June 1980

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THE PUBLIC SECTOR: BUDGETS AND BARGAINING

DONALD W. BRODIE*

The so-called "taxpayers' revolt" is an old phenomenon combining a specific dislike for paying taxes and a more general dislike for large government. The modern version of this "revolt" has received renewed attention in recent years, particularly in California.¹ Superimposed on the problem of taxpayers' revolt is the recent and more complex financial crisis of large cities, such as New York City, which face possible bankruptcy.² The causes underlying these conditions are highly complex, but the immediate effect of both the crisis and the revolt is to sharply diminish public employers' budgets. The diminished budgets, in turn, have significant consequences in public sector collective bargaining. It is the purpose of this article to examine the relationship between public budgets and public sector bargaining in general and some aspects of the impact on collective bargaining caused by the taxpayers' revolt and financial crises in particular. The article will focus primarily on collective bargaining at the state and local government level, not at the federal level. It will be necessary, however, to consider some special relationships affecting collective bargaining that may be created by the local acceptance of federal money.

This article will identify several conclusions about the subject, but cautions should be noted. First, in those jurisdictions where it exists, state and local level collective bargaining is primarily a statutory subject. As such, the rules are subject to immediate change at the will of the appropriate legislative body,³ and the subject matter is therefore far from stable. Second, the real extent and scope of the taxpayers' revolt and the fiscal crises are still unknown. Whether they are momentary phenomena or long term trends is uncertain. If the budgetary plight of

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3. The relative uniformity of statutory, administrative, and judge-made law of the private sector was lost in the decision of National League of Cities v. Usery, 426 U.S. 833 (1976).
public employers worsens significantly, the rules will probably undergo substantial changes. Third, both the crises and the revolt, in their present forms, are relatively new. At this point, the reactions of the legislatures and the courts are still probably closer to reflexive responses than to analytical solutions directed toward remedying the underlying causes. These notions suggest that there is much law remaining to be developed, which may render today's conclusions only temporary.

Again, the primary focus is on the state and local government and on the public employee who is engaged in collective bargaining. It is not the purpose of this paper to fashion the ultimate definition of the public employee; however, some limitations on the class are worth noting. For a public employer facing financial difficulty, all personnel costs affect the budget equally. However, not all public employees may be subject to the rules of collective bargaining, even in those jurisdictions having legislation permitting public sector bargaining. The rules applicable to the unionized public employee are different than those for the unrepresented public employee. The differences lie not only in the administrative and judicial overlay of collective bargaining, but also in the basic political nature of the relationship.

Although the focus here is solely on the unionized public employee, it is useful to identify some of those classes which might not be covered. Public sector bargaining legislation usually excludes the judicial branch, so employees associated with the judiciary may not be covered. Multistate agencies or agencies formed by voluntary agreement by several local government entities may not be covered. Some police may hold office by appointment rather than employment. Temporary employees may be excluded. Organizations funded by both private and public money may not be subject to collective bargaining jurisdiction. The public employer must carefully determine whether a class of employees is covered by the legislation when that employer seeks to alter the wages, hours, and working conditions. When an employee comes under the public sector bargaining legisla-

7. Murphy v. Mack, 358 So. 2d 822 (Fla. 1978).
tion, the employer may no longer be able to enter into individual contracts with the employee concerning wages, hours, and working conditions. When these matters involve mandatory subjects of bargaining, making changes in them with regard to unionized public employees may force the employer to bargain.

WHEN THE BUDGET RUNS OUT—OR DID IT?

Public employers faced with a taxpayers’ revolt or a possible bankruptcy share an obvious problem: They are short of money to fund the wages and fringe benefits contracted for or demanded by the public employees. The real question, however, may be: Is the public employer really at the stage of financial inability, or is the public employer merely anticipating a future deficit or potential complaint by taxpayers? The answer is not always obvious.

Burden of Proof

An initial issue to be resolved is the allocation of the burden of proof of proving financial inability to pay. The public employer, the public employee union, or the interest arbitration panel are the possible candidates. The union is an unlikely choice because it lacks direct access to the basic information and lacks the legislative authority to raise or lower revenue. In addition, giving the power of determination to the union might itself involve an unlawful invasion of a management prerogative.

In an impasse situation, where the public employer claims

11. See note 119 infra and accompanying text.
12. In the public sector, it is not uncommon to use interest arbitration to resolve a bargaining impasse. The interest arbitrator or panel must decide the final terms of the contract. The financial package commonly is among the issues in arbitration. For a statutory example of interest arbitration, see OR. REV. STAT. § 243.742 - 243.762 (1973).
13. The public labor board might be another candidate. For example, the public labor board might find improper use of the ability to pay argument to be a violation of employer's duty to bargain in good faith on a salary issue, and, as a remedy, order merit salary increases. Such a remedy would be valid only if there was statutory authority. For a case where there was no statutory authority, see Jefferson County Bd. of Supervisors v. Public Employment Relations Bd., 36 N.Y.2d 534, 369 N.Y.S.2d 662, 330 N.E.2d 621 (1975).
14. In Caso v. Coffey, 41 N.Y.2d 153, 391 N.Y.S.2d 88, 359 N.E.2d 683 (1976), the court rejected the argument that the employer's last best offer should be presumed to be a good faith statement shifting the burden to the union.
financial inability and the union disagrees, some effort has been made to shift the burden to the interest arbitrator, where the arbitration device is used. Under such a rule, the interest arbitrator would, in effect, have to identify the source of funding in order to justify a costly ruling in the union's favor on wages and working conditions. The rulings appear, however, to be to the contrary. The arbitrator may be required to consider ability to pay, but not prove its presence or absence. The burden of proof of financial inability lies on the public employer and not on the interest arbitrator. If the interest arbitration award upsets the employer's planned budget, it is up to the employer to rejuggle priorities, cut services, or seek additional revenue. In other words, ability to pay is not determined by the line item entry dedicated to wages, but rather, is concerned with the overall state of finances. Where the interest arbitration award is valid, the public employer may have to rejuggle the budget to fit the award into the overall picture. The one with the management prerogative must manage.

A finding of inability to pay or financial crisis might also be declared by a legislative body in the passage of special legislation. This declaration will help to determine whether or not inability to pay exists, but it need not be conclusive. The declaration of financial crisis in the New York state legislation concerning New York City was sufficiently


19. Where both the union and the employer asked the arbitration panel to audit the books and find the money, the panel rejected the offer, citing its own lack of authority and the obligations of elected officials. City of Rialto v. Rialto Fire & Police Protection League, 67 Lab. Arb. 654 (1976) (Gentile, Arb.).

compelling on the facts. Reliance on the legislative declaration of financial emergency in California, however, was not sufficient. The state supreme court looked at the state's surplus funds which the legislation used to bail out local government. They determined that factually there was no crisis which would allow the resultant contract impairment.

The determination of financial crisis can be important to the public employer. Where a financial crisis is proved to exist, the public employer may be entitled to take drastic action vis-à-vis the public employees and the contract. Where no crisis exists, the employer must live by the standard rules of contract interpretation.

In summary, the burden of proof of the inability to pay lies on the public employer, and not the union or the impasse arbitrator. Legislative declarations may or may not be conclusive. Inability to pay is based upon a consideration of the employer's entire financial picture, and not merely on what the public employer has designated for wages and fringe benefits.

Evidence of Inability to Pay

Where interest arbitration has been substituted for the strike and the negotiators have come to impasse, the interest arbitrator, as reviewed by the court, may need to determine what constitutes sufficient evidence of inability to pay.

Documenting the case of inability from the employer's point of view, and the absence of inability as perceived by the union, requires careful, detailed work. Among the particular types of evidence which might be considered are the following:

- Budget priorities of the community, budget limitation in effect by statute, the total budget in prior years, amount of budget which is the result of property tax levies, the equalized tax rate in the community compared to that in other communities, any financial liability the community may have to accommodate as the result of pending litigation, the median family income compared to that of other communities.

