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Gregory Thomas Fain

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Local Public Employees Right To Strike After *County Sanitation District v. Los Angeles County Employees Association*

Prior to 1945, public employees were generally better off than their counterparts in the private sector. The job security of public employees was greater than that of private employees and public employees enjoyed comparable, if not superior, wages and fringe benefits.¹ Public employees pursued their group interest through associations and leagues whose typical function was to lobby for favorable civil service laws, pay scales, and fringe benefits.² After World War II, however, private sector unions made substantial advances in gaining improved wages and benefits for private sector employees.³ Public employees soon discovered that their wages and benefits had fallen behind those of private employees.⁴ In response to the decline of their relative economic status, public employees began to join unions in increasing numbers.⁵

In California, the number of employees in the public sector has expanded dramatically in recent years.⁶ This expansion has been accompanied by a corresponding increase in public employee union

1. Shaw and Clark, *The Practical Differences Between Public and Private Sector Collective Bargaining*, 19 U.C.L.A. L. REV. 867, 867 (1962). Government employees were not subject to the periodic layoffs common in many private sector industries. *Id.* at n.3.

2. Bernstein, *Alternatives to the Strike in Public Sector Relations*, 85 HARVARD L.J. 459, 460 (1971).

3. See Shaw and Clark, *supra* note 1, at 867. In the period from 1948 to 1963, wages in private manufacturing industries rose a total of 80%. REYNOLDS, *LABOR ECONOMICS AND LABOR RELATIONS* 414 (1964).

4. Shaw and Clark, *supra* note 1, at 867.

5. The American Federation of State, County, and Municipal Employees (AFSCME), the largest union representing state and local government employees, increased its membership from approximately 90,000 in 1960 to over 200,000 by 1970. SMITH, MERRIFIELD AND ROTHSCILD, *COLLECTIVE BARGAINING AND LABOR ARBITRATION*, 856 (1970).

6. Comment, *Collective Bargaining Under the Meyers-Milias-Brown Act: Should Local Public Employees Have the Right to Strike?* 35 HASTINGS L.J. 523, 523 (1984). Governmental employee unions are the fastest growing sector of organized labor in California. Comment, *California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes*, 11 SAN DIEGO L. REV. 473, 473 (1974). By August of 1983, the state employed 294,500 workers, while local governments at the city and county level employed 999,700 workers. Employment Data and Research Div., Employment Dev. Department, California Labor Market Bulletin Statistical Supplement 6 (1983).

membership.⁷ Statistical analysis shows that the number of public employee strikes in California has increased at a rate that corresponds with the rate of growth of public employee unions.⁸ With the growth of public sector unionization, the strike has assumed greater importance for public employees.

Until the 1985 decision of the California Supreme Court in *County Sanitation District v. Los Angeles County Employees Association*,⁹ California courts had applied the common law rule that in the absence of an enabling statute, public employees did not have the right to strike.¹⁰ In *County Sanitation*, the California Supreme Court recognized, for the first time, the right of public employees to strike.¹¹ The court, however, acknowledged an important exception to the rule that public employees have the right to strike. This exception is that public employee strikes may be prohibited where they affect "essential public services."¹²

This comment will seek to ascertain which public employees will fall within the "essential public services" exception to the *County Sanitation* holding.¹³ In order to facilitate the discussion of which employees are "essential," the comment initially will compare the right to strike in the public and private sectors and analyze the status of California law prior to *County Sanitation*.¹⁴ Next, this comment will look to the various meanings which have been attached to the term "essential public services" in the case and statutory law of jurisdictions other than California.¹⁵ In conclusion, a statute designed to facilitate effective dispute resolution in California's public sector will

7. Comment, *supra* note 6, at 523.

8. In 1968, only 17 strikes occurred in the public sector. de Gialluly, *Employment, Employee Organization and Strike Trends in California Public Service*, 5 CAL. PUB. EMP. REL. 1, 1 (1970). By 1979 that number had risen to 83 and in 1980 there were 53 strikes by public employees. Div. of Labor Statistics, Dept. of Indus. Relations, *Work Stoppages in California* 6 (1983).

9. 38 Cal. 3d 564, 699 P.2d 835, 214 Cal. Rptr. 424 (1985).

10. *Stationary Engineers v. San Juan Water Dist.*, 90 Cal. App. 3d 796, 801, 153 Cal. Rptr. 666, 671 (1979); *City of San Diego v. American Federation of State, County and Municipal Employees*, 8 Cal. App. 3d 308, 310, 87 Cal. Rptr. 258, 260 (1970).

