and the grievance shall not be subject to further appeal or reconsideration.
4. By mutual agreement, the grievance may revert to a prior level for reconsideration.

#### **Section 5. Employee Rights and Restrictions**

1. The employee has the right to the assistance of a representative in the preparation of his written grievance, and to represent him in formal grievance meetings. The grievant may be required by either party to be present in meetings with Management for purposes of discussing the grievance.
2. A County employee selected as a representative in a grievance is required to obtain the permission of his immediate supervisor to absent himself from his duties to attend a grievance meeting. The employee representative shall give his supervisor reason-

able advance notice to ensure that his absence will not unduly interfere with departmental operations.

3. An employee and his union steward may represent his grievance to Management on County time. In scheduling the time, place and duration of any grievance meeting, both the employee, union steward and Management will give due consideration to the duties each has in the essential operations of the department. No employee shall lose his rights because of Management imposed limitations in scheduling meetings.

#### **Section 6. The Parties' Rights and Restrictions**

1. Only a person selected by the employee and made known to Management prior to a scheduled formal grievance meeting shall have the right to represent or advocate as an employee's representative.
2. If the employee elects to be represented in a formal grievance meeting, the department may designate a Management representative to be present at such meeting.
3. Management shall notify Council of any grievance involving the terms and conditions of this Memorandum of Understanding.
4. The Council representative has the right to present at any formal grievance meeting concerning a grievance that directly involves the interpretation or application of the specific terms and provisions of the Memorandum of Understanding.
5. If the Council representative elects to attend any formal grievance meetings, he must inform departmental Management

prior to such meeting. The department may also designate a management representative to be present at such meeting.

#### **Section 7. Procedure**

##### **1. Informal Complaint**

- A. Within five business days from the occurrence of the matter on which a complaint is based, or within five business days from his knowledge of such occurrence, an employee may discuss his complaint in a meeting with his immediate supervisor.
- B. Within five business days from the day of the discussion with the employee, the immediate supervisor shall verbally reply to the employee's complaint.

##### **2. Grievance**

###### **Step 1. Foreman**

- A. Within five business days from the occurrence of the matter on which a complaint is based, or within five business days from his knowledge of such occurrence, an employee shall file a formal written grievance. Four copies of the departmental grievance form shall be completed by the employee stating the nature of the grievance and the remedy he requests from his departmental Management. The employee shall submit two copies to his immediate supervisor and retain the third and fourth copy.
- B. Within five business days the immediate supervisor shall give his decision in writing to the employee on the original copy of the grievance.

### **Step 2. Middle Management**

- A. Within ten business days from his receipt of the supervisor's written decision and using the returned original copy of the grievance form, the employee may appeal to the appropriate level of management as previously indicated by his Department Head. The Department Head has the authority to waive the middle management step if such a step is not appropriate because of the size of his department. The middle management representative shall discuss the grievance with the supervisor concerned and the employee before a decision is reached by him.
- B. Within ten business days from receipt of the grievance, the middle management representative shall give a written decision to the employee using the original copy of the grievance.

### **Step 3. Department Head**

- A. Within ten business days from his receipt of the decision resulting from the previous step, the employee may appeal to the Department Head using the original copy of the grievance.
- B. Within ten business days from the receipt of the employee's grievance, the Department Head or his designated representative who has not been involved in the grievance in prior levels shall make a thorough review of the grievance, meet with the parties involved and give a written decision to the employees.
- C. If the Department Head or his designated representative fails to give a deci-

sion at the third level within the specified time limit, the formal grievance will be considered settled in favor of the employee in the manner in which the employee stated his desired settlement in his written grievance.

- D. On matters that do not directly concern or involve the interpretation or application of the specific terms and provisions of the Memorandum of Understanding, the written decision of the Department Head or his designated representative shall be final, unless the grievance is submitted to arbitration pursuant to Section 8 hereof.

### **Section 8. Arbitration**

- 1. Within ten days from the receipt of the above written decision of the Department Head, or his designated representative, the Joint Council representative on behalf of an employee whom it has represented in the processing of this grievance may request that the grievance be submitted to arbitration as provided for hereinafter.
- 2. Only those grievances which directly concern or involve the interpretation or application of the specific terms and provisions of this Memorandum of Understanding may be submitted to arbitration hereunder. In no event shall such arbitration extend to:
  - A. The interpretation, application, merits, or legality of any state or local law or ordinance, including specifically all ordinances adopted by County's Board of Supervisors; unless the arbitrator, in his discretion, finds it necessary to interpret or apply such state or local law in order

to resolve the grievance which has been submitted to the arbitrator.

- B. The interpretation, application, merits, or legality of any or all of the County of Los Angeles Civil Service Commission Rules, nor matters under the jurisdiction of said Commission has established procedures or processes by which employees or employee organizations may appeal to, or request review by, said Civil Service Commission, including, but not limited to, discharges, reductions, suspensions, transfers, classification actions, performance evaluations, and similar matters within the jurisdiction of said Civil Service Commission; nor
  - C. The interpretation, application, merits or legality of the rules or regulations of the Department Head, the Department of Personnel, or any other County Department, agency, or commission, unless the arbitrator, in his discretion, finds it necessary to interpret or apply such rules or regulations in order to resolve the grievance which has been submitted to the arbitrator.
3. In the event the Joint Council representative on behalf of an employee whom it has represented in the processing of this grievance desires to request that a grievance, which meets the requirements of paragraph 2 hereof, be submitted to arbitration, he shall within the time requirements set forth above send a written request to County's Employee Relations Commission, with a copy thereof simultaneously transmitted to County's Director of Personnel and to the County Department Head or Officer affected, which written request shall:

A. Set forth the specific issue or issues still unresolved through the grievance procedure and which are to be submitted to arbitration; and

B. Request that said Employee Relations Commission, pursuant to its applicable Rules and Regulations, appoint an arbitrator for the purpose of conducting arbitration concerning such grievance as provided herein.

- 4. Arbitration of grievances hereunder will be limited to the formal grievances as originally filed by the employee to the extent that said grievance has not been satisfactorily resolved. Arbitration hereunder shall be conducted in accordance with applicable rules and procedures adopted or specified by County's Employee Relations Commission, unless the parties hereto mutually agree to other rules or procedures for the conduct of such arbitration. The fees and expenses of the arbitrator shall be shared equally by the parties involved, it being understood and agreed that all other expenses including, but not limited to, fees for witnesses, transcripts, and similar costs incurred by the parties during such arbitration, will be the responsibility of the individual party involved.
- 5. The written decision of an arbitrator resulting from any arbitration of grievances hereunder shall be entirely advisory in nature and shall in no way be binding upon any of the parties hereto or appealable.
- 6. The decision of an arbitrator resulting from any arbitration of grievances hereunder shall not add to, subtract from, or otherwise modify the terms and conditions of this Memorandum of Understanding.



## Article 29

### GRIEVANCES—GENERAL IN CHARACTER

In order to provide an effective mechanism whereby disagreements between the Council and Management concerning the interpretation or application of any of the provisions of this Memorandum of Understanding affecting the rights of the parties or the working conditions of a significantly large number of employees in the unit may be effectively resolved, the following procedures are agreed upon:

- A. Where Council has reason to believe that Management is not correctly interpreting or applying any of the provisions of this Memorandum of Understanding, Council may request in writing that a meeting be held with the authorized representatives of the County who have authority to make effective recommendations for the resolution of the matter. Such written request shall set forth in detail the facts giving rise to the request for the meeting and shall set forth the proposed resolution sought.

Within five business days of receipt of the request for such a meeting, the parties will meet for the purpose of discussing and attempting to resolve the disagreement.

- B. Within ten business days of such meeting, and in the event the matter is not satisfactorily resolved, Council shall have the right to meet with the principal representative(s) of the County who have authority to resolve the matter. For purposes of this provision, Management's principal representative(s)

shall mean its Director of Personnel or his authorized representative, and any other County department head or his authorized representative, who has authority to resolve the matter.

- C. Within ten business days after the meeting provided in (B) above, if the matter is not satisfactorily resolved, and if the disagreement meets the requirements of Section 8, Subsection 2 of Article 27 the disagreement may be submitted to arbitration in accordance with the provisions of Section 8 of Article 27 of this Memorandum of Understanding.

It is further understood that this Article is not intended as a substitute or alternative for the grievance procedures set forth in Article 27 of this Memorandum of Understanding. Instead, this Article is intended to provide a procedure to resolve disagreements affecting the rights of the parties or disagreements arising from the application of the terms of this Memorandum of Understanding affecting the working conditions of a significantly large number of the employees in the unit, as distinguished from the rights of individual employees. Accordingly, the parties agree that the procedures set forth herein shall not be implemented where the dispute or complaint involved is or could be effectively brought by an employee or employees, and otherwise processed through the grievance procedures set forth in Article 27 hereof.

# **NEGOTIATED GRIEVANCE PROCEDURES IN CALIFORNIA PUBLIC EMPLOYMENT: CONTROVERSY AND CONFUSION**

By Norman Amundson, Institute Staff\*

About a year ago, I listened to a union representative explain why the first round of negotiations with a government agency was proceeding very slowly. Management would not agree on a grievance procedure which would be part of the bilateral memorandum of understanding. In the opinion of the union negotiating committee, this item had to be resolved before they could move on to a discussion of other items. The representative explained that in any initial bargaining situation the highest priority should be given to the negotiated grievance procedure. It provides, over the course of the agreement, a means of peacefully settling disputes over matters contained in the agreement; and it recognizes the union as the spokesman for aggrieved individuals or groups.

A few months ago I listened to a city attorney state that he couldn't understand the union's insistence on a negotiated grievance procedure. He felt the civil service appeals procedure in effect in his city was a fair procedure. The employee was entitled to a hearing before the civil service commission and if he disagreed with the decision of the commission he could challenge it in the courts. Basically there weren't many problems anyway. The employees received good treatment as evidenced by the fact that the city had never had any major problems — just minor ones which were easily handled.

The need to reconcile these opposing views is becoming more acute in California now that implementation of employee relations policies is well under way and so many jurisdictions are presently involved for the first time in formal bargaining. This article attempts to explain briefly

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\*The author wishes to thank Don Vial and B. V. H. Schneider for their many helpful suggestions during the preparation of this article. (*Editor's note: CPER invites responses to, and comments on, the above article and on all material which appears in this Series.*)

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the purpose of grievance procedures, the differences between negotiated procedures and traditional civil service forms of appeal, the significance of these differences with regard to employer and employee organization objectives, and some of the problems involved in using a negotiated procedure.

## Definitions

What is a grievance? As a starting point, Webster's definition is probably as useful as any: "a cause of distress felt to afford reason for complaint." In the workplace a grievance might be defined as any complaint of an employee relating to his job, pay, working conditions, or treatment.

What is a grievance procedure? The U.S. Bureau of Labor Statistics (Bulletin No. 1425) states:

*The essence of a grievance procedure is to provide a means by which an employee, without jeopardizing his job, can express a complaint about his work or working conditions and obtain a fair hearing through progressively higher levels of management.*

This, of course, is a very general definition of a grievance procedure and could apply equally well either to the traditional civil service appeals system or to a negotiated procedure. (It should be noted at this point that all complaints may not necessarily be admissible as grievances in a formal procedure.)

The difference between traditional civil service and negotiated grievance procedures will be dealt with in more detail below. Briefly, *both* incorporate the "fair redress" concept contained in the BLS definition. Their common purpose is to insure equal treatment and the right of a fair hearing in the workplace; that is, a guarantee of procedural fairness and due process as opposed to possible arbitrary action.

The typical civil service system, however, is unilaterally established (often after some form of consultation with employee organizations, if they exist). Although many changes are being made in some of the newer systems to accommodate the development of collective bargaining relationships, such systems remain essentially "appeals" mechanisms for aggrieved individual employees. The final decision is usually made by the employer or by a civil service commission (appointed by the employer). In processing a grievance through the various steps of the procedure, the grievant may be represented by his employee organization (or seek the assistance of another third party, such as an attorney), but the grievance remains an individual matter. The employee organization's relationship to the grievance arises out of the "service function" provided for a member.

A negotiated grievance procedure, on the other hand, is bilaterally established by the parties to the collective bargaining agreement or memorandum of understanding. It is part of the agreement. Within the scope of grievable issues, it typically covers the application and interpretation of the terms of the agreement or memorandum of understanding. Without interfering with the right of an individual to pursue his own grievance (a matter protected by law in both the public and private sector), negotiated procedures patterned after the private sector extend the role of the employee organization well beyond the "service function" of representing the individual grievant at various steps of the procedure. The grievance of an individual becomes an "organization grievance" when it is picked up and supported by the employee organization. The right to represent the grievant at every step is assured; in addition, the employee organization is placed in the position of being able to determine whether or not a grievable issue in fact exists, and is usually given the authority to take up a grievance on its own, as well as on behalf of an employee or group of employees. The significance of this relationship of the employee organization to the grievance in a typical negotiated system is that grievance handling is seen more as a continuation of the bargaining process

during the life of the agreement than as a system of "appeals" to higher authority. Thus, there is no patience with the idea that the employer should make the final decision. The typical negotiated procedure (including many of the procedures being negotiated in the public sector) involves independent, binding arbitration as a final step.

The advisability and/or legality of binding arbitration have been subjects of considerable debate since collective bargaining has spread to public employment. Neither question will be covered in this paper, but it is important at the outset to distinguish between *two* kinds of arbitration utilized in labor-management relations. One occurs when the parties can't come to an agreement on the terms of a contract. Such an impasse is called an "interest" dispute. In the United States, arbitration is rarely used to resolve "interest" disputes. Unions in the private sector have traditionally resisted the use of "interest" arbitration except on a purely voluntary basis. The parties have preferred to establish the terms of their own contractual relationship, even if resort to force is necessary.

On the other hand, binding arbitration is commonly accepted in the United States as the appropriate final step in negotiated grievance procedures. Impasses over grievances are known as "rights" disputes, to distinguish them from "interests" disputes. The purpose of "rights" arbitration is to settle, without work stoppages, disputes arising during the life of an agreement over its application and interpretation. However, where arbitration is provided there may be some restrictions on its use. In some industries, for example, the parties have agreed to exclude certain grievances from the arbitration step, e.g., production standards and health and safety disputes. Usually, a grievance may be brought to arbitration only if it qualifies as a "grievance" under a definition contained in the agreement. A "complaint," for example, might include any problems that arise in connection with work. If a complaint does not meet the definition of a grievance it is not subject to arbitration, although it may be pursued by the employee organization short of arbitration.

### **The Trend Toward Negotiated Grievance Procedures**

Industrial relations experts are quick to point out that the level of dignity afforded employees through negotiated grievance procedures has been one of the most important contributions of American unions to the welfare of employees. It is not surprising therefore that there should be a discernible shift toward the private sector model of handling grievances in California public employment. The trend toward negotiated grievance procedures is a national development of major significance. A recent study of 303 collective bargaining agreements in state and local public employment, reported in the April 1970 issue of *Industrial and Labor Relations Review*, shows that grievance procedures existed in 282 or 93 per cent of the agreements examined; 159 or 53 per cent had provisions for binding arbitration of grievances; and an additional 25 agreements provided for advisory arbitration.

Why is this happening in public employment? In answering this question, it is important to bear in mind that the differences between negotiated systems and traditional civil service methods of handling grievances and appeals are crucial. For example, the private sector concept of grievance handling as a continuation of the bargaining process stems from the fact that the provisions of a negotiated agreement require continuous refinement and interpretation in their application to specific employer-employee relationships. An unresolved grievance becomes a formal labor-management dispute, subject to final and binding arbitration as an alternative to economic action (strikes and lockouts) during the life of the agreement. In this sense, the successful operation of the grievance mechanism is often considered to be an expression of a mature and stable bargaining relationship.

Since civil service systems are not based on bargaining relationships, it is understandable

that the focus of civil service grievance procedures should be on concepts of equal treatment and the right of a fair hearing. Procedures are established to assure "due process" in appeals from dismissals, suspensions, and other adverse actions taken by management, as well as in the expression of complaints about working conditions. The public official's concept of *fairness* need not embrace the employee organization's concept of *negotiations* in the handling of grievances.

Thus, to the extent that grievance handling is advanced by employee organizations as a continuation of the bargaining process during the life of an agreement, the resistance of public officials to negotiated grievance procedures may simply reflect a desire on the part of public officials to protect the civil service from collective bargaining inroads. On the other hand, public employee organizations may find their efforts to establish negotiated grievance procedures restricted by the narrow scope of their bargaining relationships with public agencies. In general, it is difficult to extend the scope of negotiated grievance procedures beyond the scope of bargainable issues. In a very real sense, the scope of collective bargaining sets the limits of a negotiated grievance procedure. As collective bargaining is extended in a civil service system, the tendency is for negotiated grievance procedures to displace traditional civil service systems in the handling of employee grievances. In California, both the pace of this development and much of the current dissension and confusion over grievance procedures can be traced to state laws and local ordinances which promote bargaining relationships at the same time that they seek to enhance civil service systems.