23. See notes 42-44 infra and accompanying text.
24. The public labor board might also determine this issue on the question of whether the employer's claim was made in good faith. See generally C. Morris, The Developing Labor Law 312-14 (1971) [hereinafter referred to as Morris].
ties and its ability to absorb a new tax increase, outline of the amount available in the budget for increases for a particular bargaining unit, any revenues lost to the community having a significant impact on the budget, the community’s debt level and total amount of debt service it pays, amount of increases allotted to other groups in the community, level of benefits for other employees and structure of their contracts, and reduction in services which would result from the union’s final offer.  

Other types of useful evidence might include the amount of tax delinquencies, family income of taxpayers, per capita assessed value, retail sales level, home sales level, general state of the overall economy and the local economy, welfare obligations of the unit of government, particularly in light of any pending recessions, and rating of government securities in the market.  Such presentations by both sides should be made in the utmost good faith.

A number of items, taken alone, will not demonstrate financial inability. Increased public criticism of government expenditures, combined with finding a less expensive alternative, will not justify public employer actions based on financial inability when there is an existing contract. Incomplete financial information combined with a fear of future deficit are inadequate proof. A general slowdown in the economy, e.g., lessened building activity, may not be enough to demonstrate an actual falloff in the public employers’ specific business, e.g., building valuations and permits. Where a contract calls for discretionary fringe benefits such as sabbatical leaves based upon educational soundness of proposal, the public employer cannot deny all requests regard-

30. MERC Orders County to Retain Hospital Firefighters During Contract Term, [1978] 775 GOV’T EMPL. REL. REP. (BNA) 9 (Michigan Employment Relations Board).
less of merit on the grounds of financial exigency.33 Where the public employer takes action based upon financial exigency, such as layoff, and it is later determined that there was no inability, the awards of reinstatement and back pay can be very expensive.34

The problem of priorities in a government budget is a difficult one. A public employer will usually bargain with several units of public employees, resulting in several contracts. In addition to those contracts, the employer may be making capital expenditures and incurring other obligations. Campaign promises of elected officials may require additional funding. Each of these obligations cannot be given an equal priority claim on the available funds. The result is that the public employer may have to underfund some activities in order to accomplish the priority goals that have been identified.

The attempted “underfunding” of the union demands on a labor contract may result in a bargaining impasse. Where interest arbitration is used to resolve the impasse, the interest arbitrator must redetermine the character of priorities. This will involve a balancing of collective bargaining aspirations with other governmental priorities. As one arbitrator stated:

Despite a tight budget the Fact Finder feels there is sufficient justification for applying a relatively high priority to the matter of wages. . . . [T]he effect non-competitive wages can have on the present and future efficiency of the Commission's operation [cannot be ignored]. If a reasonable wage parity . . . cannot be maintained, good employees may be hard to attract, and old employees may be influenced to seek employment elsewhere. Either prospect would make it more difficult for the Commission to meet its community obligation.35

Financial ability and governmental priorities are but two of the factors to be considered by the interest arbitrators. Other factors might include past practices and contracts, comparisons with other similar public or private sector employees, comparisons with others in similarly situated geographical areas, and the public interest.36 One award on a wage reopener took account of a forthcoming tax levy election and awarded

33. Board of Educ. v. Somers Faculty Ass’n, 48 App. Div. 2d 873, 369 N.Y.S.2d 753 (1975). The public employer may have the contractual or statutory authority to deny all requests based on the individual merit of each request, but the determination on merit must be distinguished from denial based on financial exigency.

34. Chicago Teachers Awarded $2.8 Million for “Lay Off” on Last Day of 1977 Year, [1979] 808 GOV'T EMPL. REL. REP. (BNA) 13; Yonkers Begins Paying Award in “Fiscal Crisis” Case—Some Financial Problems Elsewhere, 8 PUB. PERS. AD. 2 at ¶4.2 (1979) ($8 million involved).


a seven percent increase if the levy passed and four percent increase if the levy did not pass.37

Despite its importance in a revolt or crisis situation, it seems unlikely that financial ability will become the sole criterion for the interest arbitrator or the courts reviewing the award in the near future. The New York City financial exigency legislation was recently amended to take account of the experience gained to date. Financial ability was given greater emphasis, but was not made the sole determinative. Financial ability must be considered and given substantial weight: Financial ability is defined as "the financial ability of the City . . . to pay the cost of any increase . . . without requiring an increase in the level of City taxes existing at the time of the commencement [of the impasse proceedings]."38 As was indicated in a related case,39 it appears likely that the priority given to a particular contract must still be considered in relationship to other demands on municipal revenues.

In summary, proof of inability to pay by the public employer and rebuttal evidence by the union ranges from evidence on the state of the general economy to particularized information on the community. The determination by the impasse arbitrator that the public employer has the ability to pay may require the public employer to rejuggle the budgetary priorities.

When the Budget Is Exhausted

Once it is demonstrated that a true fiscal crisis has arisen, drastic action may be needed to preserve the public employer as a functioning arm of government.40 The drastic action may include layoff, shortened work week, hiring and wage freezes, or changes in fringe benefits, any or all of which may violate a collective bargaining agreement or statutory right. The labor agreement will not be permitted to become a "suicide pact."41 Despite a constitutional prohibition against the

37. Arbitration Briefs, 8 PUB. PERS. AD. 7 at ¶9.19 (1977). This might, however, literally be a case of "passing the buck."
40. In order to avoid financial problems, a court may reform a contract erroneously containing an enlarged benefit. Reformation may occur even where the arbitrators must select between final offers. Michigan Court Permits Reformation of Contract, [1978] 758 GOV'T EMPL. REL. REP. 20.
impairment of contracts, the question for most courts “concerns not whether the state may in some cases impair the obligation of contracts, but the circumstances under which such impairment is permissible.” Such circumstances might include fiscal as well as non-fiscal reasons, but our focus here is on fiscal reasons.

The California Supreme Court enumerated the following criteria to be met before contract impairment can be permitted:

1. Finding of emergency adequately documented.
2. Impairment for the protection of a basic general interest of society, not for the advantage of a particular group.
3. Reasonably related to emergency and conditions imposed by emergency, i.e., delay rather than destroy contract rights.
4. Legislative impairment is temporary and limited to exigency which provoked the legislative response—temporary and limited, not severe and permanent.

Using essentially these types of considerations, the New York City wage freeze legislation was found to be valid. The New York court found the existence of a true fiscal crisis, a sufficiently equal sharing of the burden between collective bargaining units, a reasonable relationship between the problem and the proposed actions, and a limited, temporary suspension of contract rights as contrasted with a total loss.

43. For recent non-fiscal reasons, see Porcelli v. Titus, 108 N.J. Supr. 301, 261 A.2d 364 (1969) (promotion policy overridden by need to transfer black staff members which was not permitted by terms of agreement); War, Insurrection, End Contractual Obligation, [1977] 716 GOV'T EMPL. REL. REP. 11 (contract terminated without severance by University of Hawaii for field work project to be conducted in Laos; Communist takeover of Laos before contract completed).
44. Sonoma County Organization of Pub. Employees v. County of Sonoma, 23 Cal. 3d 296, 305-06, 152 Cal. Rptr. 903, 907, 591 P.2d 1, 5 (1979). The New York court recognized these factors: “But the collective agreement in question, negotiated before a legislatively declared emergency, short-term in length, and indistinguishable from the city’s other contractual obligations which remain enforceable, is not yet vulnerable to attack as in violation of public policy.” Board of Educ. v. Yonkers Fed’n of Teachers, 40 N.Y.2d 268, 276, 386 N.Y.S.2d 657, 661, 353 N.E.2d 569, 573 (1976). An arbitrator in New York identified useful criteria to determine whether a fiscal crisis layoff was valid. The arbitrator would find it to be a subterfuge if the city:
   a. Was not faced with a genuine city-wide fiscal crisis;
   b. Had falsified a fiscal crisis or represented that it was confronted with a fiscal crisis when it was not;
   c. Was confronted with a genuine fiscal crisis but a reduction in the manning of fire companies was not necessary to meet it;
   d. Faced a genuine fiscal crisis but the Fire Department was required to bear the brunt of layoffs and manning reductions unreasonably disproportionate to what was required of other bargaining units;
   e. Failed to reactivate the minimum manning schedule which had been deactivated by the fiscal crisis, when the crisis abated to the extent that fire fighters were recalled provided the funds or law under which they were returned to work did not legally restrict their use to restore manning levels.
45. Subway-Surface Supervisors Ass’n v. New York City Transit Auth., 44 N.Y.2d 101, 404
The California court, on the other hand, found no true emergency, but a permanent and significant destruction of the contractual rights that went to the heart of the contract. The legislative wage freeze was determined in California to be an unlawful impairment of the collective bargaining contracts.