11. 38 Cal. 3d at 569, 699 P.2d at 849 214 Cal. Rptr. at 438. "We conclude that the common law prohibition against public sector strikes should no longer be recognized. Consequently, strikes by public sector employees in this state are neither illegal or tortious . . ." *Id.* at 586, 699 P.2d 835, 849, 214 Cal. Rptr. 424, 438.

12. *Id.* at 586, 699 P.2d 835, 849, 214 Cal. Rptr. 424, 438. "The right to strike is by no means unlimited . . . The legislature has already prohibited strikes by firefighters under any circumstance. It may conclude that other categories of public employees perform such essential services that a strike would invariably result in imminent danger to the public health and safety, and, therefore, must be prohibited." *Id.*

13. See *infra* notes 64-91 and accompanying text.

14. See *infra* notes 17-55 and accompanying text.

15. See *infra* notes 92-113 and accompanying text.

be proposed.¹⁶ The proposed statute will include suggested methods of dispute resolution in California's public sector.

COMPARISON OF THE RIGHT TO STRIKE IN THE PUBLIC AND PRIVATE SECTORS

The strike is frequently described as the "cutting edge" in labor negotiations.¹⁷ The benefit of the strike as a method for resolving labor disputes is that while the work stoppage is a potent weapon against management, it also inflicts damage on the striking employee.¹⁸ Thus both sides are encouraged to work towards a speedy resolution of the dispute.

Although the strike is now considered an appropriate tool for resolving labor disputes in the private sector,¹⁹ acceptance of strikes in the public sector has been more circumspect.²⁰ A key rationale for the distinction between public and private sector strikes is that there are significant restraints on union power in the private sector. For example, wage increases won through a strike often lead to increased prices in the finished product or service provided by private employees.²¹ Higher prices generally cause a decreased demand for the product.²² Thus, excessive demands by private organized labor creates the risk to a striking employee of job layoffs.²³ A recent example of economic constraints working to limit wage and benefit demands in the private sector can be found in the wage concessions made by Chrysler Corporation employees and the United Auto Workers (UAW) in 1981. Chrysler Corporation had been faced with staggering economic losses

16. See *infra* notes 114-165 and accompanying text.

17. Lev, *Strikes by Governmental Employees: Problems and Solutions*, 57 A.B.A.J. 771, 771 (1971).

18. Bernstein, *supra* note 2, at 463. While strikes occur in only about two to three percent of all private sector negotiations, many of the remaining peacefully negotiated contracts would likely not be reached if it were not for the threat of a strike. Olson, *The Use of the Right to Strike in the Public Sector*, 33 LABOR L.J. 494, 494 (1982).

19. Hanslowe and Acierno, *The Law and Theory of Strikes by Governmental Employees*, 67 CORNELL L.J. 1055, 1055 (1982).

20. *Id.*

21. Comment, *The Collective Bargaining Process at the Municipal Level Lingers in its Chrysalis Stage*, 14 SANTA CLARA L. REV. 397, 410 (1974).

22. *Id.*

23. *Id.* "The strike is, after all, an instrument for applying economic coercion. In the private sector, it has been an effective weapon in the hands of employees because employers have been constrained by the need to compete in a product market or else go out of business. But political, rather than economic, forces are the dominant constraints in the public sector." Anderson, *Strikes and Impasse Resolution in Public Employment*, 67 MICH. L. REV. 943, 957 (1970).

and sought a loan from the federal government to help save the corporation from bankruptcy.²⁴ In order to survive as a corporate entity, Chrysler asked for wage concessions from Chrysler employees. The leaders of the UAW realized the gravity of the situation and recommended that their workers take a thirteen percent pay cut which would save Chrysler \$622 million in wages.²⁵ Prior to voting on the wage concession package, union leaders told Chrysler employees that failure to approve the concession would mean dissolution of the Chrysler Corporation.²⁶ Chrysler employees took the advice of union leaders and approved the \$622 million wage concession.²⁷

A private employer is better situated to deal with a strike and obtain a favorable settlement. When faced with a strike, the private employer has several courses of action available. The first alternative is simply to ride out the strike.²⁸ A second choice would be to accede to the demands of the union and pass the increased costs onto the consumer.²⁹ The final and most extreme alternative available to the private employer is to go out of business.³⁰