### **State Laws and Local Ordinances – Impact on Grievance Procedures**

Both the Winton Act governing teachers and other school employees and the Meyers-Milias-Brown Act governing local public employees declare the intention of the Legislature to preserve and strengthen existing personnel systems. Section 3500 of the MMB Act (which is the same provision applicable to state employees under the original Brown Act) states:

*Nothing contained herein shall be deemed to supersede the provisions of existing state law and the charters, ordinances, and rules of local public agencies which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations. This chapter is intended, instead, to strengthen merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public agencies by which they are employed.*

A comparable provision in the Winton Act reads:

*Nothing contained herein shall be deemed to supersede other provisions of this code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations. This article is intended, instead, to strengthen tenure, merit, civil service and other methods of administering employer-employee relations through the establishment of uniform and orderly methods of communication between employees and the public school employers by which they are employed.*

These acts appear to encourage the maintenance of traditional grievance procedures while moving in the direction of collective bargaining by requiring public agencies to meet and confer with employee organizations. In the case of the MMB Act, "good faith" is required. Agreements with recognized employee organizations must be reduced to nonbinding memoranda of understanding for submission to the governing board. The scope of representation covers all matters relating to employment conditions and employer-employee relations, including, but not limited to wages, hours, and other terms and conditions of employment. Specifically excluded, however, are matters related to the "merits, necessity or organization of any service or activity provided by law or executive order." In the case of school teachers under the Winton Act, no limitation is imposed on the scope of "meeting and conferring." All matters relating to the professional interests of teach-

ers and the "mission" of schools are included, as well as wages, hours, and working conditions. However, there is no "good faith" requirement in the Winton Act, and no provision is made for reducing agreements to "memoranda of understanding."

It might be observed that the scope of "meeting and conferring" appears to become more restrictive as the statutes move closer to a form of collective bargaining. In the same vein, procedures for handling grievances tend to reflect the scope of bargaining permitted at the local level in the implementation of these statutes.

## **The Changing Scope of Grievance Procedures**

*The traditional system.* Although "grievances" exist and are usually provided for in civil service systems, their definition tends to change once formal bargaining relationships and negotiated grievance procedures are established. A straight civil service definition of a grievance is usually quite broad. Kern County's is fairly typical (reprinted in entirety at the end of this article):

*... employee complaints relating to working conditions, hours and employee relationships beyond his control including employment situations in which the employee believes an injustice has been done because of lack of departmental policy, or a departmental policy that is unfair, or because of the deviation from or misinterpretation of a policy.*

However, this broad definition of a grievance is somewhat misleading. In fact, in many public agencies, employee complaints are divided into two categories with separate procedures. The following excerpt from Modesto's Personnel Rules exemplify the kind of distinction which is made (see also Section 993 of Kern County's Ordinance in appendix):

*16.2 Matters Subject to Grievance Procedures. Any city employee shall have the right to present a grievance regarding wages, salaries, hours and working conditions, for which appeal is not provided [emphasis added].*

The Modesto Personnel Rules establish separate hearings and appeals procedures for disciplinary actions – suspensions, demotions, or dismissals.

*"Appeals" and "grievances":* The definition of "appeals" and "grievances" varies widely among government agencies. However, the difference in the *procedures* involved might be stated in the following way:

1. A *grievance* stems from an employee's dissatisfaction with a working condition or a personnel practice; it typically is any complaint which does not fall into the "appeal" category. Grievances are often not appealable outside the management structure.

2. The term *appeal* is used to describe a complaint over an "adverse action" which management had taken, such as an official reprimand, suspension, discharge, or transfer. Final recourse is usually to the political body, civil service commission, or personnel board, rather than to management.

Under a typical negotiated grievance procedure in the private sector both "appeals" and "grievances" as defined above are included within the scope of the grievance procedure and are subject to impartial settlement at the last step.

As noted above, the key to the scope of private sector grievance procedures is the scope of the bargaining relationship. For example, Modesto has a limited "meet and confer" policy with regard to bargaining, and Modesto's Rule 17 on Employer and Employee Relations and Employee

Representatives states that "in presenting and discussing grievances . . . all employees and representatives of employee organizations shall first follow the grievance procedure set forth in Rule 16," quoted above in part. No mention is made of the possibility of a negotiated grievance procedure. Modesto follows the traditional civil service model and provides for final resolution of grievances by the City Manager.

*Adapting to a bargaining relationship.* Similarly, the El Cerrito Employer-Employee Relations Ordinance provides that grievances shall be processed in accordance with procedures established by the city. In the procedure, a grievance is broadly defined to cover "a claimed violation, misinterpretation, inequitable application or non-compliance with [the city's employer-employee relations ordinance] . . . or rules and regulations implementing this Ordinance, or personnel rules and policies of the City . . ." However, it also includes within the definition of a grievance the interpretation of any agreement or understanding between the city and employee organizations. The latter provision is significant, because the grievance procedure recognizes the right of an employee organization itself to file a grievance, as well as to represent aggrieved employees. Yet, the memorandum of understanding between the city and East Bay Municipal Employees Union, Local 390, SEIU, AFL-CIO, makes no provision for a negotiated grievance procedure (see *CPER* No. 4 for reprints of the three documents). However, the parties to the memorandum are satisfied that they can work out grievances under the general procedure, as indeed they have in one involving a fireman in the bargaining unit.

The grievance procedure in the City of Torrance represents still another half-way step toward the private sector model. A uniform procedure is set forth in the Employer-Employee Relations Ordinance (see *CPER* No. 4). Grievances are broadly defined, but again, complaints arising from disciplinary actions are excluded from the grievance procedure unless no review is otherwise provided. Furthermore, no provision is made for a negotiated grievance procedure even though the Ordinance provides for the execution of a memorandum of understanding with a majority organization covering wages, hours, and working conditions. An aggrieved employee may be represented by an employee organization, but an employee organization does not appear to be able to grieve on its own. In the final disposition of grievances, provision is made for the City Manager to convene an Employee Appeals Board under a chairman who functions in the capacity of an independent arbitrator. Decisions are final and binding.

*Allowing for negotiated procedures.* In contrast with the above approaches to grievance handling, a new San Diego County Employee Relations Policy specifically provides for negotiated grievance procedures pursuant to memoranda of understanding which are supplemental to the procedure maintained for all employees (see reprint in *CPER* No. 4):

*Section 9. Grievance Procedure. The Board shall maintain a formal written grievance procedure for use by all department heads and employees, provided that nothing herein shall preclude the adoption by the Board of a modified or supplemental grievance procedure pursuant to a memorandum of understanding. The grievance procedure shall be available to every employee without fear of reprisal and regardless of his membership or nonmembership in an employee organization.*

Since the policy is new, there are no negotiated procedures in existence at this time. Under the county's uniform procedure, however, this hybrid approach still excludes from coverage grievances (appeals) which are reviewable under civil service procedures, including those involving disciplinary actions, work evaluations, job classifications, etc. No provision is made for impartial, third-party resolution of grievances. Employee organizations appear to be restricted to representing aggrieved employees when asked, and then only after the first step, under the uniform county grievance procedure.

The Santa Clara County system also recognizes negotiated grievance procedures. Under this county's Employee-Management Relations Ordinance (see *CPER* No. 3), "grievances involving wa-

ges, hours and other conditions of employment which affect members of the representation unit may be processed by the recognized employee organization on its own behalf directly with the appropriate level of management." As a general rule, individual and group grievances are processed under the procedures established by Merit System Rules, but grievances arising out of a negotiated agreement must be processed under the negotiated procedure. There appears to be no choice of procedures regarding matters covered by a collective bargaining agreement:

*3.9.6-6: GRIEVANCES. Grievances involving wages, hours and other conditions of employment which affect members of the representation unit may be processed by the recognized employee organization on its own behalf directly with the appropriate level of management. Individual and group grievances shall be processed in accordance with the provisions of the grievance procedure as provided in the Merit System Rules. Grievances with respect to any agreement negotiated in accordance with this chapter shall be processed in accordance with procedures set out in such agreement or directly with the County Executive if no agreement on a grievance procedure is reached. Grievances involving the interpretation and application of this chapter may be appealed to the County Executive.*

Perhaps the Marin County experience comes closest to indicating how a hybrid system can accommodate a private sector approach to grievance handling within the framework of a modified civil service system as collective bargaining relationships develop. The Marin County Employer-Employee Relations Resolution – one of the first in the state to provide for collective bargaining for majority organizations – merely provides that "A grievance procedure shall be established by the Personnel Commission and adopted by the Board of Supervisors which shall provide a uniform procedure available to all county employees to seek adjustment of grievances arising out of their employment relations." The uniform procedure, adopted by the county after lengthy discussions with employee organizations, defines a grievance as follows (see *CPER* No. 1 for both documents):

*A grievance is a claimed violation, misinterpretation, inequitable application or non-compliance with provisions of a collective bargaining agreement, or of County ordinances, or resolutions, rules, regulations, or existing practices affecting the status or working conditions of County employees, except that individual personnel actions within the purview of the Marin County Code are not grievances within the meaning of this policy [emphasis added].*

Apart from the exception, which seeks to maintain separate civil service procedures for appealing adverse actions, the definition of a grievance specifically recognizes the provisions of collective bargaining agreements. Employee organizations, as well as individual employees or groups of employees, may file grievances. Beyond this, a representative of a majority organization is entitled to be present at all meetings, conferences, and hearings involving grievances of employees who are in the bargaining unit. Unresolved grievances may be settled either by decision of the Personnel Commission or by final and binding arbitration. Arbitration requires agreement by the County Administrator and the grievant on the issues to be arbitrated. Where the grievance pertains to the specific terms of an existing collective bargaining agreement, however, mutual agreement to arbitrate is not necessary. The employee organization alone may request arbitration.

Collective bargaining agreements in Marin tie into this flexible, uniform procedure for handling grievances. For example, the agreement between SEIU Local 535 and Marin County covering Probation Workers (*CPER* No. 1) defines a grievance as follows:

- 1. A claimed violation, misinterpretation, inequitable application, or noncompliance with the provisions of this contract or of any supplemental agreement.*
- 2. A claim by an employee or a group of employees or by the Union in his or their or its own behalf, of a violation, misinterpretation or inequitable application of existing policy, orders, rules and regulations, or then existing practice, applicable to the Probation Department or its employees or the Union.*



The provisions of the uniform county procedure are incorporated by reference into the collective bargaining agreement, including final disposition of grievances through arbitration or other appropriate method. In this manner, the stage is set for the union to pursue grievance handling as a continuation of the bargaining process.

*Combining "appeals" and "grievances" in a negotiated procedure.* As noted, however, the Marin approach still provides for the handling of "adverse action" grievances separately from other grievances. In this respect, Orange County's agreement with the County Employees Association appears to have taken an important step in the direction of pulling together separate procedures in the final disposition of grievances. Both discharge cases, as well as other grievances, may be taken to final and binding arbitration or to the Board of Supervisors at the option of the aggrieved employee. Another provision states: "The grievance appeal procedure shall be used if a regular employee wishes to appeal the decision of his Department Head to reduce him to a position in a lower class for reasons of unsatisfactory performance or physical disability."

*Two school district examples.* Turning to school districts, two existing agreements in the state illustrate the extent to which the private sector model for handling grievances is being adapted to meet the collective bargaining demands of teachers. They are: a recent agreement between the Santa Maria High School District Board of Education and the Santa Maria High School District Negotiating Council, and the highly publicized agreement between the United Teachers of Los Angeles and the Los Angeles Unified School District Board which is currently being contested in the courts (the agreements are included in the Documents Section of this issue).

The Santa Maria agreement is a far-reaching document which covers many professional and curriculum issues outside the traditional areas of wages, hours, and working conditions. It includes a brief negotiated grievance procedure which defines a grievance as a "written complaint by an employee or group of employees that there has been a violation, misinterpretation or inequitable application" of the agreement. The procedures for handling grievances are still to be developed through negotiations. These procedures, however, must include binding arbitration as the ultimate step, "which shall be restricted to the interpretation and application of this agreement." Another provision of the agreement sets forth conditions for grievance handling which resemble the private sector model:

*All employees shall have the right to organizational representation at each step. Organization representatives shall have the right to intervene and present their position at any step in the grievance procedure. The organization may initiate a grievance on any matter affecting the application or interpretation of this Agreement.*

The UTLA negotiated grievance procedure is much more elaborate. Although it contains many exceptions, the language follows closely several of the provisions found in private sector agreements. The definition of a grievance is fairly typical of negotiated agreements:

*A grievance shall be defined as a claim by the Negotiating Council or by one or more employees covered by this Rule involving the interpretation or application of this Rule or a claimed violation or an incorrect application of any rules or policy of the District or of the Board of Education [note: references to the "Negotiating Council," rather than the union, and to "this Rule," rather than the agreement, are intended to comply with the legal requirements of the Winton Act].*

Exclusions from the grievance procedure, however, are numerous. They reflect both the Winton Act's intent to prevent inroads against existing personnel procedures and the desire of the school board to maintain established mechanisms for appeals from management decisions. Excluded are the following:

*(a) The review of examination results for which other procedures have been established.*

*(b) Criticisms or performance reports of any nature except the review of a "Notice of unsatisfactory service of certificated employee"; provided, however, that such criticisms or performance reports must be communicated to the employee at the time or shortly after they are made.*

*(c) The review of a written opinion non-confidential reference submitted in conjunction with an examination or evaluation for a position for reinstatement; provided, however, that this exclusion shall not preclude the filing of grievances over any claimed misstatements of fact.*

*(d) Any rule or policy or administrative procedure of the District and the Board of Education; provided, however, that the exclusion shall not extend to disputes over alleged violations or incorrect applications of any rule, policy or procedure. This exclusion shall not apply to claims that any rule, policy, or administrative procedure is in conflict with any term or condition of this Rule.*

*(e) Suspensions or dismissals covered by review procedures under the California Education Code.*

*(f) The review of oral or written performance evaluation except the review of "Notice of unsatisfactory service for certificated employees" or an "Inadequate rating."*

*(g) The review of a written open non-confidential reference submitted in conjunction with an examination or evaluation for a position, or reinstatement.*

*(h) A reduction of force applied in accordance with the Board of Education, Rule 3321 and the California Education Code.*

*(i) Any matter governed by law or a matter on which the District and the Board of Education are without authority to act.*

The steps in the grievance procedure are carefully spelled out to protect the rights of the aggrieved person and to assure the full participation of the organization in the handling of grievances. Submission of an unresolved grievance to impartial arbitration is the ultimate step available to either the organization, the aggrieved employee, or employees, "provided that the grievance involves the interpretation or application" of the agreement. This restriction on arbitration appears to be closely related to the exemptions from the negotiated grievance procedure noted above.

The same section which restricts arbitration procedures to a grievance involving the interpretation and application of the agreement also refers to the existing Board of Education Certificated Adjustment Procedure. It reads in part:

*Any grievance involving any District or Board Rules, procedures or policies may be processed in accordance with the existing Board of Education Certificated Adjustment Procedure (Board Rules 3600-3608) concerning the filing of grievances and a hearing before a Board of Review. All existing Board rules on grievance and Board of Review procedures shall be maintained and shall apply to any grievance or complaint filed by any employee that does not involve the interpretation or application of this Rule.*

At the same time, recognition is given to the "cumbersome" and "expensive" aspects of maintaining dual procedures for processing grievances. An interesting provision, which discourages the use of the existing Certificate Adjustment Procedure (presumably because of the development of a negotiated procedure) reads as follows:

*(c) Recognizing that the present Certificated Adjustment Procedure is cumbersome, time consuming, and expensive, the District Joint Committee under Article V shall study the present procedure and shall recommend a more limited and efficient substitute. The District Joint Committee shall submit its recommendations to the Board of Education no later than January 1, 1971, and such recommenda-*

*tions, if adopted by the Board, shall be put into effect immediately under this Rule. In the meantime, the Negotiating Council is requested to limit the use of the present Certificated Adjustment Procedure to a minimum. Although employees shall continue to have the right of recourse to this procedure during the period that the District Joint Committee is considering its recommendations, they shall be given the opportunity of deferring the filing of grievances not involving the interpretation or application of this Rule until such time as the present procedure is modified in accordance with the recommendations of the District Joint Committee, with the understanding that existing time limitations shall in that event be waived. Any employee wishing to exercise this option, however, shall be required to give notice to that effect at the time that he would ordinarily have filed the grievance. In the event that the subsequent revision of the existing procedure excludes the deferred grievance, the employee shall nevertheless be permitted to file and process the grievance under the new Board rules.*

**Transit districts.** Complications of this nature are not necessarily an endemic disease associated with labor relations in the public sector. Where civil service traditions are absent in public employment, there do not appear to be any problems in extending the private sector model to grievance procedures in public employment. This is apparent in collective bargaining agreements based on labor relations policies set forth in public transit district laws.

