

**MORE OF EVERYTHING YOU ALWAYS
WANTED TO KNOW ABOUT PUBLIC
EMPLOYEE BARGAINING IN TEXAS –
BUT WERE AFRAID TO ASK*¹**

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ABSTRACT

Although Texas public employees (other than some essential service employees covered under separate laws) are not permitted to bargain collectively or strike, this has not prevented bargaining and strikes from taking place in municipal jurisdictions. This article reviews the laws, rulings, and case precedents affecting these employees, the status of bargaining, and the problems. Some solutions are suggested.

Introduction

As indicated by the title of this paper, the systematic study of public employee bargaining in Texas is not new, but dates to Newland's seminal study in 1962 [2]. The series of studies published in the last decade and a half are consistent in at least two ways. Each has documented the continued growth of public employee organization and related activity in Texas. Each has suggested the presence of serious shortcomings in existing legislation. This paper too is concerned with public employee organization growth and problems that may be attributed in part to existing legislation. Yet, as noted in detail later in the paper, the recent Supreme Court ruling in *National League of Cities v. Usery* [3] may put a premium on the need for revised public employee labor relations law in Texas.

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¹ I would be remiss in not admitting the theft of the title from Charles J. Morris [1].

Thus, mindful of past legislative activity, an additional attempt to present "More of Everything You Always Wanted to Know . . ." still seems in order as Texas attempts to cope with the problems of the last quarter of the twentieth century.

Public employees throughout the state may be viewed in several categories. There are the employees of the state, the various counties, cities and towns, and other independent taxing authorities such as hospital and water districts. Public safety and public education employees also constitute identifiable groups. And, for purposes of labor relations, public mass transit employees may be viewed as a special group where employer-employee relations are conditioned by the Urban Mass Transportation Act of 1964 [4]. This paper omits consideration of problems of police and fire fighters and public educators where they are governed by special legislation [5]. Emphasis is thus put on municipal employees, with secondary emphasis given to state, county, special district and public mass transit employees. We begin with a review of the development of legislation affecting public employees in Texas, including recent legislative activity and relevant court cases in both state and federal courts. Following is a look at the growth of public employee organizations and the resulting spread of related activity, including strikes. A third section views current labor relations problems facing the state and its political subdivisions, while the final section of the paper deals with potential future activities and a legislative proposal.

Legislative and Court Action

In 1899 the Texas legislature passed a law allowing "any and all persons engaged in any kind of work or labor . . . to associate themselves together and form trades unions [6]." While the law seemed to include public employees, subsequent court cases showed otherwise. In 1920 an appeals court affirmed the decision of a district court upholding the dismissal of Dallas fire fighters for refusing to disband a local of the International Association of Fire Fighters they had formed. In so doing, the court noted that the statute allowed unions but did not seek to regulate employers' attitudes toward their organization [7]. A second 1920 case involved fire fighters in San Antonio threatened with dismissal because of union organization. The appeals court ruled that the 1899 law applied only to private sector employees [8]. In 1929 the Texas Commission of Appeals ruled that a city could not enter into a contract that would delegate control of its power and duties, thus surrendering governmental or legislative functions. While the case did not involve labor unions, the logic of the decision was later applied to public employee bargaining [9], thus further restricting the rights of public employees. And in 1947 the civil appeals court upheld a Dallas ordinance prohibiting union membership for all city employees. In making a distinction between public and private sector employees, the court found the ordinance neither unconstitutional nor in conflict with state law [10].

Thus, close to fifty years after enactment of a law that seemed to include public employees, judicial interpretation continued to exclude this group from organizational and bargaining rights.

The 1940's brought "abuses of (union) stewardship, jurisdictional strikes and the use of the secondary boycott, refusal of some unions to bargain in good faith, as well as the sharp rise in labor disputes in the immediate postwar [W.W. II] period [11]." In 1946 Houston was the site of the largest public employee strike in the state's history. These activities created a climate that resulted in the passage of the Taft-Hartley Act by Congress in 1947 and the passage of nine pieces of restrictive labor legislation by the Texas legislature in the same year. Two of the nine bills have import for this study. The Right-to-Work Act, which applies to public and private sector employees, outlaws union shop agreements by removing the use of membership or nonmembership as a condition of employment [12].

Article 5154c, which applies only to public employees, includes right-to-work language and thus provides for public employee membership in a "labor organization," defined in Section 5 of the Act as:

Any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with one or more employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work [12, Art. 5154c].

Section 6 allows employees "to present grievances concerning their wages, hours of work, or conditions of work individually or through a representative that does not claim the right to strike [12]."