These same checks and balances are not available to the public sector employer. In the public sector, employment often entails "essential" services, inelastic demands, and few close substitutes for the services provided.³¹ Therefore, in the public sector no such natural balance occurs between the employers and employees interests.³² The sole constraint on public employees is in the budget allocation of responsible legislators.³³

Unlike his counterpart in the private sector, the public employer generally cannot simply discontinue service when faced with unreasonable union demands. In situations where public health and safety are involved, the government must continue to provide the services no matter what the cost.³⁴ Consequently, public employees have greater power and can demand and receive greater benefits than their private sector counterparts.³⁵ Two rationales have been advanced for

24. N.Y. Times, Jan. 20, 1981, at D5, col. 4.

25. *Id.*

26. *Id.*

27. N.Y. Times, Jan. 27, 1981, at D1, col. 4.

28. Witt, *The Public Sector Strike: Dilemma of the Seventies*, 8 CAL. W.L. REV. 102, 108 (1978).

29. *Id.*

30. *Id.*

31. Hanslowe and Acierno, *supra* note 19, at 1064.

32. *Id.*

33. Anderson, *supra* note 23, at 957.

34. ABOUD, *THE RIGHT TO STRIKE IN PUBLIC EMPLOYMENT* 5 (1974).

35. *Id.*

denying public employees the right to strike. The first is that allowing public employees the right to strike puts undue pressure on elected officials.³⁶ Secondly, public employee strikes should be prohibited because the government is a "sovereign entity."³⁷

The political pressure argument asserts that when essential services are denied, the voting public becomes restless and puts pressure on officials to settle disputes as quickly as possible.³⁸ The ultimate settlement would be in favor of the employees because the pressure applied to political officials to resolve the dispute will override the long-term interests of the governmental entity.³⁹ The "sovereign entity" argument views the strike as a blow to the government and a threat to the political fiber of the nation, state or city involved in the dispute.⁴⁰ To say that public employees can strike is the equivalent of saying that they can "contravene the public welfare."⁴¹ For many years, California courts used the common law rationale to deny public employees the right to strike.⁴² In order to appreciate the significance of the California Supreme Court's holding in *County Sanitation*, the pre-1985 law and rationale behind that law must be examined.

California Law Prior to *County Sanitation*

In California, except for firefighters who are expressly prohibited by statute from striking,⁴³ the legislature has not expressly permitted or prohibited strikes by public employees. The Meyers-Milas-Brown

36. Wellington and Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107,1123 (1969).

37. See *Norwalk Teachers Assoc. v. Board of Education*, 138 Conn. 269, 276, 83 A.2d 482, 485 (1951). In *Norwalk*, the court eloquently elaborated the sovereignty argument stating: "In the American System, sovereignty is inherent in the people. They can delegate it to a government which they can create and operate by law. They can give the government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ people to carry on its task. These people are the agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of the government and contravene the public welfare." *Id.*

38. Wellington and Winter, *supra* note 36, at 1123.

39. *Id.*

40. See Olson, *supra* note 18, at 495.

41. 138 Conn. at 276, 83 A.2d at 485.

42. *City of San Diego v. Am. Fed'n of State, County and Mun. Employees, Local 127*, 8 Cal. App. 3d 308, 312, 87 Cal. Rptr. 258, 261 (1970); *Almond v. County of Sacramento*, 276 Cal. App. 2d 32, 34, 80 Cal. Rptr. 518, 520 (1969).

43. CAL. LAB. CODE §1962. Section 1962 provides, in part, that firefighters "shall have the right to form, join or assist labor organizations to present grievances and recommendations regarding wages, salaries, and working conditions to the governing body, and to discuss the same with such organization but they shall not have the right to strike . . ." *Id.*

Act (MMBA)⁴⁴ establishes a framework of rights and protections for public employees which, in many respects, closely mirrors those enjoyed by workers in the private sector.⁴⁵ The legislature, however, has intentionally avoided enacting any provision which could be considered either a blanket grant or prohibition of the right to strike.⁴⁶ Interpretation of statutory provisions dealing with the rights of workers in the public sector has been left to the courts.