The agreement between the Alameda-Contra Costa Transit District and Division 192 of the Amalgamated Transit Union is a good example. Its grievance procedure reads like almost any negotiated procedure. Discharges, suspensions, and other adverse actions are not excluded from the provisions of the agreement. In fact, protections are provided which go far beyond most private sector agreements:

*Section 3 – No employee will be disciplined, discharged, nor will adverse entries be made in his personnel record except for just and sufficient cause.*

*The District agrees that it will notify the employee in writing within ten days from the date of knowledge of the occurrence forming the basis for the contemplated discipline or discharge of its intention to render discipline. No employee will be disciplined or discharged unless a copy of the precise charge against the employee is furnished him within ten days of the date of knowledge of the occurrence. A copy of the notice will be sent to the Association.*

*Either the employee or the Association shall have the right to request a hearing on the charges within ten days of receipt of the charges. Failure to request a hearing within a period of ten days after receipt of the charges will be a forfeiture of the right to a hearing, provided, however, for good and sufficient cause the time limitation to answer the charge may be extended. An employee who has been suspended, disciplined or discharged shall be entitled to a fair and impartial hearing by the proper officials of the District and may be represented by accredited officers of the Association. A written decision on such a hearing shall be rendered as promptly as possible, but in no event later than five days after completion of the hearing, and copies furnished the Association and employee.*

*At any hearing the employee and his representative will be allowed to question all witnesses. Hearsay evidence shall not be accepted as a basis for discipline or adverse entry in the employee's record.*

*In the event the decision is not satisfactory to the employee or the Association the matter may be appealed to the General Manager of the District or a representative designated by him within 20 days after receipt of written decision; provided, however, for good and sufficient cause the time limitation may be extended. The General Manager or his representative will consider the appeal, if filed, and render a decision ten days from the date of appeal of the decision resulting from the hearing. If the decision is still unsatisfactory, the matter may be submitted to arbitration as provided in Section 14 of this Agreement.*

*Employees not at fault and required to appear at hearings at any level will be paid either run or shift pay for the day.*

*Adverse notations on an employee's record more than one year old as of the date of the infraction under investigation will not be taken into consideration or be admissible as evidence.*

*Any adverse entry in an employee's personnel record will be subject to the provision of this Section and shall be regarded as discipline.*

*An employee shall not be discharged because of accidents without an opportunity to transfer, if possible, to some other department.*

*Any disciplinary action shall be reported by telephone to the Association within 48 hours, and confirmed by letter within three days.*

The negotiated grievance procedure contained in the agreement between the Sacramento City Transit Authority and the Amalgamated Transit Union, Division 256 (printed in the Appendix to this article), is another example of a full-blown private sector model being applied to a public jurisdiction without a civil service tradition. The scope of the procedure is in the definition of a grievance: "The term 'grievance' shall mean a complaint or dispute arising between the parties to this Agreement concerning the proper interpretation or application of any provisions of this Agreement." Adverse actions are not covered under separate procedures because the collective bargaining agreement covers the full scope of the employment relationship.

*Deciding what is grievable.* Defining a grievance as arising from the "interpretation or application" of the agreement may seem to narrow the grievance area as much as separating out "adverse action" appeals. This may or may not be true, as indicated above, depending on the scope of bargaining. In any event, employee organizations see their primary function as representing employees on *all* matters involved with "wages, hours, and working conditions." The thrust of collective bargaining is to establish agreed-upon rules on all important issues and to include in the agreement clauses intended to extend the scope of grievable issues as far as possible, for example, by including "past practices" clauses or references to the maintenance of "harmonious relationships."

As might be expected, clashes occur between employee organizations and employers over whether a grievance really is a grievance within the meaning of the agreement. When this happens the grievance procedure itself is usually used for definition purposes, that is, to determine whether an issue is a grievable matter. For example, the management representative at the first level may reject a grievance (without discussing the issue) as not grievable. The employee organization may then refer the grievance to the next step on two issues — the original issue and the right to grieve on that particular issue. Somewhere during succeeding steps in the grievance procedure the latter issue will be resolved. If both sides consider it of sufficient importance, it may ultimately be decided by an arbitrator who rules: (1) This issue is not grievable and management is correct in rejecting it, or (2) This issue is a grievable matter and my decision is as follows...

In some cases the procedure is for the employee organization to file a separate grievance over management's refusal to accept a grievance on a particular issue. Resolution of the second grievance then decides whether the grievance over the original issue will be processed.

## **The Role of the Employee Organization**

Traditionally, under civil service systems, the role of the employee organization in handling grievances has been thought of in terms of the right of the aggrieved employee to be repre-

sented or assisted at various steps of the appeals procedure. This is the "service function" referred to earlier in the handling of grievances. The employee organization exercises no control over the grievance. Only the aggrieved employee has the authority to determine whether the grievance should be continued or dropped at any step of the appeals procedure. Representation by the employee organization may help somewhat to depersonalize the grievance, but the individual will have to lay his "good will" on the line to pursue the grievance.

Virtually all grievance or appeals procedures in public employment today provide that the aggrieved may be represented by a fellow employee, a representative of an employee organization, or other person of his choice, such as an attorney. In some instances, as in the City of Santa Paula's grievance procedure, for example, representation may not be permitted until the second step of the procedure, but the right is well established. Many of the newer procedures, as already indicated above, go beyond this. They establish the *right of the employee organization* to be represented at every step of the grievance procedure and to be kept fully informed on actions taken by management; they also provide that the employee organization may file a grievance on its own. These developments are most apparent in negotiated procedures, but they also occur in general grievance procedures of public agencies. In any event, they are indicative of the changing role of employee organizations in the handling of grievances in the public sector.

The direction of the change is to give employee organizations greater control over the handling and processing of grievances. The union becomes the "buffer" between the aggrieved individual and the "establishment" as the grievance changes from an "individual" to an "association" or "union" grievance. Thus, the employee organization's "good will" is put on the line, instead of the employee's. More importantly, the employee organization may assume the responsibility for screening complaints, deciding which ones to pursue as grievances and which to reject as "bum beefs." This screening function of the employee organization is frequently welcomed with enthusiasm by managers. It may turn out to be the quid pro quo for management's acceptance of the private sector approach to grievance handling. At the same time, of course, the screening responsibility pressures the organization to follow "fair representation" practices in the handling of employee grievances.

The initial result of moving toward greater employee organization control in grievance handling may be a marked increase in the number of grievances filed by employees. This need not be taken to indicate an increase in discontent. Discontent has probably always existed, but the employees may have preferred not to express it. When a grievance procedure has been unilaterally formulated by the public employer, and the responsibility for initiating the grievance rests solely on the employee, it takes an unusually strong personality to file and carry on with a grievance, particularly if he must use the courts as a last resort. In addition, the costs of being represented by an attorney at some stage of the proceedings can become a deterrent to action. Unless forced to appeal a disciplinary action, such as a suspension without pay or a discharge, the employee will tend to look for some other solution to his job problems.

Possible light use of civil service grievance procedures in the past may also be due in part to the fact that, with a few notable exceptions, the independent employee associations which are so common in public employment have not given much attention to grievance processing. The successful representation of people on grievances requires a larger treasury and more full-time representatives than the low dues structure of most associations have been able to provide. In addition, few associations have viewed such representation as one of their major functions. This situation is changing rapidly at the moment as the independent associations move into formal bargaining relationships.

### **Employee Organization Objectives in Negotiating a Grievance Procedure**

Although perceptions of grievance procedures may differ, it seems likely that employee or-

ganizations in the public sector will seek the same objectives in negotiated grievance procedures which have been sought in private employment. By way of summary of points already touched on, these goals would include the following:

1. *Final and binding arbitration as the last step.* The arguments about governmental inability to delegate responsibility, once advanced as insurmountable barriers to third-party settlement of grievances, are crumbling. Public sector experience with arbitration has led to greater acceptance of the system because it works. For example, one public personnel manager in a California jurisdiction stated recently that he feels that binding arbitration in their collective bargaining agreement has made the union assume a more responsible attitude toward grievance processing. In his opinion, the establishment of precedents and the costs of arbitration have resulted in a more careful screening of grievances by the union.

2. *Involvement of stewards and other representatives at all steps of the procedure.* Employee organizations usually want the steward present at the initial steps of the procedure. In some unions the policy is to have the grievance presented by the steward or union representative at the first level. In a bargaining approach to grievances, the employee organization's interest is to insure uniformity of treatment as much as possible, and to be aware of informal grievance settlements which may affect the settlement of other grievances of a similar nature. Often, "precedents" can be established at any step of the grievance procedure. The employee organization will also be very conscious of the fact that an individual employee may not be aware of all of his rights. He may lack knowledge of the agreement, rules, past practices, etc.

3. *Time limits which require quick disposition of grievances without discouraging them.* Employee organizations understandably seek time limits which move a grievance through the procedure as quickly as possible. However, they will seek to avoid time limits in the initial filing of grievances. The argument advanced for not having time limits on the initial filing is that an employee may not know he has a grievance, especially when a grievable condition has existed over a long period. To obtain justice, the time limit on the initiation of a grievance is sometimes related to the date the person or persons involved become aware of the grievance.

4. *Employee organization control of the grievance.* This involves the question of "fair representation" noted earlier. An important responsibility is assumed by an employee organization when it achieves recognition as the representative of a particular group of employees. Laws, customs, accepted practices, court decisions, and organizational survival are a few of the considerations which influence decisions which must be made with respect to grievances. Employee organizations will want a central role in deciding whether a grievance should be dropped, resolved on the basis of a proffered settlement, or pushed on to the next step and eventual arbitration. At stake may be a substantial expenditure of funds, questions of precedents being established, handling of internal political pressures, future collective bargaining goals, achieving an equitable settlement, and many other issues.

5. *Insistence on the employee organization's right to file a grievance on its own behalf.* Without this right, many employee organizations feel that the relationship of grievance handling to the organization becomes meaningless. It is considered essential to protect the collective bargaining agreement and to preserve beneficial practices which may have developed outside the formal written agreement. For example, an employee may not wish to file a grievance even though a violation of the agreement has occurred. He may be fearful that the grievance will adversely affect his opportunities for promotion or give him a reputation as a troublemaker. Or an employee may have worked out some special arrangement with his supervisor which is to his advantage, but violates the agreement, working rules, or past practices. The organization will want to file a grievance in these instances on its own behalf as the representative of all the employees, even though the individual involved may not wish to grieve.

## Some Areas of Conflict with Management's Objectives

Needless to say, some of management's objectives may be diametrically opposed to those of the employee organization, particularly in new bargaining situations. The employer, for example, may not wish employee organization representation at the initial steps. He may oppose time limits in the procedure, outside decisions at the final step, etc. However, experience in the private sector indicates that most employers come to accept many of the employee organization's procedural goals as the more efficient method of handling grievances.

There are a few points on which management negotiators may "hang tough." One of them is a "Past Practices" clause. This is a clause which states that procedures in effect at the time of signing an agreement shall remain in effect unless specifically changed by negotiation. Management often regards a strong "past practices" clause as an infringement on its right to manage.

Management, of course, places heavy emphasis on clauses which seek to secure "management's rights." In this connection, grievance definitions which reserve certain areas of control to exclusive decision by management are common in unilaterally established grievance procedures. The focus is usually on items which, for example, protect management's right to determine the size of the work force, to direct the work force, to determine the mission of the agency, the manner in which work is to be performed, the hiring of employees, and similar traditional management functions. Employee organizations will probably take the position that even though these are areas for management decisions, these decisions can be questioned through the grievance process. Los Angeles County's ordinance comes to grips with the problem in a rather unique way. Instead of leaving the matter of management's rights to collective bargaining negotiations, it sets forth extensive management rights in the ordinance, and then gives employees the right to challenge their application through grievance procedures:

*Section 5. COUNTY RIGHTS. It is the exclusive right of the County to determine the mission of each of its constituent departments, boards, and commissions, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the exclusive right of the County to direct its employees, take disciplinary action for proper cause, relieve its employees from duty because of lack of work or for other legitimate reasons, and determine the methods, means and personnel by which the County's operations are to be conducted; provided, however, that the exercise of such rights does not preclude employees or their representatives from conferring or raising grievances about the practical consequences that decisions on these matters may have on wages, hours, and other terms and conditions of employment.*

## Conclusion

In the final analysis, the main purpose of grievance procedures is to resolve grievances as expeditiously and as fairly as possible without work disruptions. Even though the parties involved may have spent hours of negotiating time drawing up a grievance procedure, it may never be used. For example, in one small public jurisdiction, a negotiated procedure was established about 10 years ago. The procedure was not utilized, yet many grievances were resolved. When a problem arose either the union president would call the agency manager or vice versa. If possible, they settled the issue on the phone. If not, they would arrange a meeting of the involved parties and eventually work out a settlement. The parties knew the formal procedure was in existence but had developed a working informal procedure which both sides preferred.

In the San Francisco Bay Area, where over half the union workers in the private sector are covered by multi-employer contracts, a similar informal procedure has gained wide usage. The union business agent will be contacted by the member either by phone, at the union meeting, or when the business agent visits the work location to "police" the agreement. The business agent listens

to the problem and tells the worker it's a good grievance or that it's a "bum beef" and can't be taken up.

If the business agent takes action on the grievance, the action usually consists of talking to someone representing management about the problem. Who he talks to depends on many things – his personal relationships, who has authority, past experiences – it may not be anyone in the firm involved. He may go directly to the employer association representative who will then get in contact with the firm involved and resolve the problem.

In other situations a competent union steward may resolve the grievance by a discussion with an experienced and personally secure foreman. Many grievances are disposed of in this way and never become a part of any records – in spite of admonitions by union officials and management persons to keep such records.

In larger firms there is a greater tendency to use the formal procedures. Grievances are processed strictly according to the book (the collective bargaining agreement book, that is) and are settled somewhere during the internal steps, dropped by the union, or taken to arbitration. Often it is possible to work out a settlement just prior to arbitration. Arbitrators tend to search for a middle ground on difficult cases and the knowledge of this fact often furnishes enough pressure to bring a compromise settlement.

Undoubtedly many of the same practices will ultimately develop in grievance handling in the public sector. The basic goal in both sectors is to resolve work-related problems in the most efficient and equitable manner. This is fundamental in any working situation.

Thus, it is generally agreed that the best and easiest place to resolve grievances is at the first step where the discussion is between the employee, his steward, and the immediate supervisor. If a grievance is to be resolved at this stage, the immediate supervisor must have as much authority and decision-making power as he can possibly be given. The first step is often termed an informal step. It is there that negotiations begin. If the authority to settle is not present on both sides, the grievance procedure is handicapped from the outset.

In one public jurisdiction in California the informal stage of the grievance procedure has been expanded to include a wide range of people. Anyone who might help resolve the problem – top-level management, supervisors, personnel representatives, union officials – can be involved in meetings which are informal and completely off the record. If they fail to resolve the problem, the grievance must then go into the formal procedure even though the same people may be involved.

A related method of achieving early resolution of a grievance is to provide enough flexibility in the procedure to enable the employee organization to go directly to the level of management with the power of decision. There is no point in having procedures which take the parties through meaningless steps, that is, steps where the management representative has no power to resolve the issue. This concept is recognized in the Santa Clara Ordinance quoted previously: "Grievances . . . may be processed by the recognized employee organization on its own behalf directly with the appropriate level of management." This sort of procedure may help answer a common complaint of public employees that they can't find out who really has the power to make decisions. A negotiated grievance procedure tends to force management to delineate clearly its lines of authority.

\* \* \* \*

The above article is not meant to be a comprehensive summary of either grievance procedures in general or California public sector experience in particular. However, hopefully it answers some questions. Certainly it points up the central issue: Will civil service grievance and appeals procedures give way to the type of negotiated procedures common in the private sector? It is rather early



to tell, although certainly there is a trend in that direction. The basic goal in both sectors is to resolve work-related disputes in the most efficient and equitable manner. No doubt this is the test which will be applied as the parties in California public employment examine the problem.

## APPENDIX

The following examples of grievance procedures from public agencies are illustrative of the various approaches in use today in California.

This is an example of a traditional, unilaterally established procedure of the type which many employee organizations are challenging:

**City of Oakland  
Chapter V — Personnel, Article 7  
GRIEVANCE PROCEDURE (1-22-64)**

**7.01 — PURPOSE.** The procedure provided under this article affords non-uniformed City employees the opportunity to be heard on matters relating to alleged discrimination, work assignments, co-worker relations, working conditions, etc. This procedure is not to be used in resolving problems related directly or indirectly with salary, hours of work, classification or performance ratings.

**7.02 — GUIDING PRINCIPLES.**

- (a) Each grievance be handled in a fair and impartial manner.
- (b) Each grievance be settled as quickly and at as low a level as possible.
- (c) The authority and responsibility of the department head is not to be interfered with.
- (d) The employee be given full opportunity to be heard.

**7.03 — PROCEDURE.**

- (a) The employee presents his grievance personally or in writing to his immediate supervisor.
- (b) If the problem is not settled at this level, the employee or his representative shall submit his grievance in writing to the head of the particular division. The written grievance must set forth the specific complaint and all the related facts. The division head will allow for full discussion of the grievance; and if he rejects it, he shall give to the employee and/or his representative the reason or reasons therefor and will forward the written grievance to the department head, (with a copy to the City Manager) upon which he will have noted the reasons for his decision.
- (c) The employee and/or his representative may then present the grievance personally to his department head. At this meeting both the department head and his division chief shall be present. After full discussion, the department head shall, within two working days, advise the employee of his decision.
- (d) If the grievance remains, the employee or his designated representative or both may submit his grievance to the office of the City Manager. At this meeting the aggrieved employee, his representative — if the employee so desires — and the department head shall be present.