While "labor organizations" are allowed to present grievances in behalf of their members if they do not claim the right to strike, they are not allowed to bargain collectively. Section 2 of the Act declares recognition of a "labor organization" as a bargaining agent to be against public policy, while Section 1 declares such bargaining agreements null and void. In addition, Section 3 prohibits strikes and prescribes as penalties forfeiture of "all civil service rights, re-employment rights and any other rights, benefits, or privileges . . . [12]"

The climate for public employee organization changed little, if any, until 1956, when the Dallas municipal ordinance prohibiting city employees from joining unions — the same ordinance that has been unsuccessfully challenged in 1947 — was struck. While the district court had again ruled the ordinance legal, the appeals court overruled, finding a conflict with state law passed in 1947. The Texas Supreme Court refused to hear the case [13]. For the first time the right of public employees to join labor organizations was upheld in the Texas courts. Later cases broadened the protection of Article 5154c by enlarging the meaning of membership to include individuals who were about to become or who were thought to be union members rather than simply those who were

already members [14] and by reaffirming the right of unions and other labor organizations to represent members in the presentation of grievances [15].

Both state and federal courts have upheld the prohibition against bargaining. The city of Dallas, after purchasing the mass transit system from its private owners in 1963, refused to recognize the union previously accorded exclusive bargaining rights and refused to allow union representatives to continue taking part in the administration of a previously negotiated pension plan. The appeals court upheld the action of the transit system and thus the anti-bargaining provision of Article 5154c [16].

The constitutionality of the anti-bargaining provision was upheld by the U.S. District Court in 1971. An independent union not claiming the right to strike alleged violation of First (freedom of speech) and Ninth (freedom of association) Amendment rights when the city of San Antonio denied recognition as exclusive bargaining agent on the basis of Article 5154c. The court saw no merit in the argument that public and private sector employees should be treated alike and no violation of Constitutional rights [17].

The passage in 1973 of The Fire and Police Employee Relations Act (FPERA), which states that "collective bargaining is deemed to be a fair and practical method for determining wages and other conditions of employment" for police and fire fighters [18] stands in stark contrast to Article 5154c and its denial of public employee bargaining. This divergency spawned a court suit by the Amalgamated Transit Union, Local 694 in San Antonio, a union governed by Article 5154c. The claim was that of a violation of First (freedom of speech) and Fourteenth (equal treatment under law) Amendment rights. However, the suit was dropped prior to a hearing once an ongoing strike was settled.

A recent case involving Missouri public employee law indicates that the current dichotomous Texas structure is probably constitutional. The Missouri law allows public employees other than police and teachers to bargain. In response to a suit brought by St. Louis police, the U. S. District Court ruled in February 1976 that the law bore a rational relation to a legitimate government objective in view of the police officer's "unique place in society [19]." This ruling was affirmed without elaboration by the U.S. Supreme Court on June 21, 1976 [20]. The decisions indicate that states may apportion bargaining rights to various groups of employees depending upon the rational needs of the state, with variations in approach being constitutionally protected. Because the situation in Missouri is somewhat reversed from that in Texas it is possible that a future challenge in this state would bring a different ruling. However, this seems unlikely.

As noted above, police and fire fighters have separate legislation allowing them to bargain conditioned upon passage of a referendum in the locality concerned [18, 5(b)]. However, in localities where referenda have not been held, where they have been held and failed, and where bargaining rights have been granted and later repealed, the provisions of Article 5154c still apply. Faculty and staff

employees of two- and four-year public institutions of higher learning also fall under Article 5154c, as do nonteaching employees of independent school districts. However, public school teachers are allowed "professional consultation" rights under the Texas Education Code [21]. Finally, certain groups of public mass transit employees may be allowed to bargain despite current state law. Article 13(c) of the amended Urban Mass Transportation Act of 1964 "mandates that the workers and their unions will lose no rights as the result of public takeovers financed by federal funds [22]." Thus where private transportation systems have been purchased by the cities under the provisions of the Mass Transit Act, existing bargaining arrangements have been preserved. This has happened in Houston, where the publicly owned system is managed by a private firm, thus removing the employees from the provisions of Article 5154c and allowing the city to meet the requirements for obtaining federal funds.

For purposes of this paper, except for the FPERA, the only significant pieces of legislation passed which expanded public employee rights in Texas were a 1967 law allowing checkoff in cities of 10,000 or more [23] and a 1969 law allowing checkoff to employees of counties with 20,000 or more inhabitants [24]. However, there has been additional legislative activity. In the 1967 and 1969 legislative sessions there were unsuccessful attempts to pass laws providing for the continuation of collective bargaining and related rights where private mass transit systems were purchased by municipalities. In 1971, 1973 and 1975 the Texas AFL-CIO tried unsuccessfully to get legislation passed that would provide for collective bargaining for public employees. And, in a break with previous posture, the Texas Municipal League had a bill introduced in the 1975 session that would have provided municipal employees the right to exclusive representation for purposes of meeting and conferring in good faith. It too suffered the same fate as the union legislation.²

This review of recent activity would not be complete without mention of three legislative study committees. By virtue of Senate Concurrent Resolution No. 20, passed in May 1973 the legislature established an 18-member Public Employees Study Commission "to study employer-employee relationships, to hold public hearings throughout the state in at least five different locations; to review the experience in other states in this field, and to determine the relative merits and hazards of adopting any proposed revision of the present law . . . [26]" The Commission was made up of elected and appointed public officials from all levels of government plus private citizens, with an equal number of appointments made by the governor, lieutenant governor, and speaker of the house. Among the final recommendations of the Commission were those endorsing a central personnel agency and grievance procedures for state employees, and a meet and confer approach to employer-employee relations for all employees, with the continuation of the strike prohibition and the use of nonbinding dispute resolution procedures [26].