When a California statute is substantially similar to a federal statute, California courts may look to a federal precedent for guidance.⁴⁷ The federal Labor Management Relations Act (LMRA)⁴⁸ gives public sector employees the right to bargain collectively and to engage in "other concerted activities." The phrase "other concerted activities" has been interpreted by the United States Supreme Court to include strikes.⁴⁹ Unlike LMRA, the MMBA makes no mention of "other concerted activities."⁵⁰ At least one commentator has argued that the omission could indicate the reluctance of the California Legislature to expressly recognize a right to strike in the MMBA.⁵¹ On the other hand, the silence of the legislature could represent an implicit recognition of public employees right to strike.⁵² Thus, California statutory law has left the issue of public employees right to strike shrouded in ambiguity.

Until the California Supreme Court decided *County Sanitation* in May of 1985, California courts applied the common law rule that in absence of an enabling statute, public employees do not have the right to strike.⁵³ The California Supreme Court declined to render a decision giving guidance in the area of whether public employees have the right to strike.⁵⁴ The explanation for this reluctance to render

44. CAL. GOV'T CODE §§3500-3510.

45. 38 Cal. 3d at 573, 699 P.2d at 841, 214 Cal. Rptr. at 430.

46. Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 23 HASTINGS L.J. 719, 719 (1972).

47. See *Solano County Employees Ass'n. v. Solano County*, 136 Cal. App. 3d 156, 160, 186 Cal. Rptr. 147, 150 (1982).

48. 29 U.S.C. §157 (1982).

49. See *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 474 (1955).

50. CAL. GOV'T CODE §3502.

51. See Comment, *supra* note 6, at 528.

52. Comment, *Public Employee Legislation: An Emerging Paradox, Impact and Opportunity*, 13 SAN DIEGO L. REV. 931, 953 (1976).

53. 8 Cal. App. 3d at 310, 87 Cal. Rptr. at 260; 94 Cal. App. 2d at 46, 210 P.2d at 312.

54. See, e.g., *International Brotherhood of Electrical Workers, Local 1245 v. City of Gridley*, 34 Cal. 3d 191, 199, 666 P.2d 960, 964, 193 Cal. Rptr. 518, 522 (1983) ("In the instant case, the union has not contested the city's assertion that the strike was illegal; we may therefore assume, for the purposes of analysis that it was."); *San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1, 7, 593 P.2d 838, 842, 154 Cal. Rptr. 893, 897 (1979) ("We need not consider whether the strike was illegal since we hold that the city has no power under the

a decision was that if public employees are unhappy about a labor situation, the remedy lies with the legislature and not with the courts.⁵⁵ In response to sharp criticism for leaving the issue of public employees right to strike undecided, the California Supreme Court attempted to give definitive guidance in *County Sanitation*.

County Sanitation

In *County Sanitation*, the plaintiff was one of twenty-seven sanitation districts within Los Angeles County and was responsible for the operation and maintenance of sewage treatment and transport facilities throughout the county.⁵⁶ Approximately seventy-five percent of the Los Angeles County Sanitation District's employees went out on strike after negotiations between the district and the union for a new wage and benefit agreement reached an impasse.⁵⁷ The district filed suit seeking an injunction to terminate the strike and recovery of monetary damages.⁵⁸ The trial court granted and the appellate court affirmed a judgment in favor of the sanitation district.⁵⁹ This decision, however, was reversed by the California Supreme Court. The court stated "that the common law prohibition against public sector strikes should not be recognized in this state."⁶⁰

The court recognized an important exception to the rule that public employees have the right to strike. The exception is that public employee strikes may be prohibited where they affect "essential public services the disruption of which would seriously threaten the public health or safety."⁶¹ The court, however, did not elaborate on which activities would be considered "essential public services."⁶²

While the decision did not lend guidance regarding which services should be considered essential, the court expressly stated that:

[T]he legislature could conclude that certain categories of public employees perform such essential services that a strike would in-

MMBA to revoke the union's recognition for engaging in strike activity, legal or illegal."); City and County of San Francisco v. Cooper, 13 Cal. 3d 898, 912, 534 P.2d 403, 417, 120 Cal. Rptr. 707, 721 (1975).

55. Newmaker v. Regents of the University of California, 160 Cal. App. 2d 640, 646, 325 P.2d 558, 564 (1958).

56. 38 Cal. 3d at 568, 699 P.2d at 837, 214 Cal. Rptr. at 426.

57. *Id.*

58. *Id.*

59. *Id.* at 569, 699 P.2d at 837, 214 Cal. Rptr. at 426.

60. *Id.* at 585, 699 P.2d at 849, 214 Cal. Rptr. at 438.