One major point in controversy between New York and California was whether the contractual (or statutory) rights had "vested." Vesting is concerned with whether the employees lost their pay increase, calculated on the basis of services already performed in the past, or lost an expectancy based on services to be performed in the future. Generally speaking, vested contractual employee rights cannot be abrogated by subsequent legislative action. The New York legislation was carefully drafted to avoid several possible pitfalls in the "vesting" argument. The legislation did not terminate existing employment, nor deprive employees of payments for services rendered in the past, nor alter regular payments into the statutory pension fund. The New York court had to interpret the legislation and contract in such a way as to avoid finding a vested right in the current employees in the provisions for future wage increases. The New York court said there was no consideration for the expectation of future wage increases, hence its extinguishment did not invade a "right." The California court, without actually deciding, doubted the validity of the New York position. The New York position on vested rights in future wage increases is followed in Delaware. The Delaware court found such legislation prospective in design and operation, and found nothing in the future promise of wage increases to induce employees to enter or remain in public employment.

The California position is consistent with that of Montana, where the court considered the rights to be vested in current employees, and
specifically found that longevity pay increases, for example, do induce public employees to serve longer. Such an inducement would mean the rights to future longevity increases have vested as to current employees. The argument concerning the vested character of future promises of pay increases is important in several respects. For example, fiscal constraints may be imposed by legislation. Such legislation should be carefully drafted to avoid as many of the vesting arguments as possible. Distinctions may have to be made in pensions, wages, and other fringe benefits.

The true fiscal crisis is still rare and difficult to prove. Where the existence of a crisis is problematic, it seems likely that the courts will permit only minor impairment, if any. The major type of impairment of contract, such as in New York, will be permitted only where the crisis is bona fide and actual. The vesting argument again reminds the union and employer that there are different classes of employees who may have to be treated differently. “Across-the-board” employer actions against public employees are likely to be more suspect than differential treatment. Similarly, unions may be less successful in bargaining across-the-board gains in times of stress than in attempting more specialized bargaining. The union may achieve more by attempting to hold existing benefits for current employees, and bargain different rights for future employees.

Some collective bargaining legislation provides for the reopening of the contract in the event of employer inability to perform. Presumably, a unilateral declaration of inability would not be effective to trigger the operation of the clause. The evidence of financial inability in the constitutional sense will probably be required, unless the parties


53. Vested rights would presumably remain with the employees as long as they retained their positions. The effect of repealing the rights-giving legislation of contract would mean that those rights could not vest in employees subsequently hired. On this basis, the higher the rate of employee turnover, the more money would be saved by the public employer after the repealing legislation.

54. See notes 47-53 supra.

55. This may raise questions concerning the union's duty of fair representation, see Morris, supra note 24, at 343-46. However, where a true fiscal crisis exists, the union is likely to have greater flexibility than in normal circumstances.

56. The statute provides, in pertinent part:

In the event any provision of a collective bargaining agreement is declared to be invalid by any court . . . or by inability of the employer . . . to perform to the terms of the agreement, then upon request by either party all or any part of the entire collective bargaining agreement shall be reopened for negotiation.

have bargained a lesser standard. Under such a statute, a clause covering inability would probably be found to be a mandatory subject of bargaining.

In summary, when a budget crisis exists, the public employer may not be bound by the constitutional limitations on the impairment of contracts. The finding of a budgetary crisis requires a finding of the social interest and the use of reasonable measures no more destructive of the contract than necessary. Constitutional protection arises when the contract rights have vested. Courts have split on whether promises of future wage increases have vested.

The Layoff

The public employee receives many monetary benefits, including such items as present wages, future increases, longevity pay, severance pay, pension rights, health-medical-dental-legal, and other fringe benefit payments. When the financial crisis arises, each of these may be affected in a particular way and each would require separate analysis. However, the most dramatic effect of the budget crisis is the layoff or wholesale termination of jobs. Layoff issues range from constitutional questions of due process to interpretation of the terms of applicable contract.

The basic doctrine applicable where the public employer seeks to take unilateral action involves the duty to bargain in good faith. Where the enabling statute requires bargaining on a matter, the decision must be made bilaterally (i.e., bargained) rather than unilaterally (i.e., employer alone decides). When a matter is not subject to bargaining, such as those which fall under managerial prerogative, it is generally not subject to resolution by the impasse arbitrator. A true emergency expands managerial prerogative and reduces the duty to bargain.

Attempts to contractually prohibit layoffs have not been successful in the true emergency situation. "The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractual relations are worthwhile. . . ." The ulti-

57. Due process is not a major topic of this article. In passing, it is noted that due process is a relative concept, Mathews v. Eldridge, 424 U.S. 319 (1976), of uncertain application, Arnett v. Kennedy, 416 U.S. 134 (1974), and of even greater uncertainty in times of emergency, Goss v. Lopez, 419 U.S. 565 (1975).

mation power of the public employer to layoff in a crisis seems relatively clear, but its exercise must follow the dictates of good faith as well as any statutory or contractual limitations. The layoff must be genuine, and not a subterfuge. Where the crisis is less evident and the contract is of reasonable duration, a public employer might be limited by the terms of a voluntary collective bargaining agreement giving greater protection to the employee's job security than to the employer's right to layoff. Where layoff is not a mandatory subject of bargaining and where the employer has not voluntarily bargained the matter, the decision to layoff may be unilaterally made, but the employer may be required to bargain about such effects of the terminations as timing of layoffs, number and identity of employees to be laid off, workload and safety of those remaining, and minimum manning. The employer cannot use the layoff merely to avoid existing responsibilities when a less expensive alternative comes along.

Use of the layoff will result in an immediate reduction in the public employer's budget in a crisis situation. If an immediate crisis is not involved, but long term budget stabilization or reduction is needed, attrition and nonreplacement will generally provide significant relief. Attrition affects the makeup of the employer's workforce in nonelective ways, thus affording the employer less control of the makeup; how-


60. For the layoff to be proper it must be inspired by an acceptable Industrial Relations motive and the following conditions must be observed: (1) the work must be abandoned by the County; (2) the work must not be contracted out; (3) the work must not be performed by non-unit personnel. Genesee Co. Sheriff's Dept v. Teamsters Local 214, 66 Lab. Arb. 27 (1976) (Keefe, Arb.). But see Bennett v. MacMillan, 2 PBC ¶20,424 (Mass. Super. Ct. 1975). The court in Young v. Board of Educ., 35 N.Y.2d 31, 34, 358 N.Y.S.2d 709, 711, 315 N.E.2d 768, 769 (1974), observed: "Had a new or part-time position been created to carry on the work formerly done by petitioner, a different question would be presented . . . ."