² For an extended discussion of 1975 legislative activity see I. B. Helburn [25].

A recommendation for a central personnel agency for state employees and uniform guidelines for intra-agency grievance procedures plus an outside appellate body was at the heart of a report by the State Personnel Subcommittee of the House State Affairs Committee [27]. A bill embodying these concepts passed the House during the 1975 legislative session, but was defeated in the Senate. The labor relations recommendations of the Public Employees Study Commission had even less impact, as both the Texas Municipal League and Texas AFL-CIO bills did not get out of their respective committees.

In September 1976, the House Intergovernmental Affairs Committee adopted a subcommittee report recommending that collective bargaining rights not be extended to additional public employees in Texas. The subcommittee felt the interests of Texas citizens are best served by retention of final decision-making authority in the hands of elected officials [28].

Thus at this juncture police and fire fighters may bargain if granted the right in a local election, public school teachers may meet and confer, some employees of essentially public transit systems may bargain, and all other public employees in the state, exclusive of those working for the federal government, may organize and have a representative present grievances but may not bargain. With the exception of those transit employees governed by the Mass Transportation Act, no public employees in Texas may strike.³

The Growth of Public Employee Organizations

This survey of public employee organizations and their activities starts at the state level and works down. However, to understand activities at the state level, some background is in order.

There is no centralized personnel agency in Texas. "Every two years (more often if a special session is called), the legislature rewrites the majority of the state's basic personnel laws and policies as part of the general appropriation bill. During the interim between legislative sessions, there is no mechanism for making changes in these prescribed policies [29]." The personnel policies prescribed by the legislature involve wages, salaries and fringe benefits, leaving each agency in the state free to design and administer a personnel system that is considered best suited to the agency's operations [29, xi-xii].

Agencies that participate in the state Merit System Council must follow specified procedures in the appointment, promotion and dismissal of covered employees, with such employees having the right to appeal to the agency in cases involving "disqualification from examination, examination rating, removal from register, discrimination, dismissal, suspension or demotion [29, p. 17]." Yet, in 1972 fewer than 30 per cent of the salaried noneducation employees

³ Technically, such transit employees are not public employees since they work for private management companies. However, the transit systems for which they work have been purchased with public funds.

were covered, with only the Department of Public Welfare, Department of Health and Texas Employment Commission having over 600 covered employees of the eleven agencies under merit council provisions [29, p. 14].

Even Merit Council agencies retain great flexibility in personnel administration. For example, these agencies are not required to have an internal grievance procedure, and in fact some of these, and other agencies as well, have no viable procedure, there being no state requirement for one.⁴ Thus, the multiple-step grievance procedures in the Department of Public Welfare and the office of the Comptroller of Public Accounts are the exception rather than the rule.⁵

Within this general environment, the Texas Public Employee Association (TPEA) is the major organization for state employees. Organized in 1946 because of concerns with retirement and civil service systems [30], the organization now includes approximately 39,000 members [31], roughly one-third of the number of state employees eligible to join.⁶ Membership is open to salaried and hourly paid employees, and classified and exempt employees, meaning that the organization is a mixture of managerial and nonmanagerial types, with the resulting diversity of opinion about activities and policies the organization ought to pursue. TPEA is primarily a lobbying organization interested in legislative improvements in pay and related benefits. While there is no significant organizational interest in collective bargaining⁷ the TPEA has sponsored grievance training for members and has put a high priority on the passage of legislation that would mandate grievance procedures within state agencies.

In the past three years TPEA has been organizing drives among nonfaculty employees of various four-year colleges and universities in the state, primarily as a response to employee interest in competing organizations affiliated with organized labor: the Laborer's International Union, the Operating Engineers and the American Federation of Teachers. In addition, in 1975 TPEA challenged the right of the City of Austin to enter into a written agreement with the Communication Workers of America and the American Federation of State, County and Municipal Employees concerning a straw vote to determine which

⁴ As noted in the first section of this report, legislation providing for agency grievance procedures was defeated during the 1975 legislative session.

⁵ The Department of Public Welfare procedure includes a final step at the agency level with a five-member review panel, with two of the five members being peers of the grievant. The panel is to make recommendations to the appropriate Regional Administrator or Deputy Commissioner. The final step in the Comptroller's Office procedure involves a panel consisting of a member of management, a peer, and a neutral chairperson from outside the agency. The panel is to make recommendations to the Comptroller. While there are no systematic studies of experience under these two procedures, there are indications that they are not working particularly well.

⁶ There are approximately 120,000-125,000 eligible employees, including 73,000 classified, 38,000 non-faculty university, 7,500 highway department hourly-paid, 2,900 part-time and temporary, and 2,400 exempt [32].