\* \* \*

This is also a traditional civil service procedure. It is complete and carefully drawn, and is presented as an ordinance rather than an administrative order.

**Kern County  
Article 5**

**EMPLOYEE GRIEVANCE PROCEDURE (5-18-67)**

**Section 993. APPLICATION OF GRIEVANCE PROCEDURE:** This chapter is intended to provide a fair and orderly procedure for recognition and review of employee grievances. Nothing herein shall apply to employee disciplinary matters which shall continue to be processed under the provisions of the Civil Service Ordinance and the rules adopted thereunder. The following procedure shall apply to employee complaints relating to working conditions, hours and employee relationships beyond his control including employment situations in which the employee believes an injustice has been done because of lack of departmental policy, or a departmental policy that is unfair, or because of the deviation from or misinterpretation of a policy. It is intended that all opportunities for resolving such problems at the departmental level be utilized before appeal is made to the Board of Supervisors.

**Section 994. DEFINITIONS:** The following terms as used in this chapter shall have the meaning herein after set forth:

- (a) **EMPLOYEE.** Any employee in the classified service of the County of Kern regardless of status.
- (b) **IMMEDIATE SUPERVISOR.** The person who assigns, reviews, or directs the work of an employee.
- (c) **SUPERIOR.** The person to whom an immediate supervisor reports.
- (d) **REPRESENTATIVE.** A person who appears on behalf of the employee.
- (e) **DEPARTMENT HEAD.** The officer or employee having charge of the administration of a function of Kern County government including the authority to appoint or remove persons from positions in the county service, or his authorized representative.

**Section 995. OBJECTIVES.** The employee grievance procedure is established to accomplish the following objectives:

- (a) To settle the disagreement at the employee-supervisor level informally, if possible;
- (b) To provide an orderly procedure to handle the grievance, through each level of supervision if necessary, with final decision vested in the department head subject to appeal to the Board of Supervisors;
- (c) To resolve the grievance as quickly as possible;
- (d) To correct, if possible, the cause of the grievance to prevent future similar complaints;
- (e) To provide for the development of a two-way system of communication by making it possible for all levels of supervision to hear such problems, complaints and questions raised by employees;
- (f) To reduce the number of grievances by allowing them to be expressed, and thereby adjusted and eliminated;

(g) To promote harmonious relations generally among employees, their supervisors and the departmental administrative staffs;

(h) To assure fair and equitable treatment of all employees.

Section 996. INFORMAL GRIEVANCE DISPOSITION: Most problems or complaints can be settled if the employee will promptly, informally and amicably discuss them with his immediate supervisor. Such an initial discussion shall precede any use of the formal Grievance Procedure. (In those situations where the nature of the problem involves his immediate supervisor, the employee should discuss the problem informally with the next level supervisor.) If the immediate supervisor fails to reply to the employee within five working days or the employee is not satisfied with the decision, the employee may utilize the formal Grievance Procedure.

#### Section 997. FORMAL GRIEVANCE PROCEDURE:

(a) The formal Grievance Procedure shall be initiated by the employee stating the nature of his grievance and his desired solution in writing on the Grievance Form available in the departments for this purpose. The employee may have a representative at all steps of the procedure either from an employee organization or any other person of his choice. The original and two copies of the Grievance Form shall be completed and the original delivered to the immediate supervisor and a copy to the department head within five working days after the immediate supervisor's decision or non-response following the informal grievance discussion. An answer in writing shall be made to the employee by his immediate supervisor within ten working days of the receipt of the completed formal Grievance Form, unless the time limit is extended by mutual agreement. If, upon receipt of the written decision, the employee takes no further action within five working days, the grievance shall be assumed to have been settled.

(b) If the employee feels that the immediate supervisor has not resolved his problem, he may appeal in writing on the original Grievance Form to his next higher superior and to the department head jointly. The person occupying such next higher level of supervision (identified for that purpose by the department) and the department head shall confer in an attempt to dispose of the grievance. An answer and decision shall be made in writing on the original copy of the Grievance Form to the employee from the department head. The same time limitations as prescribed in Step (a) shall prevail.

(c) If the employee feels that the department head has not resolved his problem, he may appeal in writing on the original Grievance Form to the Committee of the Board of Supervisors which exercises committee supervision over the department involved. Said Committee of the Board of Supervisors shall have ten working days in which to resolve the grievance and to prepare a written reply to the employee on the original Grievance Form.

(d) If the matter has not been satisfactorily resolved at Step (c) the employee may request that his grievance be submitted to a three member ad hoc board of review. After such referral, the board of review shall acquire such facts, take such testimony and interview such witnesses as deemed necessary by its members and shall present its conclusions and recommendations in written form to the employee, the department head and the Board of Supervisors Committee within ten days.

An employees' request for referral to such a review board shall be filed in writing with the Committee of the Board of Supervisors within five working days after his receipt of the Committee's reply under Step (c). The granting

of a request for referral and impanelment of a review board shall be within the discretion of the Board Committee and if granted the three members of the ad hoc board of review shall be selected as follows: the Board of Supervisors Committee to which the employee has appealed shall select one member of such board, the employee concerned shall select one member, and the two members thus chosen shall select a third impartial member, provided that in the event that the two members first chosen are unable to agree on the selection of the impartial member, both members of the review board will be dismissed and two new members will be selected in accordance with this section.

(e) If satisfactory disposition of the employee's grievance has not been achieved after resort to the foregoing steps (a) through (d) the employee may appeal in writing on the original Grievance Form to the Board of Supervisors. Such appeal shall be filed with the Clerk of the Board within five working days after the employee's receipt of the review board report under step (d) or notification that a review board will not be impaneled. The Board of Supervisors shall, within a reasonable time, render a decision which shall be conclusive, final and binding upon the employee and the department head.

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This is an example of a negotiated procedure which includes provision for final and binding arbitration.

#### City of Anaheim and Anaheim Municipal Employees Association Article VI GRIEVANCE PROCEDURE (10-21-69)

Any grievance or dispute which may arise out of the application or interpretation of the terms or conditions of this Memorandum shall be settled in accordance with the procedure set forth in Rule 31 GRIEVANCE PROCEDURE of the Personnel Resolution.

If the grievance is not satisfactorily adjusted in the Third Step, it shall be submitted in writing to an impartial arbitrator for a final and binding decision. The arbitrator shall be selected by mutual consent of ANAHEIM and the AMEA as soon as possible after the effective date of the Memorandum and shall serve at the pleasure of ANAHEIM and the AMEA.

Any employee's grievance shall be settled in accordance with the procedure set forth in Rule 31 GRIEVANCE PROCEDURE of the Personnel Resolution.

If any employee's grievance arising out of a disciplinary action against him, or alleging violation of a commonly accepted safety practice or a specific provision of the Personnel Ordinance or Personnel Resolution is not satisfactorily adjusted in the Third Step, it shall be submitted in writing to an impartial arbitrator for a final and binding decision. The arbitrator shall be selected by mutual consent of ANAHEIM and the AMEA.

Any violation of this Memorandum as alleged by ANAHEIM shall be resolved between authorized representatives of ANAHEIM and the AMEA. In the event that the parties cannot resolve the dispute, the dispute shall, upon the request of either party, be referred to the arbitrator for a final and binding decision.

The arbitrator's decision shall be final and binding on both parties, it being agreed that said arbitrator shall have no powers to add or subtract from the provisions herein, and that the laws of the State of California shall be controlling at all times.

All expenses of any arbitration shall be borne equally by ANAHEIM and the AMEA.

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This procedure is fairly typical of negotiated grievance procedures in the private sector, except for one provision: "Adjudication" is used instead of "arbitration" to describe the final step in the process. The decision of the board of adjudication is final and binding on both parties.

**Transit Authority of the City of Sacramento  
and Amalgamated Transit Union,  
Local Division 256, AFL-CIO**

**Article 8: GRIEVANCE PROCEDURE (8-1-68)**

**Section 1.** The term "grievance" shall mean a complaint or dispute arising between the parties to this Agreement concerning the proper interpretation or application of any of the provisions of this Agreement. "Management representative", "Transportation Superintendent", or "General Manager", as used in this Article, refers to those persons, or in the event of the absence of one of the persons, to their duly authorized representatives.

**First Step**

**Section 2.** An employee who has a grievance shall, with or without a UNION representative, contact the appropriate Management representative and present his grievance orally. If the employee and the UNION representative do not feel that the grievance has been properly adjusted, the grievance shall then be written up with a clear indication of the question(s) raised by the grievance and the article(s) and section(s) of the Agreement which have been violated.

**Section 3.** The grievance form shall be filled out and shall be signed by the grieving employee and the UNION representative. The written grievance shall be dated and signed as received by the appropriate Management representative. The written grievance must be presented within one-hundred-twenty hours (120:00) after the occurrence of the incident which caused the grievance.

**Section 4.** The management representative receiving the written grievance shall give his answer in writing within twenty-four hours (24:00) (excluding his normal days off and holidays) and shall state the facts upon which his decision is based, including the remedy or correction offered, if appropriate.

**Second Step**

**Section 5.** If the employee and/or the UNION representative are not satisfied with the decision rendered at the first step, then the grievance shall be presented to the Transportation Superintendent within seventy-two hours (72:00) (excluding Saturdays, Sundays and holidays), and a hearing held within one-hundred-twenty hours (120:00), or at the next regularly scheduled meeting. The Transportation Superintendent shall present his decision in writing within forty-eight hours (48:00) (excluding Saturdays, Sundays and holidays) after the hearing, and shall state the facts upon which his decision is based, including the remedy or correction offered, if appropriate.

**Third Step**

**Section 6.** If the employee and/or the UNION representative are not satisfied with the decision rendered at the second step, then the grievance shall be presented to the General Manager within seventy-two hours (72:00) (excluding Saturdays, Sundays and holidays), and a hearing held within one-hundred-twenty hours (120:00), or at the next regularly scheduled meeting. The General Manager shall present his decision in writing within forty-eight hours (48:00) (excluding Saturdays, Sundays and holidays) after the hearing, and shall state

the facts upon which his decision is based, including the remedy or correction offered, if appropriate.

**Article 9: ADJUDICATION  
Fourth Step**

**Section 1.** Any dispute or grievance not satisfactorily adjusted at the Third Step may be submitted for adjudication by the AUTHORITY, the UNION, or the employee as provided for in this Article.

**Section 2.** Whenever the UNION or employee has submitted a grievance which has been decided adversely to the UNION or employee and desires to adjudicate the dispute, the UNION or employee shall submit a request therefore in writing within forty-eight hours (48:00) after the next regularly scheduled UNION meeting following the adverse decision of the General Manager. The matter shall then be submitted to an Adjudication Board.

**Section 3.** The Adjudication Board shall consist of three (3) persons, one appointed by the UNION and one appointed by the AUTHORITY. Such appointments shall be made, and each party shall notify the other of their respective appointment, within ten (10) days from the date the matter was submitted for adjudication. The two so appointed shall endeavor to select the third member. In the event the persons appointed cannot agree on the third member within ten (10) days of the last appointment, he shall be selected in the following manner:

The parties shall, within ten (10) days, jointly request the State Conciliation Service to list seven (7) persons qualified to act as an impartial member of the Adjudication Board. The UNION and the AUTHORITY shall, within ten (10) days of the receipt of said list, alternately strike three (3) names from said list, and the seventh remaining name shall thereupon be accepted as the third member of the Adjudication Board. The decision as to which shall be first to start the elimination proceedings shall be determined by lot.

**Section 4.** The issue to be submitted to the Adjudication Board shall be limited to the grievance as submitted in writing, and, unless otherwise agreed in writing, the jurisdiction of the Board shall be limited to the determination of said issue. The Board shall have no authority to modify, vary, alter, amend, add to or take away from, in whole or in part, any of the terms or provisions of this Agreement.

**Section 5.** The Board shall meet in the City of Sacramento within ten (10) days after the selection of the third member, or as soon thereafter as possible.

**Section 6.** The Board, or either party, may call any employee as a witness, and such employee, if on duty, shall be released from duty for the purpose of such appearance.

**Section 7.** The rulings of the Board with respect to the procedure and all objections to the exclusion or inclusion of evidence shall be binding on the parties.

**Section 8.** Each party shall bear the expenses and fees of the member appointed by it and its own expenses involved in the matter. All other expenses incurred by the Board, including the making of a record, in the Board deems it necessary, shall be borne equally by the parties. The reimbursement of wages for employees called as witnesses, where a loss of wages has been incurred by said employee, shall be paid by the party calling such witness.

**Section 9.** The Board's decision shall be in writing and shall be submitted within ten (10) days from the conclusion of the hearing.

**Section 10.** The decision of the majority of the Board shall be final and binding on the parties.

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## **Rights of individual employees**

The most serious structural weakness in the American grievance and arbitration process is, in my opinion, its seeming inability to provide adequate protection to the bargaining unit member who is at odds with the designated bargaining representative. This charge is easier made than proven, but I base it on some 25 years of experience as an arbitrator and student of labor law and industrial relations. The kinds of cases that come to mind are the exception rather than the rule; but they occur frequently enough to cause me deep concern.<sup>10</sup> A few examples will indicate the general scope of the problem, but there are many variations on these basic themes.

1. A union routinely takes to arbitration every grievance involving discipline or discharge, regardless of merit. Then one day the employer fires X, a constant critic of the incumbent union officers and of the company management. Both parties say, "good riddance;" X files a grievance, but the union decides that it lacks merit and refuses to process it.

2. The union appeals X's grievance to arbitration, but presents it in such an inadequate way that the arbitrator quickly understands that the union wants to lose.

3. The parties have a bipartite arbitration board; only if the board deadlocks is a neutral called in. Y is arguing a position opposed by the bargaining representative. The bipartite arbitration board reaches a decision against Y without calling in a neutral.

It goes without saying that in many of these cases the grievant deserves to lose. In others, however, his claim may be meritorious. The point is that the nature of the process encourages the principals to the collective agreement to further their mutual institutional interests even if this sometimes results in unfair treatment to individual employees. Of course, the employee has the theoretical remedy of a lawsuit or unfair labor practice charge against the union for breach of its duty of fair representation; but the odds in such cases are overwhelmingly in the union's favor.

Unfortunately, most of the suggested means of providing greater protection of individual rights under the collective agreement also present serious risks to the collective bargaining relationship between the employer and the union. For example, to permit an aggrieved employee to carry any case he wishes to

\*Excerpted from "Employee Rights Under An Agreement: A Current Evaluation"  
Benjamin Aaron Monthly Labor Review,  
August, 1971 pp. 52-56

arbitration over the union's objection is neither practicable nor desirable. The union has valid institutional interests of its own to protect, and these would be seriously endangered if every dissatisfied employee were guaranteed the right to compel arbitration of a grievance based on a contract interpretation rejected by the union and the employer. Similarly, it would be equally inappropriate either to require the union to assume the costs of these arbitrations or to insist that the grievant pay. The former approach would quickly bankrupt many local unions; the latter might make it impossible for many employees to pursue their legal remedies. In any case, a majority of the Supreme Court in *Vaca v. Sipes* expressly rejected the theory that every employee should have the right to take his grievance to arbitration.<sup>11</sup> It reasoned, correctly in my view, that adoption of this principle would substantially undermine the collective bargaining relation between union and employer and very likely overburden the arbitration process to the point of rendering it inoperable.

Several academic writers have argued that the individual employee has rights under the collective agreement which cannot be compromised or ignored by the principals without his consent. If I read Professor Summers correctly, he would permit the individual employee to file an action against his employer for breach of contract, under section 301 of the Taft-Hartley Act, if his union refused to process the grievance to arbitration. Presumably, the union, as an interested party, could intervene.<sup>12</sup> Professor Blumrosen would limit the individual employee's independent right to proceed against the wishes of his union to discharge and seniority cases involving "critical job interests." These, he argues, should be heard on their merits in some impartial forum, where "the employee should be allowed to prove that his claim is meritorious" and the union should "be required to demonstrate why it rejected his claim."<sup>13</sup>

But if it is unwise to permit employees to insist that their grievances be arbitrated when the union is unwilling to do so, it seems no less so to allow them to proceed in court. A decision in either forum in the employee's favor might seriously undermine the structure of rules and mutual understandings established by the employer and the union, and might also adversely affect the rights of the great majority of employees in the bargaining unit.

In only one situation does it seem to me that the employee can safely be permitted to sue his employer for breach of contract under section 301 without first

proving, as he is now required to do, that the union has violated its duty to represent him fairly. That is the case in which an employee claims he has been discharged in violation of the collective agreement and in which he expressly waives any right to reinstatement and asks only for damages. I would favor allowing such suits upon a showing that the union, for whatever reason, has refused to exhaust the grievance and arbitration procedure in the employee's behalf. Although there is always the possibility that the court, in upholding the employee's claim, might construe the agreement in such a way as to undermine important understandings between the employer and the union, the risk seems to me minimal, and the consequences correctable.