64. Attrition occurs when employees leave employment for reasons of retirement, finding jobs elsewhere, death, leaving the workforce, etc. Nonreplacement of those employees results in a reduction of the employer's workforce.

ever, it may reduce the amount of litigation that would result from the use of the layoff. Where layoff is used, protective clauses for the terminated employees may be required by statute or reached through negotiations. Such provisions may include early notice, layoff by seniority, limited preferential recall list, or limited continuance of health benefits. There is also increasing recognition of the role of the strike as a device, legitimate or otherwise, for effecting a reduction in personnel costs. The effect is immediate, but the timing will depend, in part, on the expiration date of the contract.

Another element to be considered in the context of the fiscally-inspired layoff is the role of the CETA worker funded by the federal government. Under the new rules applicable to the CETA program, the role of the CETA worker is unclear. The relatively shorter period of time for federal financial assistance may convert a CETA worker into a temporary class of employees not covered by public sector collective bargaining legislation.

A number of interesting defenses have been utilized in attempts to forestall a layoff. Efforts to require an environmental impact statement before a layoff have been rejected, largely because the primary impact of a layoff is not on the physical environment. On the other hand, the provisions of a “sunshine law” have been successfully invoked in a layoff situation, drawing a distinction between individual personnel deci-

68. FBA-BNA Conference Panel Discusses Recent Developments in Public Sector Bargaining, [1976] 684 GOV'T EMPL. REL. REP. (BNA) B-9. If a strike results from the deliberate actions of the employer in a negotiating impasse situation, the employer may have violated the common requirement of good faith bargaining. See generally MORRIS, supra note 24, at 277.
70. CETA regulations state that no financial assistance can be provided that would result in the displacement of regularly employed workers, impair existing contracts, or result in the substitution of federal for other funds. This has led to the discharge of CETA workers along with regular workers in California. See U.S. Appeals Court Affirms CETA Firing Case Dismissal, [1979] 799 GOV'T EMPL. REL. REP. (BNA) 12. See also City of Tiffin v. AFSCME Local 583, 69 Lab. Arb. 1154 (1977) (Cummins, Arb.); Genesee Co. Sheriff's Dep't v. Teamsters Local 214, 66 Lab. Arb. 27 (1976) (Keeffe, Arb.).
71. See 29 U.S.C. §§ 821(a), 829(b), 873(c)(1), 873(d), 873(e), 879(g), 882, 914(a)(1), 952(a) (1979).
72. CETA Employees Excluded from Unit (Florida), 8 PUB. PERS. AD. 6 (1979).
sions, which are nonpublic, and large scale personnel actions, which are subject to the open meeting requirements of the sunshine provisions. In some situations, state law may mandate that certain services be provided, such as school nurses or librarians. Despite union arguments, these provisions do not necessarily preserve jobs; the court may distinguish between the particular service provided by the discharged employee and the continuation of the service in some other manner by the public employer. In some situations, layoffs may be required by a seniority clause in the contract. For example, where the employer must reduce personnel expenditures, this result could also be achieved by reducing the workweek for the entire workforce or by discharging a portion of the workforce and requiring the remainder to continue working full time. The workweek reduction treats all employees equally, while the termination approach gives recognition to the seniority provisions of the contract. A sufficiently explicit seniority provision may require the public employer to use the termination approach in order to avoid a violation of the intent of the contract.

In summary, the public employer’s right to layoff in a financial crisis, regardless of the contract terms, seems well-established. In non-public situations, layoff or the effect of layoff might be a mandatory subject of bargaining. Protective clauses concerning layoff may be found in some statutes or contracts. Union efforts to prevent layoffs through the use of other legislation, such as sunshine laws, have not generally succeeded. The seniority clause is critical in determining whether layoff or a workweek reduction can be used.

LEGISLATION AND BUDGETS

To date, the phenomenon of financial crisis or taxpayer revolt has primarily been felt by agencies at the local government level. These local agencies have been the focus of relief efforts by federal and state level agencies, which may provide loans and other forms of financial aid. With the money come control and supervision over its use, which cause added complications in the collective bargaining process. In

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74. School Layoff Decisions Subject to Missouri Sunshine Law, 8 PUB. PERS. AD. 1 at ¶8.1 (1978). However, the remedy was held to be discretionary and reinstatement was not ordered.
75. The distinction may be less than completely clear and raises the question of whether the employer has reduced personnel through discharge or substituted another to continue the service. Campbell Elementary Teachers' Ass'n v. Abbott, 76 Cal. App. 3d 796, 143 Cal. Rptr. 281 (1978).
New York, for example, the Emergency Financial Control Board can reject or alter a contract the parties have negotiated. California legislation sought to impose a local government wage freeze. The United States Secretary of the Treasury and the Congress can use the threat of withholding federal loans where the proposed contract contains clauses which they oppose. Bargaining in this context becomes, in effect, more than bilateral. Both sides will be trying to convince bureaucracies other than the public employer that their position is the most “just.”

There are a number of other direct and indirect effects on the collective bargaining process. The importance of bargaining monetary issues may be decreased in the face of wage freezes. Trade-offs are lost and other issues assume greater importance. The union may focus its attention on increased lobbying in the appropriate legislative arena rather than on bargaining at the table. Supervisory agencies must be convinced that the proposed contract is appropriate.

The use of federal money carries with it the potential for one of the two parties—public employer or employees—to substantially alter the balance of power. Contract approval is obviously one example. The real potential, however, lies in the terms of the enabling legislation under which the funds are made available. A statute in point, although not a “bail out” statute, is the Urban Mass Transportation Act. The act provides, in part:

It shall be a condition of any assistance under section 1602 of this title 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 (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated


79. Weitzman, supra note 77, at 293.

80. The CETA employee may be another example. See note 70 supra.
or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of this title. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements. 81

Under the legislation, local communities may obtain federal money for the purchase of privately owned mass transportation property or facilities. The local community may or may not seek the federal money. If a voluntary request is made, however, use of the money is conditioned as set out above. Usually, when a public employer buys out a private employer, the employees would become public employees subject to whatever rights or lack of rights other public employees in that area are given. Under this legislation, the new public employees have, in addition, those rights provided by the protective agreement as determined by the United States Secretary of Labor. To date, the legislation has been held valid. 82 Where the protective agreement contains rights, such as interest arbitration, which are contrary to the general law or policy of the state, the terms of the protective agreement still must be maintained. 83

Both public employers and public unions might find federal or state legislation a profitable route to attempt to travel to reach their respective goals. The legislation that surrounds a fiscal crisis or a taxpayers' revolt might offer additional opportunities to reach these goals. By the same token, such crisis or revolt legislation might have the effect of rendering collective bargaining meaningless. It should be recalled that the New York legislation provided that the act should not be construed to impair the right of employees to organize or bargain collectively. 84 Despite language of this type, there will be an impact on the bargaining process. The question is whether the impact will be directed or inadvertent.

83. Local Div. 519 Transit Union v. LaCrosse Transit Utility, 585 F.2d 1340 (7th Cir. 1978); Local Div. 1287 Transit Union v. Kansas City Area Transp. Auth., 582 F.2d 444 (8th Cir. 1978), cert. denied, 99 S. Ct. 872 (1979). In Transit Union Local 714, the collective agreement did not call for interest arbitration, but the section 13(c) protective agreement did call for interest arbitration. The court concluded the interest arbitration provision was enforceable in the federal courts. Local Div. 714 Transit Union v. Greater Portland Transit Dist., 1979-80 PBC ¶36,466 (1st Cir. 1978).
In summary, “bailing out” financially pressed local government or offering more conventional loans or grants to local government requires state or federal legislation authorizing the use of funds and determining the conditions under which the funds may be used. Either the public employer or the union can dramatically alter the balance of power relationship if they can affect the terms of the enabling legislation. Legislation can require third party contract approval, extend new rights to employees, and the like.