⁷ Jim Stewart, TPEA Executive Director, took a strong position against a meet and confer recommendation as a member of the Public Employees Study Commission.

organization would be granted checkoff rights. AFSCME ultimately won checkoff rights, although the city also granted TPEA checkoff rights without an election, contingent upon payment of an administrative fee. There has been no final resolution of the court challenge. Recently, TPEA has asked the Austin City Council for a pay raise for city employees, although its membership among such employees numbers about 140, far less than AFSCME membership, and it has not paid the administrative fee necessary to gain checkoff [33]. This apparently was the first time TPEA has shown an interest in other than state employees.

Union organization among state employees appears to be minimal. Teamster activity has been reported in the Highway Department in Harris County, as has Laborer interest in staff employees of Texas A & M University. For a period of time Local 455 of the United Hospital Workers' Union, affiliated with the Retail Clerks, existed at the San Antonio State Hospital, but this local is not currently active. The American Federation of Teachers has membership among staff employees at The University of Texas in Austin. On balance, however, Texas law and the conservative and even anti-union feelings of both employees and supervisors throughout the state have resulted in a climate that has been hostile to union organization. Nevertheless, as discussed in a later section of this paper, there are changes in the current framework that should be considered.

Unionization of county employees is greater than that of state employees, but organization lags on the municipal level. The picture is mixed, with some county locals in a state of decline and some experiencing growth in membership and ability to improve conditions of the members.

In his 1962 study, Newland described activities in four counties: El Paso, Galveston, Tarrant and Jefferson [2, pp. 6-8, 17-18, 20-21, 34-35]. In all cases the American Federation of State, County and Municipal Employees (AFSCME) was involved. In 1971 Helburn noted AFSCME activity in the four counties mentioned by Newland plus Orange and Harris counties and the Harris County Hospital District [34]. Currently AFSCME is organizing in Dallas and Bexar counties as part of an effort centered on the cities of Dallas and San Antonio [35]. Thus AFSCME has county level membership in eight of the 254 counties in the state plus the Harris County Hospital District. Other union activity, if it exists at this level, is inconsequential.

The character and activities of the AFSCME county locals vary. Activity in Dallas and Bexar counties is only now emerging. El Paso County Local 206 numbers about 250, but apparently is not a strong local insofar as representational activities go. Membership in Jefferson and Orange counties is small. The locals serving employees of Galveston, Harris, and Tarrant counties and the Harris County Hospital District, while not engaging in collective bargaining *per se*, do appear to provide representation for members by pursuing grievances, making presentations before County Commissioner's Courts and by maintaining a continuing relationship with the various Commissioners so that employee concerns are discussed.

The Harris County Hospital District has a grievance procedure that ends in advisory arbitration, the procedure being the product of a five member committee that included an AFSCME representative. The procedure seems to have worked well, although the arbitrator's advice has not always been followed. Following a spring 1974 "sickout" at Jeff Davis Hospital in protest of understaffing, nine nurses were fired. Subsequently, an arbitrator ruled that five nurses should be given their old jobs back after the hospital had offered the five new jobs without back pay. Four were given their old classifications, but were not allowed to return to their old jobs in the labor and delivery room. The fifth, a supervisor, was given a nonsupervisory job [36].

In addition to the walkout in Houston, there have been two strikes involving the Galveston County Memorial Hospital. A one-day walkout by members of AFSCME Local 1521 in May 1969 resulted in the inclusion of nonprofessional employees in a Blue Cross hospitalization plan [34, p. 66]. The local was also involved in a longer strike in February 1971 with pay the primary issue for the approximately 100 striking employees [37].

On balance, county level unionization must still be described as nascent, although not without the potential for growth. What activity there is is confined to a very few counties and is not well developed, even when compared to municipal activity in the state.

By June 30, 1976 AFSCME membership in Texas had reached 11,964 [35], with most of the members concentrated in municipalities. The pattern of municipal union growth is best viewed with reference to earlier studies. Newland noted active AFSCME locals of various strengths in eleven Texas cities plus Teamster and independent locals in Galveston [2, pp. 3-40].⁸ Unsuccessful attempts at organization had occurred in Freeport, Waco, and Corpus Christi [2, p. 41].

In 1971 Helburn reported AFSCME organization in twelve cities plus Laborer membership in San Antonio and Lubbock [34, pp. 33-34]. In the period between the two reports, AFSCME had moved into Galveston and Waco while folding in Dallas.

A recent study by Minkley surveyed thirty-two cities with a population of 20,000 or more [38]. Responses from twenty-four cities showed seven with AFSCME membership, two with employees belonging to Operating Engineer Locals, and three with Laborer membership. While specific cities were not identified, in one city Operating Engineers and AFSCME both had members among city employees while in another Laborers and AFSCME competed for members. In addition, a Texas Municipal League survey showed membership in the International Brotherhood of Electrical Workers within the Lubbock Electric Department [39].

⁸ The eleven cities are: El Paso, Port Arthur, Port Neches, Groves, Nederland, Beaumont, Texas City, Houston, Dallas, Fort Worth, and Austin.