61. *Id.* at 580, 699 P.2d at 846, 214 Cal. Rptr. at 435.

62. *Id.* The *County Sanitation* court used law enforcement and firefighting personnel as examples of "essential public services." *Id.* at 581 n.26, 699 P.2d at 846 n.26, 214 Cal. Rptr. at 435 n.26.

variably result in imminent danger to the public health and safety and must therefore be prohibited.⁶³

Because the California Supreme Court established the essential public services test, but failed to give guidance on what constitutes an essential public service, a thorough analysis of what should constitute an "essential" public service is warranted.

Essential Public Services

The confusion that has existed over exactly which public services should be considered "essential" was perhaps best elaborated in the final report of the California Advisors Council on Public Employee Relations which stated:

It is relatively easy to gain consensus that police and fire protection are essential services and that some minor clerical functions are not. But in respect of the great number of services that lie between the two poles of absolute essentiality and absolute nonessentiality there is not even the beginning of consensus, only disagreement.⁶⁴

At one extreme is the view that all governmental services are "essential" because the demand for them is inelastic and because disruption of public services may seriously injure the public health and safety.⁶⁵ A former Secretary of Labor of the United States asserted that "every governmental function is 'essential' in the broadest term. If it weren't, the government shouldn't be doing it."⁶⁶

Under this broad approach, school teachers are just as "essential" as police and firefighters.⁶⁷ The only difference between the services is that the costs and losses from being without fire and police departments are much more immediate than the effect of being without teachers.⁶⁸ Because of the great influence educators have on future generations in terms of importance to the future health and vitality of this nation, school teachers and other "nonessential" employees may have a greater long-term impact on society than either police or fire protection.⁶⁹ Additional support for the position classifying

63. *Id.* at 581, 699 P.2d at 846, 214 Cal. Rptr. at 435.

64. California State Assembly, Final Report of the Assembly Advisors Council on Public Employee Relations (March 15, 1973).

65. See Wellington and Winter, *supra* note 36, at 1123.

66. Address by Willard W. Wirtz, 16th International Convention of American Federation of State, County and Municipal Employees in April, 1966. Hanslowe and Acierno, *supra* note 19, at 1069.

67. *Id.*

68. *Id.*

69. *Id.*

all governmental employees as "essential" is that it would be administratively unrealistic to do otherwise.⁷⁰ Distinguishing between "essential" and "nonessential" governmental employees may lead to tedious and unproductive litigation.⁷¹

At the other end of the spectrum is the position that the right to strike in the public sector should be unlimited and that no governmental service is "essential."⁷² According to this view, if there is sufficient demand for a particular public service, the private sector will quickly adjust and provide any service which public employees refuse to perform.⁷³ The advocates of an unlimited right to strike for public employees are misguided because even the private sector right to strike is subject to limitation.⁷⁴ For example, private sector strikes are limited during times of national emergency and where the strike is intended to pressure neutral individuals.⁷⁵

The better view, and the one that was intended by the California Supreme Court in *County Sanitation*, is that only some governmental services are "essential."⁷⁶ Apparently, this is the view of the United States Supreme Court as expressed in *Transportation Union v. Long Island R.R. Co.*⁷⁷ In *Transportation Union*, the Court stated that "it is the nature of the service provided which determines its essentiality."⁷⁸ The *Transportation Union* decision was accorded heavy weight by the California Supreme Court in *County Sanitation*.⁷⁹ Several factors have been isolated that courts should consider in making a final determination of which public services are "essential."⁸⁰

A. FACTORS TO CONSIDER IN MAKING ESSENTIALITY DETERMINATION

When analyzing the nature of a service, several factors should be

70. See Lev, *supra* note 17, at 777 n.4.

71. *Id.*

72. Burton and Krider, *The Role and Consequences of Strikes by Public Employees*, 79 YALE L.J. 418, 420-21 (1970).

73. *Id.*

74. Olson, *supra* note 18, at 496.

75. *Id.*

76. 38 Cal. 3d at 581, 699 P.2d at 851, 214 Cal. Rptr. at 438.

77. 455 U.S. 678 (1979).

78. *Id.* at 678.