**Clauses in the Contract and Budgets**

The public sector contract is written to last one or more years into the future. The state of the national and local economies, as well as the state of mind of the taxpayer, are sufficiently uncertain to virtually require that the parties to a collective agreement bargain with these uncertainties in mind. Both the employer and the union want contract clauses which will help protect their respective interests in the event of a crisis or revolt. An enormous number of clauses can be involved, and the bargaining over each clause might involve one or more of several approaches. Bargaining over a layoff clause, for example, might involve notice of a decision already made, consultation before a decision is made, bargaining over the details of the actual layoff, bargaining over the effect or impact of the layoff, or bargaining to preclude the layoff. A common factor in most of these situations will be attempts to meet the demands of the crisis or revolt with greater productivity, at the same or lower cost than the present, in those areas of employment which remain. The purpose of this section is to consider some aspects of a few of the clauses that might be bargained in the contract. The

85. A partial list might include wage or hiring freeze, redirection of services or priorities with resultant personnel actions, subcontracting, productivity, pensions, outside pay and jobs, job classification plans, salary schedules, shortened or lengthened work week, preparation or cleanup time, lunch duties, accumulation of sick or personal leave, weather-related closures, time off to process grievances, labor-management committees, early retirement, RIF, use of part-time personnel or volunteers, transfers, retraining, attrition, leaves without pay, recall, seniority, medical-dental-optical-legal fringe benefits, impasse procedures, work-related discipline, strikes, cost of living clauses, travel, and disability.

selection of clauses reflects, to some extent, the amount of judicial and arbitral attention the clauses have received.

**Contracting Out**

Subcontracting or contracting out public sector work to private sector employers can be viewed from diametrically opposed points of view. The employer may seek to contract out unit work based on bids that appear to represent a considerable saving to the taxpayer. The union may scorn contracting out as the payoff in the "new patronage."\(^{86}\) Whatever the view, a significant amount of contracting out occurs. To some extent, some of the issues of contracting out may be beyond the control of the immediate parties. The character of the decision,\(^{87}\) legislation,\(^{88}\) or inter-departmental memos\(^{89}\) may set the guidelines on the decision. A particular example of legislation may be the civil service laws of a state. Some of these laws may indicate a public policy preference for public employees to do work customarily and historically provided by civil servants, even if the public employer could save by contracting out.\(^{90}\)

Cases in the public sector often rely upon the *Fibreboard*\(^{91}\) rationale found in the private sector. Under that doctrine, the decision to subcontract is a mandatory subject of bargaining where, among other reasons, there is no basic alteration of operations, the matter does not unduly abridge the employer's right to manage the business, there is no

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86. *Contracting Out is Cited as "New Patronage" in AFSCME Publication*, [1977] 735 GOV'T EMPL. REL. REP. (BNA) 23. The cited objections include lack of competitive bidding, breeding of corruption of the public officials through payoff or kickback, waste, and inefficiency as the "savings" is often achieved by reduced services, a virtual monopoly by the first bid winner who makes extensive capital outlays, and a lack of accountability of decision making is transferred to the private employer.

87. *E.g., Army's Decision to Contract Out is Unreviewable; RIFFed Employees Lack Standing to Sue*, *Court Says*, [1976] 673 GOV'T EMPL. REL. REP. (BNA) A-3. The "military" nature of the decision was cited as the basis of the decision.


financial investment or recoupment, and it would promote peaceful settlement. Thus, the decision to contract out of school bus operations or school food service may require bargaining. In other jurisdictions, bargaining over the effects of the decision may be all that is required. Bargaining over the decision or the effects of the decision may not be needed where it is permitted by an existing collective bargaining contract. In one unusual case, a county accepted help, at no cost and involving no layoffs, from the Army Corps to clear snow-clogged roads, a job also done by unit employees. Despite the union's protest, no subcontract was found to exist. However, where a school district terminated paid teachers aides and replaced them with unpaid volunteers, the court held that the matter was subject to mandatory bargaining. It was treated as though there was an impermissible subcontract despite the character of the replacements. Subcontracting might also raise other issues. An otherwise valid subcontract for the purpose of avoiding doing business with a union might amount to a coercive threat and be considered an unfair labor practice during the organizational stage.

Contracting out in some situations might pose a special danger for some unwary public employers. Under the subcontract, the public employer contracts with a private employer who will provide a specified service. The National Labor Relations Board does not have jurisdiction over the public employer and public employees. Historically, the NLRB would elect not to exert jurisdiction over private employers who, by subcontract, had an "intimate connection" with the exempt

94. E.g., Labor Relations Highlights, 7 PUB. PERS. AD. (1978) (Connecticut State Board of Labor Relations).
99. Hereinafter referred to as NLRB.
100. 29 U.S.C. § 152(2) (1976) provides, in pertinent part: The term "employer" shall not include the United States or any wholly owned government corporation or any State or political subdivision...
The NLRB has recently changed that historical position and has adopted a "right to control" test. The new test, simply stated, indicates that the private employer may be subject to NLRB jurisdiction where the employer and the private employees are able to bargain effectively about the terms and conditions of its employees, that is, the employer retains sufficient control to bargain. The new test means that subcontractor-private employers once exempt from NLRB jurisdiction may now find themselves under its jurisdiction.

An exercise of NLRB jurisdiction will greatly enhance the collective bargaining and strike rights of the subcontractor private employees who are performing the duties of the subcontract for the public employer. Thus, a public employer school district that subcontracts bus services may find that the drivers will be accorded the greater rights granted under the National Labor Relations Act. By the same token, a class of public employees who are frustrated by the limitations under a public sector collective bargaining law, particularly in a tax revolt or crisis situation, might attempt to form or join a private corporation. They might then offer the same services to the public employer on a subcontract basis; the corporate employees would then have the benefits of employee rights under the NLRA. Obviously, the public employer does not bargain directly with the subcontractor's private employees, but the public employer will be directly affected by any strike action, and be indirectly affected by the terms of any labor agreement that would be reflected in that collective agreement.

Negotiating a subcontract raises a variety of issues upon which the union and employer may not agree. Where subcontracting is permitted, one issue that is raised is the rights of those employees who are laid off. Subcontracting may be agreed to be permitted where there is a cost saving. The cost calculation must be carefully stated, both in terms of the dollar outlay and the quality of the services received. The impact of other legislation must be measured, such as the civil service laws. The public employer must measure the subcontract decision against any organizational rights the displaced public employees may have.

101. E.g., Perkins School for the Blind, 225 N.L.R.B. 1293, 93 L.R.R.M. 1081 (1976); Roesch Lines, Inc., 224 N.L.R.B. 203, 92 L.R.R.M. 1313 (1976). Other factors were also important, such as (1) statutory enabling legislation, if any; (2) power of eminent domain; (3) tax exemptions; (4) whether records qualify as public documents; and (5) whether the administrators are responsible to the electorate. Electrical District No. 2, 224 N.L.R.B. 904, 93 L.R.R.M. 1017 (1976); Southwest Texas Pub. Broadcasting Council, 227 N.L.R.B. 1560, 94 L.R.R.M. 1616 (1977).


103. We Transport, Inc., 240 N.L.R.B. 111, 100 L.R.R.M. 1349 (Feb. 15, 1979). The National Labor Relations Act is hereinafter referred to as the NLRA.

104. See notes 57-60 supra.
be exercising at the time. The subcontract must be measured against the potential of giving rise to NLRA jurisdiction over the performing private employees. Finally, consideration must be given to whether the decision or the effects of the decision are indeed subjects of mandatory bargaining. Any subcontract must conform to applicable legislative or administrative regulations. The negotiation of a subcontract clause begins by being a fairly obvious policy decision for each side to make. The actual negotiation, however, gives rise to many issues which interrelate with other statutes and other clauses in the contract.

In summary, contracting out may be seen as a way of saving money or a way of eliminating the positions of the employees. Contracting out is often subject to statutory controls as well as the exigencies of collective bargaining. Private sector precedents are commonly applied. Contracting out may mean that the public employer work will be performed by employees having the broader rights granted by the NLRA instead of the more restrictive public sector legislation. A complex variety of issues arise in the subcontract context.