Currently AFSCME has members in sixteen Texas cities [35].⁹ Local 1550, which began in 1958 with employees of the Houston Water Department, now includes employees of the cities of Houston and Pasadena, Harris County and the Harris County Hospital District, and the non-teaching employees of the Houston and Deer Park Independent School Districts. In May 1976 the local's membership stood at 6,630, better than half the total AFSCME membership in the state.

Similarly, the Golden Triangle Public Employees Local 385, AFSCME, numbering approximately 560 members, includes employees of the cities of Beaumont, Port Arthur, Nederland and Port Neches, and Jefferson and Orange counties. While existing in separate locals, added AFSCME concentration can be seen in organization in the cities of La Marque, Texas City, Galveston, and Galveston county.

Recent events in Dallas and San Antonio are particularly noteworthy. In the past few years AFSCME has renewed organizing attempts among Dallas city employees. However, they have been in competition with the Operating Engineers and have in fact been losing the battle, as reflected in the 1975 Texas Municipal League report showing the Operating Engineers with 315 members, AFSCME with 94 [39]. However, on August 23, 1976 the Operating Engineers notified members that they had ceded representation rights to AFSCME.¹⁰ AFSCME intends to organize employees of both the city and county of Dallas, building on its own limited membership and the base provided by the Operating Engineers.

San Antonio is now the scene of two AFSCME locals. Local 2399, with approximately 1,600 members, includes employees of the city of San Antonio, Bexar County and the Northside Independent School District (food service employees). Local 219 includes about 150 San Antonio Public Service Board employees of Mexican-American background, a group that apparently has its roots in the Association de Obreros Mexico-Americanos that filed suit against Article 5154c [17]. AFSCME activity in the San Antonio area, because it has involved contests with Laborers, Electrical Workers and Retail Clerks, has spawned unfair labor practice charges plus court suits and counter suits. Yet, this is currently the primary source of AFSCME growth with the union establishing a firm base in this area and apparently obliterating earlier Laborer strength in the process.

Thus there are currently eighteen cities in Texas known to have union activity involving municipal employees. However, the level of activity and representation vary considerably. In some areas union relationships with the

⁹ The cities include Dallas, San Antonio, Fort Worth, El Paso, Beaumont, Waco, Pasadena, Port Arthur, Texas City, Groves, Nederland, Port Neches, Houston, Galveston, LaMarque, and Houston.

¹⁰ A copy of the letter was shown to the author during the interview with Charles S. Caldwell [35].

administration are minimal, resulting in little if any union impact on wages and working conditions. In other areas unions have been able to establish a strong lobbying effort and thus to exert significant influence on wage and working conditions decisions. Additionally, unions have been able to use formal or informal grievance procedures to raise questions related to their members' well-being. And, despite the antibargaining provisions of the current law, there are political jurisdictions within the state where public employee unions do bargain with public employers, although the products of such negotiations may be found in city personnel policy manuals, minutes of council meetings and other documents that substitute adequately for the more traditional form of agreement. This is particularly true in areas within the Houston-Galveston-Beaumont triangle, where the existence of shipping and refinery activities has brought strong private sector unions. In such places as Texas City and Port Neches, governing bodies are or have been composed of elected officials holding private sector union membership — officials who know and understand unions and who have not looked unfavorably upon the requests to bargain made by public sector counterparts.

As the antibargaining provisions have not eliminated that activity, so have the antistrike provisions of the law failed to eliminate public employee strikes in Texas. In 1971 Helburn reported fourteen stoppages that took place between September 1966 and August 1970 [34, pp. 56-58]. Only five of these seemed to involve unions, although these were among the more serious strikes in terms of length and numbers involved. San Antonio sanitation workers and transit system employees and sanitation workers in Galveston and Lubbock were included in union strikes. Many of the nonunion strikes involved small groups of sanitation workers.

Other strikes involved AFSCME and the Galveston County Memorial Hospital in 1971 and AFSCME and the San Antonio Water Board in 1973. In September 1973 many Houston teachers staged a one-day walkout on the first day of the fall term. Fire fighters in the same city struck in September 1974 [40]. During the same year, employees of the Houston Transit System, members of the Transit Workers Union, were involved in a forty-seven day strike. The system is operated under a private management contract so that employees are able to negotiate and strike as they were prior to the city purchase of the private system with federal money [40].

In addition to the two-week strike by employees of the San Antonio Transit System in 1969, there have been strikes lasting one day in 1971, three days in 1972, six days in 1973 and 23 days in 1974. Each strike involved the Amalgamated Transit Union, Local 694, and each was illegal under Texas law since the formerly privately owned system was purchased by the city prior to the passage of the Mass Transit Act. The 1974 strike resulted in jail sentences and fines for twenty-three union members [41].

Finally in August 1976 sanitation employees in New Braunfels struck for two

days in a dispute over the number of hours they were being credited with having worked. While non union, the twenty strikers were aided by an official of AFSCME Local 2399 [42].