In other types of cases I think individual employee rights will probably have to be protected through new and more informal mechanisms. The United Auto Workers Public Review Board is one example of such a mechanism, but it is clearly not feasible for many unions. I have elsewhere suggested the possibility of employing a number of ombudsmen, appointed by and answerable to an agency of the Federal Government, to aid in preventing serious violations of the rights of individual employees within the framework of a government-sanctioned collective bargaining relationship.<sup>14</sup> Neither that nor any other arrangement can be made to work, however, unless the parties to the collective agreement—the employer and the union—recognize the need to insure that in pursuing their commendable objective of mutual accommodation, they do not ignore the legitimate complaints of individual employees, no matter how annoying and inconvenient these may be.

### **Exclusivity of Contract Grievance and Arbitration Procedures \***

In the private sector, as previously noted, the exclusive bargaining representative is in control of the processing of grievances. Except in Title VII cases,<sup>146</sup> even if the grievance alleges conduct in violation of a statute which is within the jurisdiction of an administrative agency or of a court, the grievant must normally exhaust his contractual remedies before seeking relief elsewhere.<sup>147</sup>

The situation in the public sector has a different history. In the absence of collective bargaining, government employees have traditionally relied upon civil service laws and procedures for protection. With the advent of collective bargaining and the rapid adoption of the principle of exclusive representation in the public sector, however, has come the inevitable clash between civil service rules and collectively bargained grievance procedures. Several states have sought to resolve this conflict by statute. Thus, the Maine Employees Labor Relations Act provides in part:

An agreement between a bargaining agent and the public employer may provide for binding arbitration as the final step of a grievance procedure, provided that any such grievance procedure shall be exclusive and shall supersede any otherwise applicable grievance procedure provided by law. . . .<sup>148</sup>

Similarly, in New York, the legislature amended the statutory provisions of the civil service law applicable to the discipline or discharge of tenured employees<sup>149</sup> by permitting their supplementation, modification, or replacement by alternative provisions embodied in collective agreements.<sup>150</sup> Pursuant to this authorization, the state and the Civil Service Employees Association entered into four agreements substituting the grievance and arbitration provisions of each agreement for the statutory scheme. The constitutionality of the amended civil service law was challenged in *Antinore v. State*.<sup>151</sup> The plaintiff in that case was a tenured employee who had been suspended without pay pending removal proceedings based on charges of misconduct. Instead of resorting to the contractual grievance procedure, he brought an action in a state court for a declaratory judgment in respect of his statutory and constitutional rights within the framework of the contractual dismissal procedure. After

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146. See *Glover v. St. Louis-S.F.R.R.*, 393 U.S. 324 (1969); *King v. Georgia Power Co.*, 295 F. Supp. 943 (N.D. Ga. 1968).

147. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

148. Me. Rev. Stat. Ann. tit. 26, § 979-K (1964).

149. N.Y. CIVIL SERVICE LAW §§ 75-76 (1973).

150. N.Y. CIVIL SERVICE LAW, § 76(4) (1973).

151. 79 Misc. 2d 8, 356 N.Y.S.2d 794 (Sup. Ct. 1974).

\*Benjamin Aaron

The Impact of Public Employment Grievance Settlement on the Labor Arbitration Process; University of California, Los Angeles, Calif. 1976.

reviewing the contractual grievance and arbitration procedure and finding it deficient on a number of grounds,<sup>152</sup> the court concluded:

- (1) That the statute . . . has permitted the establishment of a constitutionally imperfect agreement. (2) That the agreement denies the employee due process. (3) That the agreement denies the employee equal protection of the laws. (4) That the employee has not waived his constitutional or statutory rights.<sup>153</sup>

Accordingly, the court awarded summary judgment to the plaintiff "to the extent that he may choose such procedures as he shall deem appropriate for the hearing, disposition and appeal, if any, of the charges brought against him, either in accordance with [the applicable] sections . . . of the Civil Service Law or, in accord with . . . [the grievance and arbitration provisions] of the employment agreement. . . ."<sup>154</sup>

The court's opinion was plainly erroneous in a number of respects and betrayed considerable ignorance of standard grievance arbitration practices and procedures. In respect of the equal protection issue, however, it raised an important point. The scope of judicial review of arbitration decisions in New York is far narrower than that for judicial review of administrative decisions. In the case of the latter, the reviewing court has the power to determine whether a decision was affected by an error of law, was arbitrary and capricious, was an abuse of discretion as to the penalty or discipline imposed, or was supported by substantial evidence.<sup>155</sup> The court reasoned that the collective agreement "isolated" the plaintiff from his "statutorial [sic] rights of judicial review enjoyed by State employees, and, effectively, denies him the equal protection of the laws."<sup>156</sup>

On appeal, the decision was reversed.<sup>157</sup> The appellate division expressed some doubt as to the constitutionality of the grievance and arbitration procedure established by the collective agreement, saying that it would be immune to challenge only if "the procedural safeguards con-

152. The grounds were absence of a standard of proof to support a finding of guilt; absence of express right of employee to present witnesses in his own behalf; absence of a definitive statement that accused employee possessed right to confront and cross-examine adverse witnesses; failure of contractual procedure to require stenographic record of proceedings and to provide employee with free copy of transcript; and failure of contract to require arbitrator to state in writing basis of his decision. *Id.* at 12, 356 N.Y.S.2d at 799-800.

153. *Id.* at 21, 356 N.Y.S.2d at 808.

154. *Id.* at 21-22, 356 N.Y.S.2d at 808.

155. N.Y. Civ. Prac. Law § 7803(3)-(4) (McKinney 1963).

156. 79 Misc. 2d at 18, 356 N.Y.S.2d at 805.

157. *Antinore v. State*, 49 A.D.2d 6, 371 N.Y.S.2d 213 (1975).

tained in . . . [the statute] governing arbitration generally, i.e., . . . right to present evidence, cross-examine witnesses, determination to be made on evidence produced; right to be represented by counsel . . . and . . . award to be made in writing. . . ."<sup>158</sup> The court declared, however, that "due process requirements—and we think equal protection as well—are not relevant when they have been waived by the party seeking to assert them";<sup>159</sup> it found such a waiver in the instant case. It rejected the argument that "a waiver of the plaintiff's individual constitutional rights incidental to a procedure for removal from his employment contravenes any public policy such that the waiver should not be given effect,"<sup>160</sup> finding, instead, that the contractual arbitration procedures constituted an advancement of the public good, because they expedited the resolution of disciplinary disputes in a simpler and more expeditious manner than that provided by statute.

According to present law, the ruling of the appellate division on the waiver issue is probably correct; but the wisdom of the policy will continue to be debated. There is something to be said in favor of allowing employees to make a binding election, at least in discipline or dismissal cases, of an existing statutory procedure or the procedure provided in the collective agreement. In such cases civil service commissions or other agencies with similar responsibilities have generally shown much the same concerns for the grievant's substantive and procedural rights as have arbitrators. If the employee elects the statutory procedure, he or she cannot then rely upon the terms of the collective agreement; nor would decisions of the administrative agency be precedents binding upon an arbitrator. Such an arrangement would not constitute a serious threat to either the bargaining representative's status or to the integrity of the collective agreement. On the other hand, it would provide an extra protection for a vital interest of an employee who, for any number of reasons, might doubt the ability or willingness of the union to present the grievance effectively under the contract procedure. Whether such a system would work in the private sector is problematical; the subject is considered in greater detail in another chapter of this volume.

**F**



TAB F

UNION SECURITY ARRANGEMENTS UNDER COLLECTIVE BARGAINING  
AND CIVIL SERVICE IN THE PUBLIC SECTOR

Introduction

Union security, a persistently controversial issue for labor and management in the private sector since the inception of labor organization in the United States, continues today to be a source of friction between the parties in the public sector as well. The cause of such friction stems from the multidimensional nature of the union security issue itself, and, not incidentally, from the emotions it elicits from those arguing its merits and demerits. The purpose here is to delineate the issue as clearly and succinctly as possible while covering all aspects of its impact on collective bargaining in the public sector. There is no doubt that public policy makers will be increasingly faced with this complex issue as unions press for inclusion of security clauses in negotiated contracts.

### What Is Union Security?

Union security is a principal objective of most American labor organizations. It normally involves some form of compulsory union membership as a condition of employment, combined with the automatic checkoff of union dues or agency fees which are collected for the organization by the employer. However, regardless of the specific form union security may take, its primary purpose is to safeguard the institutional life of the labor organization.

Three main forms of union security are used to achieve this purpose: union shop, agency shop and maintenance of membership. Over the years some variations of these three basic forms have become popular and are now readily found in collective bargaining. Each arrangement differs in the degree to which workers are free to join or not to join unions, and the period of time allowed workers prior to joining the union if that is a pre-condition of employment. Union security may be required by law, but normally it is negotiated as part of the collective contract.

The following types represent the prevalent forms of union security arrangements as they have developed.

#### Closed Shop

The distinctive characteristic of this arrangement is the requirement that a worker must join a union (or employee organization) before he is eligible

for employment. In other words, union membership is a prerequisite for hire. Once employed, the worker must remain a member of the union or be subject to termination. Under this arrangement the employer's right to select prospective employees is greatly restricted, while workers who are denied the right to join the union are prevented from working in those firms covered by this type of union security. The closed shop is illegal under the National Labor Relations Act as amended, as well as under specific laws in certain states. Hiring Hall provisions are frequently found together with the closed shop arrangements, but nondiscriminatory hiring halls are legal under the NLRA.

#### Preferential Shop

Preferential shop provisions require the employer to give hiring preference to union members. Nonunion workers may be employed only if union members are unavailable for work. After employment, those not belonging to the union must obtain union membership as a condition of continued employment. As with the closed shop, this form of union security is prohibited under the National Labor Relations Act as well as under a number of state laws.

#### Union Shop

Union shop provisions do not require that workers are members of the union at the time of hire, but once employed, the worker must join the union -- usually within 30 to 60 days from the date of employment. Union membership must be maintained as a condition of continued employment. Workers who

were hired before negotiation of a union shop provision must, upon inclusion of this clause in the contract, join the union after a stipulated period of time. A variation of the union shop, the modified union shop, exempts from compulsory union membership those employees who were not union members when the agreement was negotiated. In both the union shop and modified union shop arrangements, the employer retains complete discretion over the hiring function. In the private sector the union shop is one of the most popular forms of union security at the present time. In the public sector, union shop agreements are negotiated on a very limited basis.

#### Maintenance-of-Membership

The maintenance-of-membership clause does not require the worker to join the union; however, should the worker voluntarily elect membership, he/she must remain in the union for the duration of the contract or face discharge. Employees may leave the union during an "escape period," usually equal to 15 days after termination of the contract. As with the union shop, maintenance-of-membership provisions do not require the employer to hire or give preference to union members, nor do new employees have to join the union at any time.

#### Agency Shop

Under an agency shop arrangement, employees are not required to join the union at any time as a condition of employment. However, an agency shop

requires that all employees, whether union members or not, pay to the union a sum of money usually equivalent to the union's normal dues and initiation fees. Nonunion member charges are referred to as "agency fees" or "service costs." They are justified on the ground that inasmuch as nonunion members benefit equally with union members in the wages and conditions of work obtained by the union in collective bargaining, they should pay for the gains thus obtained for them. In other words, no worker receives a "free ride" at the expense of those who are union members. The agency shop is the most prevalent form of union security in the public sector.

A variation of the agency shop is the fair share provision. Agreements including this provision, like the agency shop, do not require employees to join the union; however, nonmembers must pay to the union a prorated share of bargaining costs. These fees are assessed to cover the costs of negotiating new agreements and of grievance handling in behalf of nonmembers. The principle of fair share is acceptable to those who support the bargaining efforts of unions, but who object to their political campaigning and lobbying activities.

#### Open Shop

Open shop provisions do not require an employee to join the union as a condition of employment. After hire an employee may voluntarily obtain union membership, but under no condition is this mandatory. Open shop

agreements to not require nonunion members either to join the union or pay union dues, agency fees or fair share costs.

#### Exclusive Recognition

Although exclusive recognition is not usually considered a categorical form of union security, it nevertheless grants to the certified bargaining agent a degree of security not afforded other competing unions. Once the union becomes the exclusive bargaining agent for a unit of employees, the employer is prohibited from negotiating with other unions, independent employee groups, or individual employees claiming to represent the identical unit of workers "owned" by the organization granted exclusivity.<sup>1</sup> Exclusive recognition lessens rivalry among competing unions and assures the recognized union that the employer cannot undermine it by dealing with other alleged representatives.

#### Union Security in California

In California the three major pieces of legislation covering collective bargaining for public employees contain sections pertaining to the union security issue. In the Meyers-Miliias-Brown Act (MMBA) covering local government (county and municipal) employees, Sections 3502, 3506 and 3507 are significant. These read as follows:

Sec. 3502 - Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency.

Sec. 3506 - Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502.

Sec. 3507 - A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under this chapter (commencing with Section 3500).

These sections, by themselves, do not specify which, if any, union security forms are permissible under the statute. However, a recent appeals court decision clarifies this matter to some extent. In 1975, the City of Hayward, California, and the United Public Employees, Local 390 of the Service Employees International Union, AFL-CIO, negotiated an agency shop provision into their Memorandum of Understanding. The dispute between the parties arose when Section 1.02 of the agreement, which provided for the agency shop, was challenged as invalid by the City of Hayward through its city manager. The trial judge rendered a decision sustaining the agency shop clause. Upon appeal, the lower court decision was overturned, "with direction to enter a new judgment declaring the agency shop provisions of the agreement to be unlawful."<sup>2</sup> (The full text of the court decision follows at the end of this section.) Thus, it would appear from the court's award that the agency shop -- and possibly other forms of union security at least as compelling as the agency shop -- are prohibited under the MMBA.

In the Brown Act, covering state employees, the pertinent sections are: Sec. 3527, Sec. 3531, Sec. 3532. These sections are similar in language to those cited under MMBA. The Brown Act, like MMBA, is not specific regarding the legality of the various forms of union security. Currently, no court decisions are available to illustrate which, if any, of the forms of union security are legal under the Act.

The Rodda Act, covering public education in California, grades kindergarten through 14 (both certificated and classified employees), in contrast to MMBA and the Brown Act, is quite specific regarding the types of union security provisions that are subject to negotiation by the contracting parties. Section 3540.1, subsections (i) (1) and (2) provide that:

(i) "Organizational security" means either:

- (1) An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him, as a condition of continued employment, if he does join, to maintain his membership in good standing for the duration of the written agreement. However, no such arrangement shall deprive the employee of the right to terminate his obligation to the employee organization within a period of 30 days following the expiration of a written agreement; or
- (2) An arrangement that requires an employee as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of such organization for the duration of the agreement or a period of three years from the effective date of such agreement, whichever comes first.



It seems clear from the above language that under the Rodda Act, the union and public employer are permitted to negotiate either a maintenance-of-membership, (i.e., subsection (i) (1) ) or an agency shop, (i.e., subsection (i) (2) ) union security arrangement.

#### Union Security: Dues Checkoff Provisions

Closely linked to the functional types of union security provisions, is the dues checkoff arrangement whereby the employer agrees to collect for the union, generally through automatic payroll deductions, union dues, initiation fees and other periodic assessments imposed by the union. In return, the union may remit to the employer a payment to cover the clerical costs incurred in collecting the dues deductions, although this is not a common practice.

The chief characteristic of the checkoff system is the assumption by the employer, rather than the union, of the responsibility for periodic collection of union financial resources.

Normally negotiated checkoff provisions are subject to some legal constraints. In the private sector the National Labor Relations Act provides minimum guidelines for checkoff arrangements for both unions and employers. These limitations relate to the individual employee's written authorization consenting to be covered by a checkoff provision despite a bona fide checkoff clause in the contract covering the entire

bargaining unit, and also to the length of time for which voluntary authorization can be effective (which may not exceed one year). However, automatic renewal clauses are permitted unless the employee elects to rescind his written authorization. Most public sector statutes allow for dues checkoff provided that (1) each employee furnishes written authorization for dues deductions, and (2) the authorization is revocable after one year or at the termination of the contract, whichever comes first.

The checkoff provision, highly favored by most unions, also has been largely endorsed as beneficial by employers. Unions advocate check-off clauses in order to save time and effort in the collection of dues. Moreover, when union membership is a condition of employment, the check-off relieves the union from the necessity of having actively to seek the discharge of recalcitrant or delinquent employees, thus allowing it to avoid an unpleasant disciplinary task.

Employers believe that when unions are relieved from collecting dues, there is less interruption of the work process; in the absence of this provision, the collection of dues monies would have to be performed at the work site where workers are readily accessible. The only alternative to the checkoff available to the union is the collection of dues through its grievance representatives, specially appointed union members or union officials (or paying dues in person or by mail at the union hall). Many

employers agree that this method contributes to slowing down production. They also contend that when the union is freed from dues collection, there is a better chance for good labor-management relations since union officials can devote more time to the proper administration of the collective agreement. Dues checkoff thus becomes an efficient instrument for both labor and management within the framework of their collective goals.

Not all employers, however, share this view. A substantial number believe the collection of union-imposed fees and dues is the sole responsibility of the employee organization. These employers refuse to become involved in what they consider to be a clear union obligation. Others cite the costs involved in dues collection, an obligation normally assumed by employers agreeing to checkoff provisions. Finally, employers contend that when the union does not spend time collecting dues, this "extra time" is utilized to police the agreement or to stimulate the filing of employee grievances over issues that would normally not warrant consideration.