**Minimum Staffing**

Minimum staffing or minimum “manning” clauses can become very significant to the public employer faced with the necessity of massive budget reductions which will require layoffs. The contractual minimum number of staff per job puts a lower level on the ability of the employer to respond. Minimums may become important to the employees too. For some employees, like fire fighters, the number of personnel available to fight a fire might relate closely to the safety of the personnel; below certain minimums, undue risks may jeopardize the lives of the fire fighters. For other employees, such as teachers, a minimum may be seen as the dividing line between preserving a status quo and being able to achieve a measurable positive result.

A useful exchange on this subject was initiated by the Arbitrator E. Schmertz, who sought to include all of these points of view in his award. The arbitrator ruled that there was a minimum limit to which the fire department could be cut: “The City's right to reduce manning levels and to lay off personnel is impliedly restricted by levels of safety to the public and the levels of reasonable danger to the firemen.”

A withering attack was mounted against the award, such that the arbitrator felt obliged to take the unusual step of responding to the

criticism. Among other matters, the response included a comment on the relative accountability of the arbitrator on the one hand, and on the other hand, the city administrators, the Washington, D.C. bureaucrats, and judges who were making equally fateful decisions about the future of New York City.\(^\text{106}\) The matter was closed when the New York courts ruled that minimum staffing is a managerial prerogative and not a mandatory subject of bargaining.\(^\text{107}\) A number of the issues raised by that arbitrator remain unanswered, particularly by the courts which seem to prefer to treat the problems in the traditional categories of delegation of authority and mandatory-permissive subjects of bargaining.\(^\text{108}\) In other jurisdictions, minimum staffing clauses have received a mixed record of acceptability.\(^\text{109}\)

It is commonly suggested that resolution of a fiscal crisis lies in a redetermination of priorities as to where the money goes and where it no longer goes. This determination is probably more judgmental than factual in most cases. In the safety area, however, perhaps the arbitrators or judges ought to require the parties to present hard data that might lead to a more nearly factual decision. A "safety exception" for airline pilots and others was engrafted onto the 1964 Civil Rights Act in this manner.\(^\text{110}\) Safety may be the most obvious example, but a similar analysis of other services might be useful. While it may be true that "something is better than nothing," it may also be true that once a government service drops below a certain minimal level, it may be left with an expensive facade doing more financial harm than social good. It is commonly said by some today that the cost of government regulation adds more to inflation than the benefits it returns.\(^\text{111}\) Similar reasoning,
if true, might be applied to a reduced program resulting from fiscal problems.

In summary, minimum staffing clauses raise important issues. They may put a floor on budgets, involve issues of employee safety, and determine whether employees mark time or achieve positive results on the job. Courts appear reluctant to consider such issues, and rather measure the problem by the extent of managerial prerogative that is involved.

**Productivity**

One of the new “buzz” words of public sector bargaining is productivity. If employee productivity increases, it is commonly said, the taxpayer will be satisfied and the spectre of bankruptcy will no longer haunt the employer. The problems are manifold, but unlike many of the other topics mentioned here, there is little specific judicial precedent to act as a guide. The key to this problem lies largely outside of the courts as well as outside of much of what arbitrators do.

Many feel that the answer to the productivity issue lies in the use of joint labor-management committees. These committees might consist of equal representation from both sides to engage in a nonadversarial dialogue about ongoing problems. Presumably, the committee is not engaged in continuous collective bargaining, as such. Rather, it would be advisory and would attempt to avoid the “win-lose” mentality of contract interpretation and negotiations. Such a committee might be established through the contract provisions or through “memoranda of understanding,” which might accompany the contract.

Many problems surround the use of a productivity clause. One is the definition of productivity, and whether it contains both quantitative and qualitative aspects. Does a larger class of students mean that a teacher is more productive (more students) or less productive (a given student may have had less attention and learning)? Another question concerns the relationship between productivity and salary increases. The minimum salary increase generally sought is that equal to the latest inflationary increases in the cost of living. To avoid an inflationary impact from wage increases, however, the increase should be accompa-

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nied by a comparable gain in productivity. Is it realistic to think in terms of annual productivity increases equal to the eight to fifteen percent inflation rate? Such gains, on an annual basis, would be astounding.

Even if productivity increases, the public employer usually has no "product" to sell to increase income, so that any productivity wage increase means an overall budget increase unless the productivity increase means an accompanying personnel layoff or other actual cash saving. Minimum staffing standards is directly related to the productivity issue, as when a newly reduced workforce may find itself with old workload. Other clauses are also relevant.

A common rule in the private sector is that the status quo (i.e., continuance of the contract) must generally be maintained during the negotiation period following the expiration of the contract. While some cases permit a change in the status quo during this period, the general rule is to the contrary. A somewhat different problem may be perceived when an automatic salary increment is applicable during this hiatus period. Some cases have decided that while the status quo must be maintained in general, the salary increments scheduled during the negotiation period need not be paid. The rationale, in part, is that increasing the salary actually changes the status quo. Another part of the rationale is that public employers may not be able to continue automatic increments in the face of static or diminishing budgets. Such clauses may also fly in the face of productivity goals.

Another clause that may relate to the issues of productivity is the negotiation of parity clauses. Parity clauses tie the salary of one contract unit to the salary of another unit. Negotiations with one unit will then bind the public employer to pay a comparable wage to the other. The relative productivity of the two groups may or may not be taken into consideration. Based upon findings that a tie-in between administrators and teachers did not encumber the ability of the school board to negotiate effectively and that such a clause would not cause a fiscal crisis, a tie-in clause has been permitted. Others have found such

114. MORRIS, supra note 24, at 302-04.
clauses to be illegal, citing such problems as the coercive effect on the public employer or the adverse impact on unions not included in the tie-in.\textsuperscript{119} While the parity clauses have met with a mixed reception, a number of other clauses are closely related.

A common criterion used by interest arbitrators to assist in determining wages is the comparability test. The wage award in a particular unit will be measured by the wage in other comparable units.\textsuperscript{120} The comparability test as such does not necessarily give any measure of productivity. It seems to further assume that because the jobs are similar, the output must also be similar. This approach tends to beg the question. Yet another non-parity standard that approximates the results of a parity clause is the use of a fixed wage guideline promulgated by the White House or a legislative body.\textsuperscript{121} A guideline upper limit that is less than the rate of inflation tends to become the minimum wage increase sought by the union, without serious consideration being given to productivity. The concern expressed about parity clauses may be genuine, but there is little reason to limit that concern to parity clauses. Many of the same factors, at least vis-à-vis productivity, are at play in comparability analysis or guideline limitations.\textsuperscript{122}

The relationship between the various clauses in the contract can be highlighted by references to the productivity issue. A relationship between productivity, minimum staffing standards, and other causes has been suggested. When the courts and legislatures are deciding which subjects of bargaining are mandatory and which are managerial pre-


\textsuperscript{121} Binding Pay Raise Award Reaffirmed by Arbitrator, [1979] 803 Gov’t Empl. Rel. Rep. (BNA) 6 (5.5% wage guideline).

rogatives, note should be taken of these relationships. It is rarely done.\textsuperscript{123} Without a careful look at the overall picture, the mandatory elements of bargaining might be structured in such a way as to preserve or even create less productive operations.

Giving management the unilateral authority to decide minimum staffing (\textit{i.e.}, a managerial prerogative and not a mandatory subject of bargaining) becomes effective in the overall social sense only when the manager is willing to conscientiously exercise the power; the sole responsibility is shifted to the public manager. In light of fiscal crises and taxpayers' revolts, one wonders whether there is something wrong in the approach. Perhaps this is one reason why the joint committee approach is suggested, to avoid the legalisms that artificially force actual bargaining into channels that may not represent the real problems involved in crisis and revolt. Bargaining decisions tend to focus primarily on economic concerns.\textsuperscript{124} Productivity includes not only monetary factors, but also work environment, leadership, psychological factors, training, equipment, customer relations, and the like. If the traditional bargaining structure will not permit this wide-ranging exchange and obligate both sides to approach it in good faith, perhaps there is some problem in the bargaining structure as created by the courts and legislative bodies.