Strikes have not been the problem in Texas in the 1970s that they have been in some states. Yet, there have been troublesome disputes. In fact, in 1973 Texas ranked twelfth of all states with 2,300 employees involved in strikes. Given the growth of public employee activity in the United States, one must speculate about the future of such activity in Texas, particularly when there is evidence suggesting that current law is not accomplishing its intended aims — preventing the growth of public employee unionization, collective bargaining, and strikes.

Current and Future Problems

Existing and potential problems at the state level can be related to the current personnel management structure in Texas, or more accurately the lack of such a structure. Although the specific data are not available, it appears as though the lack of a central job bank and referral system cause the state to lose good prospective employees. It is simply too difficult to uncover potential sources of employment in state government in a given location, let alone elsewhere in the state, for those already employed or looking for work in other areas.

More directly related to employer-employee relations are the problems associated with the absence of viable grievance procedures in many state agencies. There are agencies where interpersonal conflict is viewed with the fear reserved for a malignancy or the embarrassment reserved in earlier times for problems of mental health, rather than as a natural consequence of organizational life and an opportunity to engage in joint and creative problem solving for the good of all concerned. Testimony before the Public Employees Study Commission concerning arbitrary personnel actions by supervisors accompanied by a "love it or leave it" attitude was heard from too many employees in too many agencies in too many areas of the state to be written off as sour grapes. There was testimony suggesting that state employees were discouraged in a number of ways from appearing before the Commission, apparently to save the embarrassment of washing dirty agency laundry in public.

While the data to support specific conclusions are not generally available, it appears as though this kind of personnel management has resulted in lowered morale, losses in productivity and higher than necessary turnover, items which are related. It is likely that the time, money and effort spent on improving this facet of personnel management alone would be repaid in improvements in efficiency throughout state employment.

As noted earlier in this paper, a bill providing for grievance procedures throughout state agencies was defeated during the last session of the Texas legislature. Institutions of higher education feared the bill, calling for a

centralized personnel agency, because they did not want to see the classification system for university personnel merged with one for other state employees. Many agency heads feared the bill because they felt it would bring a reduction in autonomy. And, at least one senator voiced the opinion that it was a bad bill because it was something the unions wanted.

The senator was right for the wrong reasons. In fact, union members of the Public Employees Study Commission voted in favor of a recommendation for a grievance procedure for state employees, while noting that a workable procedure would reduce the likelihood of union organization at the state level because it would reduce the number of employee complaints and result in some improvement in working conditions. If avoidance of unionization is the goal, then officials throughout the state would be well advised to adopt the lesson learned by union leaders as the means to that end: progressive personnel management is a better defense against unionization than is poor personnel management.

The lack of a central personnel agency combined with the lack of more positive public employee labor law creates a potential problem. Currently there is little organization among state employees, although activity elsewhere suggests that this is a possibility in Texas. There is an argument that if collective bargaining comes to state employment, the number of bargaining units should be minimized so that the state is not carved up on an agency basis and certainly not on an individual facility basis. In the existing void nothing will prevent this from happening. Thus the state's policymakers ought to consider this problem while there is time to study various forms of organization rather than at a time when unions might make state government the target of an organizing campaign.

The current law for Texas public employees other than police and fire fighters has created additional problems. The most apparent, but not the only, problems involve collective bargaining and strikes. Collective bargaining is taking place in some jurisdictions in the state. This is happening because management has willingly agreed, because the unions have had the power to force bargaining, or because a number of conditions have led to a situation where bargaining makes more sense than other alternatives. Yet, where this is occurring the rules governing bargaining activity seem to arise from the power positions of each party and locally imposed constraints. The informal rules may work well, but they are not institutionalized and are subject to change as a result of changes in power relationships. The changes may work to the advantage of either party, but where instability accompanies such change the public may be the loser in the long run. Because the "game" of bargaining is already being played and is likely to become more widespread in the future, serious thought must be given to developing a set of rules for all parties to play by, thereby offering the public protection by controlling the activity in the public interest. An added by-product of such rules would be to eliminate the present situation where bargaining goes on contrary to the spirit if not the letter of the law.

Even more noticeable are the problems created by no-strike provisions —

provisions requiring strikers to be terminated. This has rarely happened, as the penalties required by law are often inconsistent with the needs of public officials. With a strike in progress and an angry public clamoring for a resumption of normalcy, the public official is not likely to terminate employees who cannot be easily replaced and thereby heighten the public din and reduce his or her own chances of political survival.

A second problem connected with no-strike provisions is the lack of dispute resolution procedures. The experience throughout the country shows conclusively that outlawing public employee strikes will not bring the practice to a halt. There is, however, evidence to show that mediation, fact finding, and various forms of arbitration may successfully replace the need to strike or reduce the likelihood of a strike. Of course, if collective bargaining itself is illegal, then there is some inconsistency in writing into law dispute resolution procedures designed to come to grips with the consequences of collective bargaining. Thus, the two areas must be dealt with as parts of a whole.

None of the above is meant as an argument for the legalization of public employee strikes. Such an argument can and has been made, although not successfully in Texas. The point is that sound public policy suggests the existence of impasse resolution procedures in states where the strike is illegal as well as in states where it is legal. Such procedures offer more long-run protection to the public than does a simple no-strike provision.