79. 38 Cal. 3d at 580-81, 699 P.2d at 846, 214 Cal. Rptr. at 435. The *Transportation Union* case underscores the conclusion that it is the nature of the service provided and the impact of its disruption on the public welfare which determines essentiality, as opposed to the simplistic determination of whether the service is provided by public or private employees. *Id.*

80. Wellington and Winter, *More on Strikes by Public Employees*, 79 YALE L.J. 441, 442 (1970).

taken into consideration.⁸¹ The most important of these factors is whether the strike poses an immediate threat to the public health and safety.⁸² The explanation for making the potential threat to the public the most important factor can perhaps best be illustrated by an example of the harm a strike by public employees may cause. In 1969, police officers in the City of Montreal went on strike.⁸³ During the first few hours of the walkout, robberies occurred at eight banks, one finance company, two groceries, and a jewelry store.⁸⁴ Eyewitnesses reported that everyday people, not hoodlums or habitual criminals, were committing offenses such as burglary. Motorists were driving through red lights and on the wrong side of the road because they realized that no one would catch them.⁸⁵

Another factor relevant to whether a service provided by a public employee is "essential" is the relative availability of substitutes for the service.⁸⁶ An example of how the availability of substitutes may weigh heavily in a court's determination of the essentiality of a service can be found in the Pennsylvania case of *Highland Sewer and Water Authority v. Local Union 459*.⁸⁷ In *Highland Sewer and Water*, a Pennsylvania court held that the sewer and water district was not entitled to an injunction which would have forced striking employees back to work.⁸⁸ The basis for the refusal by the court to grant the injunction was that since it was possible for the services to be performed by supervisory personnel or subcontracted out, there was no clear and present danger to public health, safety or welfare and, therefore, an injunction would be improper.⁸⁹

Finally, a public service may become "essential" if public employees perform a service the disruption of which would cause serious inconvenience to the public.⁹⁰ The degree to which the public is inconvenienced by the disruption of a public service depends upon the nature of the service. For example, in the case of employees who furnish "essential" services, such as police officers, the public may

81. *Id.*

82. *Id.*

83. Burton and Krider, *supra* note 72, at 433-34 (story reprinted from N.Y. Times, Oct. 8, 1969, at 3, col. 1).

84. *Id.*

85. *Id.*

86. See Wellington and Winter, *supra* note 81, at 442.

87. Pa. D. & C.2d 564 (1973).

88. *Id.* at 565-67.

89. *Id.*

90. see ABOUD, *supra* note 34, at 7.

not be able to tolerate any strikes. In borderline cases, such as school teacher labor stoppages, the public may be able to tolerate short strikes. In the case of "nonessential" services, such as municipal golf course employees, strikes could be tolerated indefinitely.⁹¹ Thus, the greater the inconvenience to the voting public, the less tolerable a strike will become. Other states have used these factors in formulating their approaches to the right of public employees to strike.

B. APPROACH OF OTHER STATES

Several states have granted public employees a limited right to strike.⁹² Most of these states are in agreement that strikes by police officers and firefighters should be expressly prohibited.⁹³ Beyond this point of agreement, however, the various states have differing methods of dealing with public sector strikes. Three of the more well-reasoned statutes dealing with public sector strikes are those of Pennsylvania, Hawaii, and Alaska.

The Pennsylvania Employee Relations Act⁹⁴ expressly prohibits strikes by police and firefighters. Instead the law requires disputes to be settled by binding arbitration.⁹⁵ Strikes by all other public employees are presumptively valid.⁹⁶ A governmental employer may rebut the presumption of validity by showing either that mediation and fact-finding alternatives have not been exhausted or that the strike would endanger public health, safety or welfare.⁹⁷ The reason for granting a limited right to strike was elaborated in the Pennsylvania Governor's Commission Report.⁹⁸ The report stressed that public sentiment is an important reason to grant a limited right to strike:

The limitations on the right to strike which we propose . . . will appeal to the general public as so much fairer than a general ban on strikes that the public will be less likely to tolerate strikes beyond these boundaries. Strikes can only be effective so long as they have

91. *Id.*

92. Those ten states are Alaska, Hawaii, Idaho, Illinois, Minnesota, Montana, Oregon, Pennsylvania, Vermont and Wisconsin. 38 Cal.3d at 569 n.8, 699 P.2d at 838 n.8, 214 Cal. Rptr. at 427 n.8.

93. *Id.* at 581, 699 P.2d at 846, 214 Cal. Rptr. at 435.