In summary, productivity clauses are in their infancy. Definitional problems are still paramount. A number of other clauses can impact on productivity clauses, such as automatic wage increase clauses, parity clauses, or comparability tests. Even when the issues of productivity clauses are resolved, any productivity wage increases that are granted must be funded.

\textit{Appropriations and Funding}

Many of the contract clauses require funding. Funding is a multi-step process involving a budget request to the legislative body, an appropriation by the legislative body, and a disbursement by the employer. Some contracts may be funded out of already existing appropriations, while others may require legislative action. The public employer who is in a condition of fiscal constraint may have second thoughts about the contract. These may be expressed by failure to request the appropriation, or failure to make the disbursement out of the


available appropriation. Cases of this character have not yet been re-
ported in the true crisis situation, but have arisen in other situations.

It is commonly stated that an employer cannot be bound to the 
 expenditure of funds until the funds have been appropriated.125 Where 
 funds have been appropriated but the contract settlement conflicts with 
 higher budgetary priorities, the employer may still be required to adjust 
 the priority of appropriated funds to meet the obligations under the 
 contract. The contract items may have to be given priority status in the 
 budget,126 or the employer may have to resort to the use of contingency 
 funds or statutory emergency powers.127 Some courts, probably a mi-
 nority, are more restrictive and do not permit the contracts to "come off 
 the top," partly because of the inevitable conflict that might arise be-
 tween the last two contracts.128

Where two or more public bodies are involved, conflict may arise. 
 For example, a school committee might sign a contract that was within 
 the appropriations, but the town council, having the sole authority to 
 actually spend, might refuse to honor the obligation. In such a case, the 
 supremacy of the school committee was upheld on policy grounds and 
 the contract was honored.129 In the situation where the appropriation 
 must be requested, the obligated party will be bound at least to make 
 the request.130 Where good faith efforts are promised, a dispute over 
 the adequacy of the efforts may be subject to arbitration.

125. Delaware v. AFSCME Local 1726, 298 A.2d 362 (Del. Chan. Ct. 1972); Bennett v. SEIU 
 Local 254, 2 PBC ¶20,327 (Mass. 1976); Ortblad v. Washington, 85 Wash. 2d 109, 530 P.2d 635 
 (1975). A multi-year contract in a jurisdiction with annual appropriations may be questioned. 
 Chicago Bd. of Educ. v. Teachers Union Local 1, 26 Ill. App. 3d 806, 326 N.E.2d 158 (1975).


128. Negotiators May Agree, But Legislature Has to Appropriate, Florida Court Rules, [1979] 
 802 GOV'T EMPL. REL. REP. (BNA) 12. Also, in this case there was a legislative letter of intent 
 limiting the appropriation for salaries to $5.1 million, even though the budget was larger. The 
 court found the limitation binding and would not honor the $6.6 million request. See also Minne-
sota Court Orders Compliance with Back Pay Award for $1,500,000, [1979] 804 GOV'T EMPL. REL. 
 REP. (BNA) 17.

 also Town of Arlington v. Board of Conciliation & Arbitration, 370 Mass. 769, 352 N.E.2d 914 
 (1976).

 707 (1976).

 Commw. Ct. 1977). The court noted that since the arbitrator could not appropriate the money, 
 awards which sought to create a binding obligation might violate the law. However, the court 
 preferred not to anticipate the problem.
within its power necessary for performance of the contract. The problems of requesting and supporting a request for funds is compounded where a predecessor in a public office bears a responsibility to "sponsor and support" the appropriation request, but is no longer in office when the request is actually made. One ruling in such a case was that the successor office holder is obligated to put the request before the appropriating body, but the successor may not be bound to "support" the matter.

In summary, public monies cannot be spent until they are appropriated by the authorized body. Where funds have yet to be appropriated, the contract may put the employer under the burden of making the appropriation request and, in some cases, supporting it.

Guidelines and Restrictions

Public employers are often under statutory or administrative commands to have the budget prepared or submitted to the voters by a certain date. The budgeting deadline may pass before negotiations can be completed. If, during negotiations, a budget is approved that would not fully fund the union's proposals, the negotiations can be seriously jeopardized. These general matters have reached the courts and boards in various ways.

A rule that is gradually developing is that the public employer will not be restricted in budget preparation by on-going negotiations, so long as matters proceed in good faith. By the same token, a union that is otherwise bargaining in good faith may aggressively seek the appropriation needed to fund its proposals from the appropriate legislative body. Again, there would seem to be a good faith requirement. Where the budget process results in an appropriation, the appropriation will constitute the outside limit for overall funding, although presumably funds may be shifted within the overall budget from one category to another. However, a line of cases may be developing in which a budget deadline date will also be interpreted as the

135. There are few cases, but one is Sanford School Comm. v. Sanford Teachers Ass'n, [1979-80] PBC ¶40,762 (Maine Labor Relations Bd. 1978) (summary of decision).
136. See note 20 supra.
deadline for negotiations and impasse procedures.137

Budgeting procedures may cause some problems. Other problems may be caused by limitations expressed in the law other than that of collective bargaining. Legislation may restrict the use of public funds in certain areas. This will restrict the bargaining, although the parties may not be aware of it at the time of negotiation. An obvious example is a legislative wage freeze. The impasse arbitrator in those circumstances cannot include increases in an award.138 Public employer contributions to a government pension fund or the terms of a disability insurance program may be spelled out by legislation.139 A maximum percent of contribution may be fixed or equal contributions may be required for all units. In these situations, the parties will not be able to negotiate increases beyond the statutory maximums or preferred status for one group of employees where the legislation provides for uniform application.140

Guidelines or budget restriction problems might also arise in conflict between two governmental groups. An advisory committee might indicate their line item priorities in the budget, but the operating agency may negotiate a contract where salary figure differs from that of the advisory group. In such a case, one court ruled that the operating agency needed the flexibility to rejuggle figures within the limits of the overall budget.141 The issue potentially creates a problem for a public


139. Fringe benefits may play an especially important role in the budget of the public employer since they constitute an important part of the overall budget. Report on NYC Employee Fringes Draws Detailed Union Rebuttals, [1976] 669 GOV'T EMPL. REL. REP. (BNA) B-9; Forum Discusses Employee Compensation in Terms of Fiscal Crisis Facing Cities, [1976] 667 GOV'T EMPL. REL. REP. (BNA) B-6. Pensions seem to be the focal point. The actual payout is delayed until the retirement occurs. An elected public employer might be willing to be generous on this item because it will have little immediate cost but may forestall a strike that would cause a reelection risk. The public employer may have left the scene by the time the pension comes due and begins to be a heavy budget strain. Scope of Arbitrator's Obligation to Review Financial Issues in Public Sector Disputes Review Before NAA, [1976] 657 GOV'T EMPL. REL. REP. (BNA) B-3.


employer agency which uses a citizen advisory board on the budget. The citizen group may feel misused if the employer does not follow the budget guidelines that they established. The public employer, however, needs the operational flexibility to transfer funds to meet operational realities, such as a collective bargaining agreement negotiated after the budget recommendations. One solution would be to legislate the guidelines in advance, i.e., prohibit or limit cost of living increases. Any attempt to legislate restrictions after the contract has been approved, and after the contract rights have vested, will run afoul of the prohibition on the impairment of contracts, absent a true emergency. If a complex statutory scheme is imposed, however, it may have the effect of preempting collective bargaining.