That law recognizing and providing for public employee bargaining can work to the advantage of the employer as well as the unions can be seen in other areas. Currently unions representing municipal employees in Texas have achieved recognition on a *de facto* basis by working their way into the political structure or in some instances by virtue of a formal council vote involving granting of checkoff rights. It seems as though the situation found in 1971 [34, pp. 35-36] still exists, that unions organizing municipal employees are often minority organizations in that they do not include as members 50 per cent of the potential. In many cases union membership as a percentage of the city work force seems far less. If Texas had a law requiring that a union, in order to get an election to determine exclusive representation rights, show support from 30 per cent or more of the potential bargaining unit — a procedure consistent with that employed under federal law — it is likely that many unions could not even get the issue to a vote. Recently the city of Austin held a vote to see if AFSCME or the Communications Workers would be given checkoff rights. Roughly 5,500 city employees were eligible to participate in this straw vote, but only 1,149, roughly 20 per cent, voted for either union [43]. Thus it is possible that law providing for exclusive representation for bargaining purposes might lead to less union activity in some cities. Regardless, such a law would provide definite and reasonable procedures for union recognition rather than leaving the matter to the tugs and pulls of the political process.

Another potential problem that might be overcome by new law involves the

proliferation of bargaining units. Cities such as New York, Detroit, and San Francisco have a myriad of unions representing municipal employees and competing among themselves to see which can achieve the best settlement. The increased pressures on the cities' resources are not in the best interests of the public, the time spent by administrators dealing with a variety of contracts and numerous negotiations might be better spent, and it is not certain that the employees benefit greatly from the situation. Law setting forth reasonable guidelines for bargaining units would help prevent such a proliferation while protecting the rights of employees to legitimate representation. In the absence of legislation, the possibility of numerous bargaining units in a given municipality remains and the public interest is not well served.

The above points are illustrative rather than exhaustive, as more technical points that merit consideration when discussing revised public employee legislation are not within the scope of this paper. The limited discussion is intended to show that passage of legislation institutionalizing a form of collective bargaining for public employees is not simply a gift for the unions and a free ticket to the gravy train for their members. The spread of collective bargaining uncontrolled by law is far more likely to lead to serious consequences for the public than is public employee bargaining accompanied by intelligently devised procedures and ground rules. The latter point has, in my opinion, not received the attention in Texas that it should.

A Look Into The Crystal Ball

The above has been written based on the assumption that unionization and collective bargaining in the public sector will increase in Texas despite the law. A second assumption, one involving federal legislation, has also influenced the discussion, and it is that assumption to which this paper now turns.

Over the past two or three years public employee unions had become more hopeful of obtaining federal legislation providing for public employee bargaining. Such legislation, by providing for such activity in states like Texas, would spread bargaining, make it easier for public employee unions to make advances, and provide a more consistent framework throughout the United States.

Chances for passage seemed to dim even before the *National League of Cities* decision [3]. Legislators appeared to be increasingly concerned about the constitutionality of such legislation, the unions themselves could not agree on a single legislative approach, and the financial problems of New York and other cities combined with the notoriety given public employee strikes in New York and elsewhere raised grave questions about the advisability of law extending public employee bargaining rights.

The Supreme Court decision in *National League of Cities v. Usery* [3], a decision declaring the application of the Fair Labor Standards Act to public employees to be unconstitutional, may shut the door on public employee

bargaining legislation until the Court takes on a different philosophical hue. Since the Court objected to the use of the commerce clause as the vehicle by which the Fair Labor Standards Act would be applied to the states, there may be little reason to believe that the same general reasoning would not hold in a case involving the commerce clause and federal public employee labor relations law.

This does not mean that the door to federal legislation in this area is closed. One form of such legislation exists in Section 13(c) of the Urban Mass Transportation Act of 1964, which states that:

It shall be a condition of any assistance . . . that fair and equitable arrangements are made, as determined by the Secretary of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for . . . (2) the continuation of collective bargaining rights; . . . [22, p. 171].

Additional insight into the potentialities of federal legislation can be gained from a recent undated memorandum circulated within AFSCME. The memo, prepared at national union headquarters, noted that the *National League* decision "in no way affects the constitutional validity of the proposed extension of the Federal unemployment compensation law to cover additional employees of the States and their subdivisions." The memo further notes that:

The legislation is based on the taxing and spending powers of Congress, and would simply add another to the reasonable conditions to be met by any State that *chooses* to participate in the basic, permanent unemployment compensation program so as to entitle private employers in the state to the 2.7 per cent tax credit and entitle the State to the Federal grant for administering its unemployment insurance program.

The logic that applies to the extension of unemployment compensation appears to apply as well to the granting of funds to the states and their political subdivisions under federal revenue sharing programs. It is clear that amendments will be prepared for attachment to revenue sharing legislation adding a grant of public employee bargaining rights to the "reasonable conditions" states must meet if they choose to participate in revenue sharing.