Irrespective of the arguments for and against the checkoff, the fact remains that contractual arrangements providing for the checkoff are prevalent both in the private and in the public sector. Additionally, in the public sector, a dues checkoff system is considered the least controversial form of union security.

The Debate Over Union Security: The Issues At Hand

Why does the union security issue cause so much controversy among labor-management practitioners? The answer lies in the multidimensional aspects of the concept. It is intertwined with issues of labor economics, industrial sociology, politics and constitutional law.<sup>3</sup> Moreover, the arguments both for and against union security are charged with a high degree of emotion which outweighs any kind of objective evaluation. These arguments focus on the following points:

Employers stress that compulsory union membership as a condition of employment deprives an individual of the right to work, and that union security severely limits a worker's freedom of association.

Employers contend that union security provisions encourage union officials to become complacent and unresponsive to the needs of the membership. Without union security, officials of employee organizations are forced to take greater responsibility toward unionism, with the result that labor-management relations are strengthened rather than weakened.

Employee organizations argue that with union security, particularly with the union shop, the organization is both more stable and financially sound. The union obtains security when it is assured of a constant membership. Without the need to continually recruit new or former members, the union can devote more time to the development of constructive labor-management relations, that is, act responsibly toward both its members and toward the employer.

Employee organizations argue further that when workers are required to join, employee morale is improved because conflict between union and nonunion workers is reduced or eliminated (traditionall, union mem-

bers dislike working with nonunion employees),

Unions contend that with union security, the organization is better able to control and discipline workers who wilfully violate the provisions of the agreement.

A most pervasive argument in support of security provisions centers on the exclusion of "free riders" in the bargaining unit. Free riders are those who chose not to become union members, but nevertheless reap the benefits of unionism without bearing the costs. Since the employee organization must represent both members and nonmembers in the bargaining unit, the union argues that nonmembers should pay for their share in support of that representation. However, in the final analysis, regardless of the arguments for and against union security, such provisions tend to strengthen the union and establish its power position vis-à-vis the employer.

#### Union Security: Special Problems in the Public Sector

The arguments involving union security are applicable to the public as well as the private sector. Public sector representatives question whether union security is compatible with the merit principle or with job tenure provisions common to public employment, and that union security arrangements are directly opposed to the nature of public service and civil service statutes. They ask, is public employment (i.e., the right to hire, promote, transfer and dismiss public servants) to be based on ability and merit or is public employment to be dependent upon

union membership? To require union membership as a condition of employment is analogous to employment discrimination based on religion, sex, race or political affiliation.<sup>4</sup> In sum, the debate centers on the issue of mandatory union membership or compulsory payment of union dues or agency fees as a condition of continued employment. Where some form of union security exists "employees may be hired, promoted and retained for reasons other than merit."<sup>5</sup>

Unions counter these arguments by emphasizing that while the merit system protects the individual worker from political favoritism, union security provides order and stability to the employment relationship<sup>6</sup> by offering a "unified approach to employee representation." They further argue that the merit principle and collective bargaining are only two of many systems affecting public employment; therefore, there is no reason why collective bargaining, with its attendant union security, and the merit principle cannot co-exist.

#### Job Tenure and Union Security

Currently thirty-seven states have adopted teacher-tenure laws protecting public school teachers from discharge except for budgetary reasons or specifically enumerated charges.<sup>7</sup> Tenure statutes are also common in federal, state and local government employment. If union security clauses in the form of compulsory union membership or agency fees are made a condition of employment and if a qualified employee is sub-

ject to discharge for noncompliance with union regulations, then union security and the tenure system come into direct conflict. A gradual alleviation of this problem may eventually come about. Over the past several years, some states have amended existing laws (others are contemplating legislation) to the effect of permitting termination of an employee upon failure to comply with specific negotiated union security arrangements. However, even then, teachers with contracts prior to such an amendment may be protected by the impairment clause of the Constitution which forbids any state to "pass any . . . law impairing the obligation of contracts . . ." (U. S. Constitution, Article 1, Section 10)<sup>8</sup>

The compatibility of the agency shop and tenure laws has been well argued by David Smith:

Some opponents of the agency shop allege 1) that general law, a public relations act for example, cannot abrogate special legislation, such as teacher tenure acts, veterans' preference acts and civil service statutes without a clear indication that the intent of the broader law is to abrogate the more specific statutes; 2) the grounds for dismissal by civil service statutes do not include failure to pay union dues and that such a dismissal would, therefore, be illegal; 3) that dismissal for such grounds would be discriminatory and thereby in violation of civil service statutes. Several agency shops have been invalidated on these grounds. The Attorney General of Oregon ruled in 1971 that "an agreement requiring dismissal for a cause not specified in the merit laws would be unenforceable and unlawful.

However, some agency shop arrangements have been validated on the ground that there is no inconsistency with civil service regulations or that

statutes regulating employer-employee relations take precedence over civil service laws. A 1967 Michigan lower court decision upholding the agency shop was later overruled by the Michigan Supreme Court. The basis for this reversal was that the requirement of fee payments equal to full dues was invalid because of inconsistencies with the language of the Michigan Public Employee Relations Act. Thus the high court did not base its decision on either civil service or tenure laws. The Michigan Labor Mediation Board (MLMB) had ruled that the agency shop was not discriminatory since it applied equally to all members of the bargaining unit. Further, the MLMB asserted that the later enactment of a collective bargaining law for public employees superseded the merit principle provisions.

#### Service Fees

Another issue faced by the public sector concerns the disbursement of union dues or agency fee assessments. Minority unions contend that monies collected from the membership are frequently used to ward off rival unionism. Employees compelled to pay dues or agency fees likewise express this opinion, namely, that their payments are not contributing to the purpose for which they were intended. Another issue in this debate concerns the expenditure of union funds for political purposes. It is a possibility that a union could, under this arrangement, support a political candidate or a proposition in direct opposition to the party in office. Employees may also find the political expenditure by unions



distasteful and often at variance with their own political views.

While efforts have been made toward establishing that agency fees reflect only the bargaining costs of unions, these efforts have proven, in general, to be troublesome. In California, the City of Torrance sets nonmember agency fees at two-thirds of regular union dues. "This figure was deemed 'reasonable' by management and the union of Torrance, but does not reflect an accounting of actual bargaining expenses." <sup>10</sup> In Hawaii, the Hawaii Public Employees Relations Board is responsible for establishment of agency fees for union services rendered in connection with bargaining and contract administration. In an early case presented to the Board, the Hawaii State Teachers Association presented costs associated with bargaining alone which were \$5.54 greater than the amount of annual dues of employees in the bargaining unit.<sup>11</sup> As the debate over establishment of pro rata agency fees continues, the desire for high figures by unions and low figures by management will surely be a major issue.

#### Union Security and Religious Preferences

A final area with which the public sector must concern itself involves the opposition of employees to union membership or payment of union assessments when their religious beliefs oppose these requirements. The 1974 amendment to the Taft-Hartley Act dealing with hospital workers attempted to deal with this issue. Section 19 of the Act reads:

### Individuals With Religious Convictions

Sec. 19 Any employee of a health care institution who is a member of and adheres to established and traditional tenets or teachings of a bona fide religion, body, or sect which has historically held conscientious objections to joining or financially supporting labor organizations shall not be required to join or financially support any labor organization as a condition of employment; except that such employee may be required, in lieu of periodic dues and initiation fees, to pay sums equal to such dues and initiation fees to a nonreligious charitable fund exempt from taxation under section 501(c) (3) of the Internal Revenue Code, chosen by such employee from a list of at least three such funds, designated in a contract between such institution and a labor organization, or if the contract fails to designate such funds, then to any such fund chosen by the employee.

It is not unrealistic to expect that the issue covered in Section 19 will assume greater prominence in the public sector as collective bargaining continues to spread and as public employees press for more individual rights.

### Conclusion

From the discussion in this section, it is clear that the complexities involved in the union security issue are great indeed. Moreover, this problem is not readily amenable to a simple solution. In the absence of an outright prohibition of any form of union security, the solution probably lies somewhere in future legislation or court decisions on a jurisdiction-by-jurisdiction basis. In the immediate future there appears to be no congressional action on a comprehensive statute, i.e., a federal minimum law governing public sector labor-management relations.

However, regardless of the propriety of a union security arrangement, one factor stands out: these provisions are being negotiated with increasing frequency in public sector labor-management contracts. If the growth of unionism in other areas of public sector employment is indicative of future trends, then the unions' demands for security provisions will become increasingly hard to resist.

Whatever resolution will ultimately be found, it must reconcile the conflicting objectives of the merit system in protecting the individual employee's job security with those of the collective bargaining system in protecting the institutional survival of the employee organization.

FOOTNOTES

1. Jack Stieber, Public Employee Unionism: Structure, Growth, Policy (The Brookings Institute, Washington D.C., 1973), p. 127.
2. City of Hayward, etc., et al., v. United Public Employees, Local 390, of the Service Employees International Union, AFL-CIO; California Court of Appeal, First Appellate District (Sup. Ct. No. H24764).
3. Paul Sultan, Right to Work Laws, Institute of Industrial Relations (University of California, Los Angeles, 1958).
4. David R. Smith, "The Agency Shop: An Old Issue in a New Environment," California Public Employee Relations, No. 17, June 1973, p. 5.
5. David R. Smith, "Union Security in the Public Sector," Midwest Monitor, March/April 1976, p. 4.
6. Smith, Op. Cit., p. 5.
7. Monitor, Op. Cit., p. 5.
8. Ibid.
9. Smith, Op. Cit., p. 10.
10. Ibid. p. 8
11. Ibid.

APPENDIX TO TAB F

City of Hayward vs. United Public  
Employees Local 390 of the SEIU,  
AFL-CIO (California Court of Appeal,  
First District)  
Sample Union Security Provisions

# CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

CITY OF HAYWARD, etc., et al.,

Plaintiffs and Appellants,

vs.

UNITED PUBLIC EMPLOYEES, LOCAL 390,  
OF THE SERVICE EMPLOYEES INTER-  
NATIONAL UNION, AFL-CIO, an unin-  
corporated association,

Defendant and Respondent.

1 Civil 36690

(Sup. Ct. No. H 24764)

The City of Hayward and its city manager appeal from a judgment declaring that an "agency shop" agreement between the City and respondent United Public Employees, Local 390, is lawful.

Respondent (hereinafter "the Union") is a labor organization affiliated with the Service Employees International Union, AFL-CIO; certain employees of the City are members of the Union. On July 11, 1972, the Union and the City entered into a "Memorandum of Understanding," whereby the City recognized the Union as representing a majority of the employees in the City's Maintenance and Operations Unit.

The agreement covered wages, hours, and other terms and conditions of employment, about which there is no

controversy. A dispute arose, however, over the validity of section 1.02 of the agreement, which provides that, although employees are not to be required to join the Union, all employees in the Maintenance and Operations Unit, including nonmembers of the Union,

"shall, as a condition of continued employment, pay to the union an amount of money equal to that paid by other employees in the appropriate unit who are members of the union, which shall be limited to an amount of money equal to the union's usual and customary initiation and monthly dues."

Except as may be authorized by statute, public employees have no right to bargain collectively with the employing agency. (Sacramento County Employees Organization, Local 22 etc. Union v. County of Sacramento (1972) 28 Cal.App.3d 424, 429; City of San Diego v. American Federation of State etc. Employees (1970) 8 Cal.App.3d 308, 310.) In 1961, California became one of the first states to create a right on the part of government employees to organize and to confer with management as to the terms and conditions of their employment.<sup>1/</sup> Another enactment, the Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3510 [hereinafter "MMBA"]) has created certain additional rights of organization in employees of municipalities and local agencies, and authorized representatives of labor and management to enter into written agreements for presentation to the governing body.

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1. The George Brown Act, now Government Code sections 3525-3526, still governs relations between the state and its employees.

(Gov. Code, §§ 3505-3505.1.)<sup>2/</sup>

The memorandum of understanding entered into by the parties was negotiated by means of procedures which conform to the MMBA. The sole question presented is whether the MMBA permits the creation of an agency shop in an agency of local government. An agency shop agreement is to be distinguished from a union shop agreement, which conditions the continuance of an employee's job on union membership; a union shop is prohibited by statute in public employment. (§ 3502.) In an agency shop, union membership is not a condition of employment, but all employees, including those who do not choose to join the union, must pay union dues. The MMBA does not explicitly refer to agency shop agreements; no reported decision has previously addressed the issue of the legality of this type of agreement.

Section 3502 provides: "Except as otherwise provided by the Legislature, public employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public agency." (Emphasis added.)

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2. Unless otherwise indicated, all statutory references hereinafter are to the Government Code.



Section 3506 prohibits both public agencies and employee organizations from interfering with, intimidating, restraining, coercing or discriminating against public employees "because of their exercise of their rights under Section 3502." The freedom of choice provisions of each of these sections must be construed as prohibiting the extraction of union dues, or their equivalent, as a condition of continued employment. Otherwise the statutory right of employees to represent themselves would be defeated.

The trial judge did not address either of these sections; instead, he found that the agency shop provision was a "reasonable rule or regulation" adopted pursuant to the authority conferred by section 3507.

Section 3507 provides:

"A public agency may adopt reasonable rules and regulations after consultation in good faith with representatives of an employee organization or organizations for the administration of employer-employee relations under this chapter (commencing with Section 3500).

"Such rules and regulations may include provisions for (a) verifying that an organization does in fact represent employees of the public agency (b) verifying the official status of employee organization officers and representatives (c) recognition of employee organizations (d) exclusive recognition of employee organizations formally recognized pursuant to a vote of the employees of the agency or an appropriate unit thereof, subject to the right of an employee to represent himself as provided in Section 3502 (e) additional procedures for the resolution of disputes involving wages, hours and other terms and conditions of employment (f) access of employee organization officers and representatives to work locations (g) use of official bulletin

boards and other means of communication by employee organizations (h) furnishing nonconfidential information pertaining to employment relations to employee organizations (i) such other matters as are necessary to carry out the purposes of this chapter.

"Exclusive recognition of employee organizations formally recognized as majority representatives pursuant to a vote of the employees may be revoked by a majority vote of the employees only after a period of not less than 12 months following the date of such recognition.

"No public agency shall unreasonably withhold recognition of employee organizations."

The trial judge reasoned that the agency shop provision could be lawfully enacted under section 3507 because "(a) it obligates the Union to represent all employees, (b) it requires nonmembers to share the cost of the benefits which such representation is intended to provide, and (c) it clearly relates to the administration of employer-employee relationships." He recognized the inconsistency of the provision with the employees' statutorily guaranteed freedom of choice, but reasoned that the right of the individual should be subordinated to a policy in furtherance of collective bargaining "as a vehicle for improving employment relationships and avoiding the harsh consequences of labor disputes involving public services."

Courts must, if possible, harmonize statutes, reconcile seeming inconsistencies and contrive them to give force and effect to all provisions thereof. (Hough v. McCarthy (1960) 54 Cal.2d 273, 279.) A court may not add to or

detract from a statute or insert or delete words to accomplish a purpose that does not appear on its face or from its legislative history. (Estate of Simmons (1966) 64 Cal.2d 217, 221.)

The MMBA was enacted to promote "full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment. . . ." (§ 3500.) It was not intended to supersede existing systems for the administration of employer-employee relations in the public sector, but to strengthen such systems by improving communication. (Ibid.)

It is argued that an agency shop agreement is a reasonable method of resolving labor disputes and that, since it is not specifically prohibited, it should be held permissible under the MMBA. But that construction would render the provisions of sections 3502 and 3506 meaningless. Section 3502 implicitly recognizes that employees may choose to join or participate in different organizations. (See, e.g., Sacramento County Employees Organization, Local 22 etc. Union v. County of Sacramento, supra, 28 Cal.App.3d 424.) It also confers upon each employee the right not to join or participate in the activities of any employee organization. Section 3506 not only prohibits management from interfering with an employee's section 3502 rights, but also imposes the same ban on employee organizations.

Without common law collective bargaining rights, public employees enjoy only those rights specifically granted by statute. Statutes governing the labor relations of other public employee groups indicate that when the Legislature has authorized union security devices, it has done so with explicit language. Certain public transit district employees have been granted extensive collective bargaining rights, including the right to contract for a closed or union shop. (See, e.g., Pub. Util. Code, §§ 25051-25057.) The labor relations of teachers and other school district employees have been governed by the Winton Act. (Ed. Code, §§ 13080-13090.) Sections 13082 and 13086 of that Act contain provisions paralleling sections 3502 and 3506 of the MMBA. The Winton Act has never been construed to authorize an agency shop. However, legislation recently enacted will repeal the Winton Act as of July 1, 1976, and add section 3540 et seq. to the Government Code. (Stats. 1975, ch. 961.)