94. PA. STAT. ANN. tit. 43, §1101.1003 (1983).

95. *Id.*

96. *Id.*

97. *Id.*

98. Governor's Commission to Revise the Public Employee Law of Pennsylvania, Report and Recommendations, reprinted in 251 Gov't Empl. Rel. Rep. (BNA) E-1, E-3 (1968). For further discussion of this report see Hanslowe and Acierno, *supra* note 19, at 1055.

public support. In short, we look upon the limited and carefully defined right to strike as a safety valve which will prevent strikes.⁹⁹

The state of Hawaii has also granted public employees a limited right to strike.¹⁰⁰ The Hawaii statute provides that employees may strike after they have exhausted statutory procedures, including a cooling-off period.¹⁰¹ If the strike endangers the public health or safety, however, the public employer may petition the Hawaii Public Employment Relations Board, which will investigate. If the Board finds that there is an imminent or present threat to public health or safety, "the Board shall set requirements that must be complied with to avoid or remove any such imminent or present danger."¹⁰² Other states, such as Alaska, have agreed with the wisdom of the Pennsylvania and Hawaii legislatures and have granted public employees a limited right to strike.

The Alaska statute places public employees into one of three categories.¹⁰³ In the first category are those services which may not be given up for even the shortest period of time. Thus far the Alaska legislature has included only police and fire protection employees, prison guards and other correctional employees within this category. Employees in the first category are forbidden from striking in all circumstances.¹⁰⁴ The second classification includes services which may be interrupted for a limited but not indefinite period of time. Employees that fall within this category are public utility, snow removal, sanitation and public school employees. Courts may enjoin a strike by these employees if the strike begins to threaten "the health, safety or welfare of the public."¹⁰⁵ The third category includes services in which work stoppages may be sustained for extended periods without serious effect on the public. All public employees who do not perform category one or category two services are included in category three. A strike by category three employees is legal as long as it has been approved by a majority of the striking unit.¹⁰⁶ Application of principles similar to those adopted by Pennsylvania, Hawaii, and Alaska could provide California with a workable standard for determining which governmental services are "essential." A

99. *Id.*

100. HAWAII REV. STAT. §89-12(a) (1981).

101. *Id.*

102. *Id.*

103. ALASKA STAT. §23.40.200 (1981).

104. *Id.*

105. *Id.*

106. *Id.*

statute is necessary to avoid the use of vague standards by the judiciary, such as "when the strike threatens public health, safety and welfare," to determine when a public employee strike may be enjoined.¹⁰⁷ In fact, Chief Justice Bird wrote a separate opinion in *County Sanitation* because she believed that "it is only fair to give the legislature some guidance."¹⁰⁸ Noting that to allow the legislature to decide which services are essential without guidance "not only invites error but encourages it."¹⁰⁹

Additional support for the necessity of statutory clarification of which public employee groups perform "essential public services" can be gained from the recent United States Supreme Court opinion of *Garcia v. San Antonio Metropolitan Transit Authority*.¹¹⁰ The Supreme Court found the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental functions" to be "unworkable."¹¹¹ The Court recognized that having lower courts apply the "traditional governmental functions" test on a case-by-case basis led to inconsistent results and confusion.¹¹² While the *San Antonio Transit* case involved an entirely different area of law, the case did illustrate the difficulties of a case-by-case analysis using a vague standard like the "essential public services" test suggested in *County Sanitation*.¹¹³ Thus California is in need of a statute similar to the ones of Pennsylvania, Hawaii and Alaska to provide California courts with consistent guidelines.

Proposed California Statute

California would benefit from a three-tiered statute similar to that enacted by the State of Alaska. The Alaska statute has proven successful in settling public employee labor disputes during the first few years of operation. In the first year and a half after enactment, only one labor dispute failed to be resolved prior to the strike stage.¹¹⁴ Impasse resolution procedures similar to those contained in the Alaska statute have been effective for Hawaii as well.¹¹⁵ In the early years of the Hawaii statute, only two strikes by public employees have

107. See ABOUD, *supra* note 34, at 29.

108. 38 Cal.3d at 593, 699 P.2d at 855, 214 Cal. Rptr. at 444 (Bird, C.J., concurring).

109. *Id.*

110. ___ U.S. ___, 105 S. Ct. 1005 (1985).

111. *Id.* at 1009.

112. *Id.*

113. *Id.* at 1021.

114. ABOUD, *supra* note 34, at 20.

115. HAWAII REV. STAT. §89-12(a) (1981).

occurred.¹¹⁶ There are some additional steps, however, which can be taken by the California legislature to facilitate effective dispute resolution. Specific proposals for a California statute are set forth below.