Were such legislation to pass, Texas might be hard pressed to refuse the money in order to further resist public employee bargaining, given the increasing needs of the cities for added sources of revenue. The resulting situation is likely to be worse than that following from passage of federal public employee bargaining legislation *a la* the Wagner and Taft-Hartley Acts. Had this happened, bargaining would have come with an administrative framework designed to deal with such things as unit determination, exclusive representation, unfair labor practices, and dispute resolution procedures, at least in emergency situations. Public employee bargaining resulting from passage of revenue sharing legislation might involve simply a requirement to legalize bargaining unaccompanied by administrative procedures. Given the present law in Texas, this might work a far greater hardship on all parties, the public included, than extensive federal law.

Even if public employee bargaining does not come through federal legislation, the pressures will increase rather than decrease at the state level. Unions can be expected to push for bargaining legislation in Austin if the door to such legislation is closed in Washington. And, in the absence of legislation, the unions will continue their efforts to build new locals and consolidate in existing situations.

When The Fire and Police Employee Relations Act was passed people on all sides viewed the legislation as far from perfect. The experience to date confirms the accuracy of the initial impressions [44]. Because the bill was developed to meet the needs of one group – employees – and amended during the legislative process with too little thought given to the ramifications of the amendments, this should not be surprising. However, it would be at best a shame and at worst a disaster to repeat history at a later date and produce a greatly flawed piece of legislation with far broader application than the FPERA.

This need not happen if public employee organizations, public employers, legislators and knowledgeable academicians and private sector practitioners begin to pool their talents and resources to produce balanced legislation. In the long run, legislation favoring either the unions or management may work to the disadvantage of all because of the chaos that will result from the response to the imbalance. The safest and surest road for the future may be paved with legislation that grants the legitimate needs of employees and employers while keeping the general public foremost in mind.

Such legislation should begin with the legitimization of public employee collective bargaining. Administrative procedures can be written into law for the holding of elections and the certification or decertification of an exclusive bargaining representative, thereby eliminating the need for strikes to force recognition of an employee organization. Guidelines for bargaining unit determination can be included to minimize the likelihood of unit proliferation while protecting the interests of employees. Legislative guidance can also be directed toward bargaining unit composition to avoid the mixture of *bona fide* managers in units with supervisees and to avoid the mixture of professionals and nonprofessionals in the same unit unless there is agreement to mix on the part of the employees concerned.

The legislation must further protect the rights of individual employees, their organizations and their public managers insofar as organization, negotiation and contract administration activities are concerned. Protection involves ensuring the absence of coercion or discrimination, the presence of a requirement to meet and negotiate with one another in good faith, and the affirmation of employees' rights to a workable and equitable grievance procedure.

It is important to the long-run value of negotiations that legislation be concerned with the scope of bargaining – subjects that might be discussed at the table. Rather than prohibit subjects which might be classified as “managerial rights” from being discussed or negotiated, the law might better serve the public by allowing management the right to legally refuse to bargain over such issues but also giving flexibility to include items on the agenda. The limited studies of

political jurisdictions where productivity bargaining has taken place suggest that public management must open negotiations beyond the narrowly construed "wages, hours and conditions of work" if there is to be much hope of getting the union to agree on changes in work procedures, crew sizes, or amount of work to be accomplished in exchange for sharing in money saved through increased efficiency.

To minimize the possibility of strikes, even though prohibited by law, dispute resolution procedures must be included in any public employee legislation. These procedures should include mediation to be followed if necessary by fact finding or arbitration. Serious consideration should be given to experimenting with newer forms of dispute resolution procedures such as final offer arbitration or mediation to finality — often called med-arb. Strike penalties should be flexible so that the application of such penalties may be tailored to the facts of the situation.

The entire piece of legislation should be administered by a body of competent neutrals, allowing board rulings on questions of appropriate bargaining units, exclusive recognition, violations of rights and responsibilities under the law, and possibly penalties for strikes. In addition, the board would administer the dispute resolution provisions of the law. The addition of another state agency should be worth the cost in terms of stability brought to public sector labor relations in Texas.

Finally, the new law ought to avoid many of the provisions in The Fire and Police Employee Relations Act. Particularly important are the omissions of the open meetings and local option provisions. While jurisdictions outside of Texas are beginning to experiment with open meetings laws applied to collective bargaining, the results are very mixed and the experience in this state shows that such provisions have great potential for disruptiveness at the expense of the public. The local option provisions have led to questionable activities on the part of local municipalities in particular and unions in some cases, with repeal providing a cruel hoax for some employee organizations.

The proposal for legislation set forth in the above paragraphs has been deliberately broad. If any legislation is to emerge from the coming session it must necessarily involve a series of compromises on the part of organized labor, the Texas Municipal League, legislators themselves, and other interested parties. One can argue that too much confidence is placed in the legislative process, that there is not enough patience, good will, expertise, and motivation to accomplish the task. Nevertheless, the signs suggest that current legislation will not stand the test of time, that new approaches to problems of union-management relations in the public sector in Texas are due, if not past due. Hopefully these new approaches will emerge from the relative calm that still exists in Texas rather than as a less thoughtful response to more chaos at a later date.

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