Under the new law, school district employees still have the right to refuse to join or participate in the activities of employee organizations and the right to represent themselves in their employment relations with the school district when no exclusive representative has been recognized. (§ 3543.) When a majority organization is recognized as the exclusive representative pursuant to the prescribed procedures (§§ 3544-3544.9), employees may

no longer represent themselves. (§ 3543.) The agency shop is explicitly authorized as an organizational security device (§ 3540.1, subd. (1)) subject to certain limitations. (§§ 3546-3546.5.) Although the MMBA has been amended from time to time since its enactment, the Legislature has never modified the language of sections 3502 and 3506 nor added provisions limiting or enlarging the rights created therein.

Those rights cannot reasonably be reconciled with an agency shop provision. The forced payment of dues or their equivalent is, at the very least, "participation" in an employee organization. Practically, it would have the effect of inducing union membership on the part of unwilling employees. While increased participation and membership is a legitimate goal of labor organizations, coercion toward that end is forbidden by statute. Such union security devices as the agency shop must await authorization by the Legislature.

The courts of other states having similar statutes recognizing the right of a public employee not to join or participate in an employee organization have held the agency shop to be unlawful. (See Smigel v. Southgate Community School District (Mich. S.Ct. 1972) 202 N.W.2d 305; New Jersey Turnpike Employees' Union, Local 194 v. New Jersey Turnpike Authority (N.J. Sup. Ct. App. Div. 1973) 303 A.2d 599, aff'd (N.J. S.Ct. 1974) 319 A.2d 224;

Farrigan v. Helsby (S.Ct. 1971) 327 N.Y.S.2d 909, aff'd (S.Ct. App. Div. 1973) 346 N.Y.S.2d 39; Pennsylvania Labor Relations Board v. Zelem (1974) 329 A.2d 477.) Apparently, only Rhode Island has held that there is a common law right to include an agency shop provision in a collective bargaining agreement. (Town of N. Kingstown v. North Kingstown Teach. Assn. (1972) 297 A.2d 342, 344-345 [statute merely gave teachers the right "to join or to decline to join" any employee organization].)

This conclusion is further supported by a comparison with federal statutes. Recognizing that many state labor enactments have followed federal models, California courts have often looked to interpretations of federal labor legislation when construing similar state statutes. (E.g., Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 615-617; Social Workers' Union, Local 535 v. Alameda County Welfare Dept. (1974) 11 Cal.3d 382, 391; Englund v. Chavez (1972) 8 Cal.3d 572, 589-590; Service Employees' Internat. Union, Local No. 22 v. Roseville Community Hosp. (1972) 24 Cal.App.3d 400, 408-409.) The National Labor Relations Act, 29 U.S.C. § 151 et seq. (hereinafter "NLRA"), contains provisions similar to sections 3502 and 3506 of the MMBA with one major difference. Section 7 of the federal act provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of

their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." (29 U.S.C. § 157.) Sections 8(a)(1) and 8(a)(3) make it unfair labor practices for an employer to threaten, restrain, or coerce employees in the exercise of their section 157 rights or to encourage or discourage union activity by discrimination in employment except for union shop agreements. (Id., §§ 158(a)(1), (a)(3).) The Supreme Court has held that, without the express provisos in sections 7 and 8(a)(3), conditioning employment upon union membership would be an unfair labor practice. (Retail Clerks v. Schermerhorn (1963) 373 U.S. 746, 756.) The court has further held that the agency shop is the practical equivalent of the union shop. (Id., at p. 751; Labor Board v. General Motors (1963) 373 U.S. 734, 743.)

The provisos permitting union security arrangements were enacted by Congress in 1935 and 1947. Sections 3502 and 3506 of the MMBA were not enacted until 1961, and major revisions were made in 1968. It is reasonable to infer that the California Legislature was aware of the analogous provisions of the NLRA, and the construction

thereof, and chose not to permit the agency shop in public employment in California. (Cf. Fire Fighters Union v. City of Vallejo, supra, 12 Cal.3d 608 at pp. 615-617.)

The judgment is reversed with directions to enter a new judgment declaring the agency shop provisions of the agreement to be unlawful.

CERTIFIED FOR PUBLICATION

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Christian, J.

WE CONCUR:

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Caldecott, P.J.

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Emerson, J.\*

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\* Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.



## SAMPLE UNION SECURITY PROVISIONS\*

### Full Union Shop

--Employees required to join within 30 days

It is understood and agreed by and between the parties hereto that as a condition of continued employment, all persons who are hereinafter employed by the employer in the unit which is the subject of this agreement shall become members of the union not later than the thirtieth day following the beginning of their employment or the execution of this agreement, whichever is later; that the continued employment by the employer in said unit, of persons who are already members in good standing of the union, shall be conditioned upon those persons continuing their payment of the periodic dues of the union; that the continued employment of persons who were in the employ of the employer prior to the date of this agreement and are not now members of the union, shall within thirty days after the effective date of this agreement become members of the union. Failure of any person to become a member of the union as required shall obligate the employer upon written notice from the union to such effect and to the further effect that such union membership was available to said person on the same terms and conditions generally available to other members to forthwith discharge such person. Further, the failure of any person to maintain his union membership in good standing as required herein shall, upon written notice to the employer by the union to such effect, obligate the employer to discharge such person. (City of O'Fallon, Ill., and Laborers; exp. 5/73)

### Modified Union Shop

--Nonmembers hired prior to specified date exempted

Upon the completion of their probationary period, all employees covered by this Memorandum of Understanding, hired after July 1, 1971, shall become and remain members of the union for the duration of this Memorandum, and all employees who are currently members of the union or who become members of the union shall remain members of the union for the duration of this Memorandum.

The employer shall introduce and support the legislation necessary to effectuate this provision (Baltimore, Md., and AFSCME: exp. 6/73)

--Present employees exempted

Employees hired, rehired, reinstated or transferred into the bargaining unit after the effective date of this agreement and covered by this

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\*Samples taken from the Reference File of the Government Employee Relations Report, Section 85:3501-85:3601.

\*Midwest Monitor, Bloomington, Indiana March-April, 1976.

agreement shall be required as a condition of continued employment to become members of the Lodge for the duration of this agreement, on or before the thirtieth (30th) day following the beginning of their employment in the unit. (City of Corunna, Mich., and Fraternal Order of Police; exp. 6/74)

#### Typical Agency Shop

--Dues equivalent

The employer hereby recognizes the form of union organization known as agency shop, hereinafter defined as one in which "Any present or future employee who is not a union member and who does not make application for membership shall, as a condition of employment, pay to the Local Union 1394, each month, a service charge as a contribution toward the administration of this agreement in an amount equal to the regular monthly dues. Employees who fail to comply with this requirement, shall be discharged by the employer within thirty (30) days of receipt of written notice to the employer from the union." Board of Saginaw County Road Commissioners, Mich., and AFSCME: exp. 1/74)

#### Modified Agency Shop

--Employees hired before specified date exempted

All teachers in the bargaining unit who are regularly employed to teach at least half time or more, except for those teachers who were employed prior to the 1969-70 school year and who were not members of the GREA and who have not since September 1969 joined or paid dues or fees to the GREA shall either become and remain members in good standing of the Association or pay the Association a Representation Benefit Fee in an amount equal to the regular Professional Dues of the Association (including those of the MEA and NEA). (Grand Rapids, Mich., Board of Education and Grand Rapids Education Association; exp. 11/74)

#### CHECKOFF

#### Checkoff Permitted

--Association dues or agency fee

The Board will deduct Professional Dues or the Representation Benefit Fee by payroll deduction from the salary of any teacher who authorizes such deduction, in writing, in accordance with the provisions of Article II, Section A. All Representation Benefit Fees deducted monthly by the Board shall be remitted as soon as practicable to the GREA. (Grand Rapids, Mich., Board of Education and Grand Rapids Education Association; exp. 11/74)

### Specified Exclusions from Checkoff

#### --Part-time or intermittent employees

Dues withholding allotments will not be made for employees (part-time or intermittent) whose earnings are not regularly sufficient to cover the amounts to be withheld. Also, dues will not be withheld for an employee whose net salary after legal and required deductions is not sufficient to cover the amount of the authorized allotment, such as when the employee has had a period of time in a nonpay status (leave without pay, absence without leave, suspension or furlough). (Computation Agency and AFGE: exp. 11/74)

### Authorization

#### --"Lawfully executed" authorization

Upon receipt of a lawfully executed written authorization from an employee covered by this agreement, the board agrees to process such forms to the district government for the deduction of the regular union dues of such employee from his bi-weekly pay. Arrangement for dues deduction and the revocation of such dues deductions shall be made in accordance with the procedures of the department of finance and revenue, government of the District of Columbia. The union shall be the only teacher organization eligible to use the payroll deduction for membership dues. (D.C. Board of Education and American Federation of Teachers; exp. 3/74)

### Remittance to Union

#### --Monthly basis

Any amount deducted from teachers salaries as Association dues shall be remitted monthly to the GREA by the Board's Business Office according to its rules and regulations (Board of Education, Grand Rapids, Mich., and Grand Rapids Education Association; exp. 11/74)

### Suspension of Deductions

#### --Insufficient funds

Union dues will not be withheld when an employee's net salary for the pay period involved is insufficient to cover the dues after other legal and required deductions have been made (National Park Service, Everglades, Fla., and AFGE: 4/74)

### Indemnity Agreements

#### --Any action taken or not taken

The Union shall indemnify and hold the Commonwealth harmless against any

and all crimes, suits, orders, or judgments brought or issued against the Commonwealth as a result of any action taken or not taken by the Commonwealth under the provisions of this Article. (Commonwealth of Pennsylvania and AFSCME; exp. 7/73)

#### Maintenance of Membership

--Members obligated for term of contract

Employees covered by this agreement at the time it becomes effective and who are members of the union at that time, shall be required as a condition of continued employment to continue membership in the union for the duration of this agreement (Calhoun County Board of Social Service, Mich., and Service Employees; exp. 2/74)

--Fifteen-day escape period, end of contract

All Faculty Members who are members of APSCUF/PAHE as of the date of ratification of this Agreement, or who, thereafter, during its term become members of APSCUF/PAHE, shall, as a condition of continued employment, maintain their membership in APSCUF/PAHE for the term of this Agreement; provided, however, that any such FACULTY MEMBER may resign from membership in APSCUF/PAHE during a period of fifteen (15) days prior to the expiration of the Agreement and provided further, that the payment of dues and assessments while he is a member shall be the only requisite employment condition. (Commonwealth of Pennsylvania and Association of Pennsylvania State College and University Faculties-Pennsylvania Association for Higher Education; exp. 8/74)

#### Enforcement

Discharge-

--Union notice, 30-day grace period

Should an employee cease to be a member in good standing in the union for failure to pay the above dues or equivalent hereto, for which he may be legally discharged, the union may request the discharge of such employees in writing, stating the failure to pay. In the event that said employees does not pay within thirty days thereafter, the City shall discharge said employees. (Wyoming, Mich., and Wyoming City Employees; exp 7/73)

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CONCLUSIONS

by

Paul Prasow

This Manual is aptly entitled "Collective Bargaining and Civil Service in Public Employment: Conflict and Accommodation."

The existence of both a merit system and collective bargaining in the same jurisdiction has produced considerable confusion and conflict in significant areas of public employment. What is perhaps not so clear is that in many governmental jurisdictions, particularly at the state and local levels, collective bargaining and civil service (merit systems) have worked out a variety of accommodations which not only permit coexistence, but actually strengthen the merit system.<sup>1</sup>

In analyzing the writings on this subject, we find that four elements have had varying degrees of impact on the accommodation process:

- 1) The attitude and perceptions toward civil service of organized public employees and their institutional representatives.
- 2) The attitude and role of those responsible for administering the merit system, whether they be called civil service commissioners, personnel commissioners, or personnel board members.

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<sup>1</sup>Robert D. Helsby and Thomas E. Joyner. "Impact of the Taylor Law on Local Governments," in Robert H. Connery and William V. Farr (eds.), Unionization of Municipal Employees (New York) Praeger Pubs., 1970, pp. 24-41.

See also Arvid Anderson. "What Impact Will the Trend Toward Unionization and Collective Negotiations with Public Employee Organizations Have on the Merit System?" Public Personnel Review, Vol. 27 (Jan., 1966), pp. 52-59.

- 3) The attitudes of public middle managers defined generally as those engaged in implementing the policies and programs of top management, but who have relatively less significant responsibilities for formulating those basic policies and programs.
- 4) The role and perceptions of elected officials - legislative and executive.

These four elements may not be present in every situation and the weight or importance of any one or more of these may vary depending upon a constellation of complex interrelationships. However, their impact upon the accommodation process may be discerned from the following analysis:

I. The Attitudes and Perceptions of Organized Public Employees and Their Institutional Representatives.

Public employee organizations or associations having once secured themselves in collective bargaining with public agencies are generally not and will not be disposed to abolish the fundamental principles of civil service or the merit system.

Public employee organizations generally do not want civil service to be an impediment to collective bargaining. But this does not mean that those organizations are adverse to civil service continuing to perform its legitimate functions.

The chief quarrel of public employee unions with civil service tribunals is not with their *jurisdiction* but with their *composition*.

Obviously, if a civil service commission serves as a genuinely neutral, impartial body, then the union's objections to it are considerably, if not entirely, reduced. Criticism then becomes minimal. On the other hand, if, as Jerry Wurf, President of the American Federation of State, County, and Municipal Employees once declared, the Civil Service Commission acts as an extension of public of public personnel management, then the employee organizations want to strip civil service of much of its jurisdiction.

If a Civil Service Commission can serve as a genuinely impartial body, then public employee unions have no reason to seek their demise, or to refer grievance cases to outside impartial arbitrators, a more costly alternative. The unions would just as soon appeal their cases to impartial civil service commissions as to outside impartial arbitrators.

Unfortunately, in too many well-documented instances civil service commissions have been and continue to be dominated by top administrative management who are reinforced by elected legislative or executive officials.<sup>2</sup> These very elected officials often appoint not only the members of civil service commissions or boards, but also the city or county counsel who are subordinate to these elected officials. These counsels often serve simultaneously as the representative of public management in employee cases before civil service, and as legal

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<sup>2</sup> Jean J. Couturier, "Civil Service League Revises Labor Policy," LMRS Newsletter. Volume 2, No. 4 (April, 1971), pp. 1-2.

See also the report on the Los Angeles County Civil Service System, by Doug Shuit, Los Angeles Times, July 23, 1976, pp. 1, 25, 26.



advisors to the same civil service body before whom they are presenting management's case against an employee who has appealed his grievance to civil service.

It is understandable, therefore, why public sector unions battle civil service, not initially on the basis of jurisdiction but on the basis of their management bias often perceived as a form of distasteful paternalism.

As Edward Peters has observed, "Employee organization representatives, are vocal in their distrust of many personnel commissions that lean heavily toward management and consider human relations and paternalism as synonymous terms. They voice considerable frustration over the exclusive jurisdiction possessed by these commissions over such vital areas as discipline, discharge and layoffs. (About half the arbitrations in the private sector involve discipline and discharge.)"<sup>3</sup>

Civil service, established originally in 1883 by the Pendleton Act has nearly a century head start on collective bargaining - therefore an impartially functioning civil service system would have little or no objection in principle to impartially administered civil service systems especially in ruling on employee grievances. However, if civil service is perceived as being pro-management or unduly paternalistic, then the unions will challenge civil service jurisdiction. If civil service

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<sup>3</sup> Edward Peters. "Impact of California Educational Employee Relations Act on Merit System," The Chronicle, a publication of the National Academy of Arbitrators, Vol. II, No. 1, (April, 1976), p. 8.

handled individual grievances in a genuinely impartial manner, the unions would accept its rulings, even if adverse in many cases as experience has demonstrated in the private sector under impartial arbitration of grievances. Indeed, private sector unions have not abandoned impartial arbitration of grievances even though a high percentage of their cases have been denied.

It is interesting to note at the federal level, Dennis Garrison, President of the American Federation of Government Employees, strongly supported the theme of accommodation as between collective bargaining and the merit system. This support was revealed in his testimony before the U.S. Senate Post Office and Civil Service Committee calling for legislative action on six major priorities of federal workers. Among these six priorities were: strengthening "collective bargaining by statute," . . . and "improved merit-system protections." (emphasis added)<sup>4</sup>

## II. The Attitude and Role of Those Responsible for Administering the Merit System

The merit system as constituted today in California and in many other states handles far more grievances than are processed through the jointly negotiated grievance procedures that appear in the many memoranda of understanding. Oddly enough, most

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<sup>4</sup>"Federal Workers Seek Action From Congress," AFL-CIO News, Washington, D.C., July 3, 1976, Page 7.

civil service commissions do not view themselves as an alternative to collective bargaining impartial arbitration. If they did, they would then perform their true functions as originally conceived: to insure due process to employees and to protect the rights of civil servants in their employment relationship.

The very aspect of civil service that makes it attractive to public employees and their organizations is precisely the handling of individual grievances.

The merit system does not have to be an alternative to collective bargaining. There may very well be concurrent jurisdiction as between the two systems, but civil service focuses on the individual, whereas the union functions as an institutional representative of a community of individual employees.

The emphasis of civil service on the individual is not a threat to the union. The latter still has the right to represent the employee either through a jointly negotiated grievance procedure or before a civil service commission. At times the union is not able to represent every bargaining unit employee on every grievance. The employee organization is often engaged in other high priority functions carried on with limited financial and staff resources: it may be in the midst of tight and urgent negotiations with management on a new agreement; it

may be deeply engaged in problem solving in the area of administration and interpretation of the agreement on a day-to-day basis.