In summary, bargaining can generally continue despite the passage of the employer’s budget or the passing of budget deadlines. However, limitations on negotiations may be found in legislation covering pensions or fiscal crisis wage freezes, for example. Where multi-agencies are involved in the budgeting process, generally the “line” organization can reorder priorities to meet contractual demands.

OVERVIEW

One of the more obvious aspects of the relationship between the public employer and the public union is that the level of rhetoric is much more shrill than the facts available to either side would warrant. A provable financial crisis is rare outside of New York City. However, the public employer will cry “crisis” in a number of different situations. Among those situations are the employer’s fear of what may happen tomorrow, the effort to mask a shift of priorities or change of attitudes that cannot be funded unless the collective bargaining agreement is broken (as a rationale to deny all requests when the employer has a discretionary power to accept or reject requests on the basis of some substantive principle), and creating the right atmosphere in collective bargaining and budget elections. The union responds in a similar manner. The union will counter the employer’s crisis claim by simply denying its existence, merely pointing to a large overall budget and insisting that it must contain excess funds, by claiming its particular unit is faced with a disproportionate burden compared to other units, by alleging subterfuge, or by claiming a statutory requirement that the employer must provide at least a minimum level of mandated services. Having

142. See notes 41-42 supra.
143. See notes 135-36 supra.
made their claims, both sides are hard pressed to present facts which verify them. There is an obvious need for both sides to soften the claims and improve their factual presentations.

The taxpayer is entitled to thorough factfinding, and if the parties are unwilling or unable, then some legislated third party involvement would seem to be warranted. Putting the burden of proof on the parties in an adversarial relationship may not be the better approach, particularly when the public is not being primarily represented by either side. As long as the parties to the negotiations are dealing in a rhetoric that stretches the facts, they both lose credibility and bargain with something less than good faith.

Another point that seems to be suggested by the cases involves the reaction to an impending crisis. The typical reaction by the public employer, by the union, and often by courts and legislatures, is to propose or take some broad, across-the-board action. In the absence of the rare immediate crisis, more selective action would seem to be more efficient and would raise fewer legal problems. Attrition may be better than layoff. Future employees need not be treated in the same manner as existing employees with vested rights. Less critical services might be reduced before touching essential services. Specific legislation directed toward specific problems may be more efficient than broad grants of authority, just as more specific language by the courts might contribute more toward potential solutions. The present general approach is to recognize extremely broad authority to remedy a rare but true crisis, and to maintain the status quo in all other situations. A middle approach might be preferable in some situations. Overstating the situation and overreacting to the problem does little to protect the public interest.

When a true crisis is recognized, the legislative and judicial response is to shift major decisional power to the employer and reduce or eliminate the role of the union and arbitrator. Whatever else is said, the employer's prior decisions were at least partially responsible for the crisis. The return to unilateral decision making may be questioned on policy grounds. This is not to suggest that the employer is solely to "blame" for the circumstances. Rather, it is to suggest that a broader information base for decision making might continue to be useful even in the time of fiscal crisis. Where a decision must be made immediately, of course, the public employer is the only one who can respond in a timely fashion. However, the fiscal crisis has many long-term issues where time is not of the essence. In these situations, it seems unneces-
sary and unwise to completely eliminate the multilateral decision making processes.

Public sector collective bargaining, as a policy choice, substitutes multilateral decision making for unilateral decision making. One can argue that this is for the sole benefit of the union and employees. However, one can also rationally argue that there is a public benefit beyond a lessening of employee strife. Decision making in the public sector in general, as contrasted with private sector decision making, is characterized by input from a variety of different sources.

The process is supposed to be more open and public than private decision making. If this is an accurate view, public sector bargaining can be viewed as a legislative choice that is consistent with this policy by adding input from the union and the arbitrator into what the employer might otherwise have considered. The longer the bargaining process is applicable, the more the public policy benefits from both the increased informational input and the more open character of the process. The rejection of this public policy through the closing down of the bargaining process should be as gradual as possible. If a minimization of multilateral decision making is actually needed, a midway step would be to convert the bargaining and arbitration roles into advisory roles, before completely eliminating them. This would preserve the intent of legislation and still keep the bargaining process from becoming a "suicide pact." If the advisory approach were adopted during the pendency of the true crisis, it would of course be incumbent on the public employer to give public reasons why the advice was rejected in situations where that was the result.

In brief, Arbitrator Schmertz raised a number of questions which cannot be satisfactorily answered by simply finding a managerial prerogative. Where a legislative policy of multilateral decision making such as collective bargaining has been adopted, that policy deserves greater protection than can be provided solely by labor relations analysis. The labor relations analysis leaves out the important nature of the decision making process, which process presumptively benefits the public.

Exclusive reliance on the labor relations/managerial prerogative analysis is weakened by another factor. In the private sector, the check on the managerial prerogative is presumably the forces of the market place. In the public sector, the market place does not exist, as such. Rather, the taxpayer-citizen can check the use of the prerogative in a

144. See note 101 supra.
variety of ways, including replacement of manager through election and political processes. The adoption of and maximum continuation of the collective bargaining process becomes another of the devices that is useful in the control process. The decision to eliminate the process in a crisis should look to the value of collective bargaining or complementing other processes in public decision making, as well as looking to some inherent power of managers to order a workforce. Ordering a workforce involves public decision making in the public sector, and therefore takes on significantly different dimensions than the same decision in the private sector. Public decisions should be made as publicly as possible, and collective bargaining, where it is adopted as a policy, adds to that process. Exclusive reliance on managerial prerogative analysis minimizes that process.

With the New York and California precedents, it seems likely that the major guidelines to the solution of a long term fiscal crisis lie in legislation. The legislation will be directed toward mandatory personnel actions that substitute legislated choices for bargained decisions. Legislation will beget legislation, as the unions shift from the bargaining table to lobbying. Where the legislation affects existing contracts, careful drafting must be used to minimize the constitutional impairment arguments. Adding a legislated bureaucratic layer to the bargaining process presents opportunities and obstacles to both public employers and unions.

Where federal legislation is involved, the example of the urban transit legislation is relevant. Public unions can seek to expand employee rights through this type legislation, which provides public funds. Public employers can similarly attempt to maximize the managerial prerogative which minimizes bargaining, either through positive statement in the legislation or through blocking union efforts to gain rights in the legislation. State level legislation may be used to impact on subcontracting, minimum staffing, recall rights of laid-off employees, and the like. The existing problems arising from the addition of public collective bargaining legislation onto an existing statutory scheme of personnel and merit system legislation will be compounded.

A long-run critical issue will be whether bargaining can survive this process. Assuming that it does survive, it is likely to become much different than it is today. One of these differences may involve the role of impasse arbitration, in situations when arbitration is substituted for the strike. The arbitration process is likely to involve a more explicit recognition of the public interest. Traditionally, arbitration resolves a dispute between antagonistic parties. In public sector bargaining, the
interests that are involved should more explicitly encompass a public interest that is distinct from the adversarial interests of the public employer and employees. If, for example, the movement toward public bargaining sessions accelerates, the logical outcome will be public participation in the arbitration process. Multi-party arbitration could result, with the position of the arbitrator being changed from that of private person to public decision maker.

Another avenue that might be followed would be to have some public, but non-judicial review of the impasse award. Whatever the outcome, however, the immediate effect of taxpayer revolt or fiscal crisis is to cause more public scrutiny of the public sector bargaining process and result. It seems likely that this increased public participation will become institutionalized in a new generation of public sector bargaining legislation.

**CONCLUSION**

Taxpayers' revolt and fiscal crisis require reexamination of collective bargaining as well as budgeting processes and decision making. Public sector collective bargaining is an integral part of many budgetary processes. As budget decision making processes are changed, public sector bargaining will also be changed. A likely result is a greater statutory overlay which may require that a public interest factor be added to the traditional adversarial interests of the public employer and public employees. Traditional judicial analysis which focuses primarily on the extent of the managerial prerogative is inadequate.

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