The union is not only engaged in grievance processing and contract administration, but it is also often confronted with the refusal of public management to negotiate on those subjects which are claimed to be within the exclusive jurisdiction of the civil service commission, i.e., classifications, reclassifications, layoffs, etc.

The unions have countered with the proposition that under the Meyers-Miliias-Brown Act, which takes precedence over any local employee relations ordinance, the civil service commission or personnel board must meet and confer in good faith with the recognized employee organizations on those personnel subjects delegated to civil service.

This argument was cogently put forth by Attorney Edward L. Faunce in his article which appears in full text as one of the appendixes of the Manual.<sup>5</sup>

The union viewpoint as expressed by Mr. Faunce and argued by Attorney Leo Geffner in an actual case, was upheld by Los Angeles County Superior Court Judge Harry Hupp, who ruled that the Los Angeles County Civil Service Commission could not adopt rules regulating layoffs and pay reductions without "meeting and conferring" in good faith with the employee organizations concerned. The issue arose because the Civil Service Commission

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<sup>5</sup>Edward L. Faunce. "Los Angeles SEIU 660 Claims Law Requires Civil Service Commission to Meet and Confer," California Public Employee Relations. (December, 1974), Vol. No. 23, P. 42-45.

unilaterally adopted regulations concerning employee layoffs or mandatory classification and salary reduction caused by lack of money or work.

The conclusions of law as reached by the court are worth citing:

1. Pursuant to the charter of the County of Los Angeles the Civil Service Commission has the jurisdiction and authority as required to prescribe, amend and enforce rules for employees employed by the County affecting mandatory reductions in lieu of layoffs and layoff provisions of such employees. Such jurisdiction of the Civil Service Commission is set forth in Section 34 of the Charter of the County of Los Angeles.
2. The amended rules adopted by the Civil Service Commission on March 3, 1976, specifically amendments to Civil Service Commission Rules 18.05, 20.06, 20.07 and 20.08, were matters involving mandatory reductions in lieu of layoffs and layoff provisions involving employees of the County of Los Angeles who are represented by Petitioner Unions and such items as set forth in such amended Rules are terms and conditions of employment within the meaning of Section 3505 of the Government Code. [Meyers-Milias-Brown Act]
3. The Civil Service Commission did act in violation of Section 3505 of the Government Code of California by refusing to meet and confer in good faith with Petitioners regarding the adoption of the amendments to the Civil Service Commission Rules on mandatory reductions in lieu of layoffs and layoff provisions prior to the adoption of such amended rules.
4. By virtue of Section 3505 of the California Government Code, the Civil Service Commission had a mandatory duty to meet and confer in good faith on request with Petitioners prior to the adoption of such amended rules and continue to have a mandatory duty to meet and confer in good faith with Petitioners with respect to such amended rules and any Rules affecting mandatory reductions in lieu of layoffs, and layoff of employees of the County of Los Angeles represented by Petitioner.
5. The amended rules set forth above regarding mandatory reductions in lieu of layoffs, and layoff of employees of the County of Los Angeles represented by Petitioners were adopted by the Civil Service Commission in violation of Section 3505 of the Government Code and such amended rules

specifically Rules 18.05, 20.06, 20.07, and 20.08 as regard such amendments are void and invalid and shall not be given any force or effect.

6. Petitioners have no plain, speedy or adequate remedy at law for the relief requested and Civil Service Commission is ordered to meet and confer in good faith with Petitioners and is ordered to cease giving any force of effect to such amended rules and not to adopt any Rules relating to mandatory reductions in lieu of layoffs and layoffs of employees employed by the County of Los Angeles represented by Petitioner unless and until the Civil Service Commission does meet and confer in good faith with Petitioners concerning the adoption of any such Rules.<sup>6</sup>

These and related developments referred to above are profoundly affecting the attitude and role of those responsible for preserving the merit principle and administering the merit system.

### III. The Attitudes of Public Middle Management

The third element in the situation concerns the somewhat ambiguous and insecure position of middle management. These officials have their own stake in the survival of civil service, quite apart from that of subordinates or their unions. Middle managers in government service want to preserve and advance their own economic self-interest. They don't wish to be cast adrift as were their counterparts in the private sector when the Taft-Hartley Act

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<sup>6</sup>Los Angeles County Employees Union, Local 434, Service Employees Union, Local 434, Service Employees International Union, AFL-CIO; Social Services Union, Local 535, Service Employees International Union, AFL-CIO; Los Angeles County Employees Association, Local 660, SEIU, AFL-CIO, vs. Los Angeles County Civil Service Commission, before Harry Hupp, Judge, Superior Court, Los Angeles County, June 29, 1976.

of 1947 expressly excluded "supervisory employees" from coverage of the National Labor Relations Act. Supervisors in the private sector may still form employee organizations, but they may be discharged for doing so. There is also nothing in the private sector law that compels an employer to meet or negotiate with any organization designated to represent "supervisors," as defined in the Taft-Hartley Act.

Supervisors in the public sector are not looking basically for a strictly collective bargaining structure. What they do seek is some form of representation to protect them against arbitrary or discriminatory conduct by their employers. The passage of Proposition B in the Los Angeles County election of June 8, 1976, gave the County Board of Supervisors a free hand in hiring and firing top county employees. The measure exempted county department heads and agency chiefs from the protection of civil service. It also dropped the County Charter requirements that these positions be filled by open competitive examinations.

Faced with this development, which is perceived as opening the door to an erosion of civil service protection, many public managers tend to view the bargaining representative at least in the beginning as a continuation of the merit system.

Civil service has protected many middle management personnel from arbitrary action of superiors. As a matter of fact middle

(and even top) management in state and local government retains an active role in most independent employee associations (California State Employees Association) and even in some of the AFL-CIO affiliated unions (American Federation of State, County and Municipal Employees). Some independent employee associations are actually controlled and dominated by middle management.

IV. The Role and Attitude of Elected Officials - Legislative and Executive

One unique aspect of public sector labor-management relations, which distinguishes it from the private sector, is the pervasive influence of political considerations in formulating basic policies, procedures, and ratification of decisions reached at lower levels of governmental operations.

A central problem in the co-existence of collective bargaining and the merit system is the failure of elected officials (legislative and executive) to define the respective parameters of the two systems. This failure should not be looked upon as an abdication of responsibility. Rather it should be viewed as a reflection of the conflicting political pressures placed upon elected officials causing them to resort to the "calculated ambiguity" thus allowing the parties and the courts to work things out as best they can. Certainly legislative and/or executive direction is desirable, but it should not be regarded as a panacea in solving the major problems arising from the interaction between a civil service system and public employee unionism.



The record would indicate that public sector collective bargaining will continue to expand over the long pull, despite temporary or short-term setbacks. Assuming that the concept of collective bargaining will be strengthened through various forms of legislation, then two choices confront the practitioners on both sides of the table:

- 1) To develop a more stable and ongoing relationship between collective bargaining and civil service; to foster accommodation particularly in the critical area of scope of bargaining.
- 2) To engage in jurisdictional battles which may ultimately lead to an all out drive by public sector employee organizations to replace the merit *system* concept with the merit *principle*, thus reducing the functions of civil service to its historic-mission of devising apolitical methods of employee recruitment, selection, placement and retention.

Which one of these two alternatives will ultimately prevail will depend on such factors as: the political climate, public opinion, and the philosophies or positions taken by the practitioners themselves.

# ANNOTATED BIBLIOGRAPHY

Anderson, Arvid. "The Impact of Public Sector Bargaining: an Essay Dedicated to Nathan P. Feinsinger." Wisconsin Law Review, 1973 (No. 4, 1973), 986-1025.

This article includes a lucid discussion of the effects of civil service laws and other pre-existing legislation on the scope of public sector bargaining. The author believes that recruitment, hiring and promotion can and should continue to be based on merit. However, other personnel practices concerning wages, fringe benefits, and discipline and grievance processing, which have become part of the merit system, are being and will likely continue to be supplanted by collective bargaining.

Block, Howard. "Scope of Negotiations vs. The Role of Civil Service Commissions." In Scope of Bargaining in the Public Sector - Concepts and Problems. U.S. Department of Labor, Labor-Management Services Administration, 1972. pp. 55-77.

The author finds that "as collective bargaining expands in the public sector, there undoubtedly will be a corresponding contraction in the role of civil service commissions. The transition will be gradual. Ultimately, however, the traditional civil service commission functions will probably be limited to recruitment, examination, placement, and, perhaps some duties unrelated to the scope of negotiations." (p. 57).

Burton, John F., Jr. "Local Government Bargaining and Management Structure." Industrial Relations, 11 (May, 1972), 123-140.

The author believes that the merit principle, administered by an independent civil service commission, is basically incompatible with collective bargaining. Three possible consequences of this incompatibility on the structure of management are cited. The author concludes that if civil service is to survive as an independent system, state legislatures must strictly define the authority of municipal and county civil service commissions and their relationship to management's collective bargaining agencies.

Camp, Paul M. and W. Richard Lomax. "Bilateralism and the Merit Principle." Public Administration Review, 28 (March/April, 1968), 132-137.

Areas of conflict between the principles of merit systems and those of collective bargaining are discussed, along with AFL-CIO proposals to reconcile the conflicts. The authors believe both systems have changed and will continue to change with the growth of collective bargaining in the public sector.

"Civil Service and Bargaining in Los Angeles County Government." California Public Employee Relations, No. 20, (March 1974), 2-21.

This compilation includes: (1) Chapter 1, "Findings and Recommendations," of the Task Force of the Los Angeles County Citizens Economy and Efficiency Commission; (2) a memorandum to the Board of Supervisors from the County Chief Administrative Officer and Director of Personnel, with their comments on recommendations of the Task Force; (3) the views of Harry Gluck, Chief, Representative Services, Local 660, SEIU, AFL-CIO.

"The Civil Service - Collective Bargaining Conflict in the Public Sector: Attempts at Reconciliation." University of Chicago Law Review, 38 (Summer, 1971), 826-849.

This comment examines judicial attempts to resolve the conflict between collective bargaining laws and civil service regulations in states in which no legislative direction is provided. It also discusses several existing and alternative resolutions of the conflict. The author believes the central problem is the failure of legislatures to define the respective parameters of the civil service commission and the collective bargaining process.

Edwards, Harry. "The Emerging Duty to Bargain in the Public Sector." Michigan Law Review 71 (April, 1973), 885-934.

This comprehensive article includes a section on the impact of civil service laws on the scope of bargaining. The author maintains that civil service, in its expanded role covering employee relations beyond the merit principle, must yield to bargaining. Thus, civil service should control only hiring, promotions, and demotions.

Feigenbaum, Charles. "Civil Service and Collective Bargaining: Conflict or Compatibility?" Public Personnel Management, 3 (May/June, 1974), 244-252.

This article discusses the political aspects of the merit system and the conflicts between civil service and unionism in the areas of union membership, seniority, job classification and pay plans. The author concludes that collective bargaining and the merit system are compatible, but that collective bargaining will produce changes in public personnel administration, and will narrow the scope of the civil service commission.

Gross, Ernest, Collective Bargaining and Civil Service in New Jersey: An Analysis of Civil Service Decisions. New Brunswick, New Jersey, Rutgers.

This paper discusses the response of the New Jersey Department of Civil Service and the Civil Service Commission to collective bargaining in two areas; (1) unfair labor practices and protected activities of employees; (2) scope of negotiations.

Helburn, I.B. and N.D. Bennett. "Public Employee Bargaining and the Merit Principle." Labor Law Journal, 23 (October, 1972), 618-629.

This article defines the merit principle, examines the development of merit systems, discusses the conflict between public sector bargaining and the merit system, reviews existing state legislation on this conflict, and presents a proposal to preserve the critical aspects of the merit principle without unduly restricting collective bargaining.

Lewin, David. "Local Government Labor Relations in Transition: the Case of Los Angeles." Labor History 17 (Spring, 1976), 191-213.

The history of labor relations in Los Angeles City and County is examined and the differences and similarities in the two jurisdictions are analyzed. The author concludes that the thesis that the growth of government causes the demise of civil service systems seems overdrawn. Rather, what unions seek through bargaining is to reduce the scope of issues over which civil service commissions exercise exclusive control.

Lewin, David and Raymond D. Horton. "The Impact of Collective Bargaining on the Merit System in Government." Arbitration Journal, 30 (September, 1975), 199-211.

This article presents a "diversity-of-impacts" thesis, where, in some instances, bargaining reinforces pre-existing merit-based personnel practices, while in other situations it results in their modification or abandonment. The authors contend that it is not possible to evaluate the impact of collective bargaining on merit rules until more is known about the extent to which merit rules actually promote their goals of efficiency and equity in government. The major methodologies relevant to examining the personnel management-collective bargaining interface in government are also examined and evaluated.

Los Angeles County Citizens Economy and Efficiency Commission. Civil Service and Bargaining in Los Angeles County Government. 1973.

Recommendations of the Commission include (1) combining the Civil Service Commission and Employee Relations Commission into a single five-member commission to be called the Los Angeles County Labor Relations Commission; (2) appointing a Director of Personnel who will report directly to the Board of Supervisors; (3) deleting the prevailing wage clause from the County Charter; (4) Revising the Employee Relations Ordinance to adjust it to changes required by the establishment of the new commission; (5) revising the salary ordinance to establish a separate compensation plan for county managers; (6) appointing a special employer-employee committee to direct the preparation of the recommended revisions.

Los Angeles County Consultants' Committee, Report and Recommendations of the Consultants' Committee. 1972.

Recommendations of the Committee include: (1) adoption of corresponding regulations by the Los Angeles County Civil Service Commission and Employee Relations Commission which, in effect, would establish a policy of not hearing any part of a complaint that is within the jurisdiction of, and has been heard by, either an arbitrator, or the other commission; (2) amending the County Ordinance to give ERCOM the authority and budget to enforce its orders by initiating appropriate legal action when necessary.

Mabee, Richard W. "A California County Moves Into the Mainstream of Labor Relations." California Public Employee Relations, No. 23 (December, 1974), 36-41.

This article discusses the impact of the meet-and-confer process on the structure and administration of the San Mateo County government, with an emphasis on the role of the county civil service system.

Morse, Muriel M. "Shall We Bargain Away the Merit Principle?" Public Personnel Review, 24 (October, 1963), 239-243

The author maintains that civil service and collective bargaining are incompatible systems that "employ different principles and have different concerns."

Mosher, Frederick C. Democracy and the Public Service. New York, Oxford University Press, 1968

This book includes a chapter on the potential conflict between collective bargaining and the merit principle. The author believes the differences between the two systems can be reduced to two issues: the extent to which conditions of employment will be determined bilaterally and the extent to which terms of employment will be based upon collective rather than individual considerations.

Rehmus, Charles. "Constraints on Local Governments in Public Employee Bargaining." Michigan Law Review, 67 (March, 1969), 919-933

The author contends that if collective bargaining by local governments is to be effectuated, all non-merit functions should be transferred from the civil service commission to a personnel department under the chief executive of each local jurisdiction. But in practice, such a transfer of authority has seldom been made.

Stanley, David T. "What Are Unions Doing to Merit Systems?" Public Personnel Review, 31 (April, 1970), 108-113.

Based on interviews in nineteen local jurisdictions, this article examines the effects of union activity on government organization, hiring, promotions, transfers, training, grievances and disciplines, classification and pay. The author believes the relationship between unions and merit system is "dynamic and immature" but that government will have to reorganize to effectively deal with growing union strength.

"A Symposium on the Scope of Bargaining Problem." California Public Employee Relations, No. 16 (March, 1973), 2-16.

Responses from California Practitioners to Don Vial's article (cited below) are included in this symposium, along with a rejoinder by Vial.

U.S. Department of Labor. Labor-Management Services Administration. Collective Bargaining in Public Employment and the Merit System. Washington, D.C., U.S. Government Printing Office, 1972.

This report defines the merit system, discusses the growth of public sector unionism, examines state legislation on public sector collective bargaining and its relationship to the civil service merit system, and the role of the civil service commission under collective bargaining. Scope of bargaining and management rights, unit determination, and union security are examined in detail as major areas of conflict between the merit system and collective bargaining.

U.S. Department of Labor. Labor-Management Services Administration. State Civil Service Employee Associations. Washington, D.C., U.S. Government Printing Office, 1973.

Statewide independent associations of civil service employees are examined, as to their origin and development, jurisdiction and membership, structure and governance, and practices and attitudes toward collective bargaining.

Vial, Don. "The Scope of Bargaining Controversy: Substantive issues vs. Procedural Hangups." California Public Employee Relations, No. 15 (November, 1972), 2-26.

Two forces that tend to restrict the scope of bargaining in the public sector are defined and analyzed: (1) the assertion of management rights; (2) the existence of competitive or alternative systems of establishing terms and conditions of employment, such as statutory prevailing wage rates procedures and the civil service system. Using this framework, the author examines scope problems in California and suggests ways to resolve the conflicts between collective bargaining and alternative systems.