A. CATEGORY ONE OF CALIFORNIA STATUTE

Category One of the California statute should closely resemble the first category of the Alaska statute. Into this category fall those services which cannot be interrupted for even a short period of time. The legislature must determine which services should be placed in this category. Because of the potential harm to the public and lack of adequate private sector substitutes, likely candidates are police officers, firefighters and guards at correctional facilities. Persons falling within this category would be forbidden from striking under any circumstance. The California statute must provide a substitute dispute resolution procedure to ensure that public employees falling within this category are able to engage in meaningful collective bargaining. Arbitration is one substitute that has been used effectively in other states.¹¹⁷

The effectiveness of arbitration in the private sector and its potential for dispute resolution in the California public sector make arbitration a viable alternative to the strike.¹¹⁸ Arbitration has gained favor in the public sector, as it has in the private sector, because it often avoids needless and expensive litigation and provides a substitute for the "open warfare" of strikes.¹¹⁹ Since arbitration affords employees the opportunity to have their cause heard and decided by an experienced, neutral third party, it imposes a sense of impartial justice that contributes to a more harmonious relationship between the disputing parties.¹²⁰

While arbitration has been highly successful in the private sector, there is some question whether this practice is appropriate in the public sector.¹²¹ Several cases have been litigated on the theory that arbitration is inappropriate because to permit an outside arbitrator to make the final decision on future wages, hours and working conditions con-

116. *ABOUD*, *supra* note 34, at 20.

117. In Pennsylvania, over 60 cases have been successfully arbitrated under the new Pennsylvania law. Anderson, *Compulsory Arbitration Under United States Statutes*, 22 N.Y.U. Conference on Labor 259, 275 (1970).

118. See Comment, *supra* note 21, at 413.

119. Vause, *LABOR ARBITRATION IN STATE AND LOCAL GOVERNMENT* 2 (1981).

120. *Id.*

121. Comment, *California Assembly Advisory Council's Recommendations on Impasse Resolution Procedures and Public Employee Strikes*, 11 SAN DIEGO L. REV. 482, 482 (1974).

stitutes an unlawful delegation of legislative power.¹²² The Supreme Courts of Wyoming,¹²³ Rhode Island,¹²⁴ Pennsylvania,¹²⁵ and Wisconsin,¹²⁶ however, have held that the submission of public employee grievances to arbitration does not constitute an unlawful delegation of legislative power. Still others argue that arbitration will destroy the collective bargaining process and the desire of the parties to settle their own disputes.¹²⁷ A third party, who would have no continuing responsibility for the decision, would have binding power to resolve disputes.¹²⁸ The experience of Pennsylvania, however, indicates that arbitration is a highly effective method of dispute resolution and that arbitration does not destroy the parties' desire to reach an agreement.¹²⁹ In Canada, where arbitration is commonly used to settle public labor disputes, the effectiveness of the arbitration option was judged by the President of the Canadian Treasury Board to be "just as strong a conciliation device . . . as the strike route."¹³⁰

Where compulsory arbitration is used, procedures must be developed to ensure that the parties are forced to negotiate extensively before submitting any grievance to arbitration.¹³¹ Premature arbitration can be spotted through the existence of several signs. A strong indication that arbitration is premature is when there are multiple unresolved issues at the time the dispute is submitted to arbitration.¹³² Another indication of early arbitration is that parties might show a total lack of understanding of the other parties' position.¹³³ If either of these conditions is present, the arbitrator should refuse to hear the case until further mediation and fact-finding procedures have been exhausted.¹³⁴

122. *Dougherty v. Austin*, 94 Cal.3d 601, 28 P.2d 834 (1982); *Redwood City v. Moore*, 231 Cal. App. 2d 563, 42 Cal. Rptr. 72 (1968).

123. *Wyoming v. City of Laramie*, 437 P.2d 295 (Wyo. 1968). In this case, the Wyoming Supreme Court upheld the validity of a compulsory arbitration statute for firefighters. The court explicitly rejected the argument that arbitration constitutes an unconstitutional delegation of power. *Id.* at 299.

124. *City of Warwick v. Warwick Regular Firemen's Ass'n*, 256 A.2d 206 (R.I. 1969).

125. *Harvey v. Russo*, 225 A.2d 460 (Penn. 1969).

126. *Rhineland City Employees, AFSCME v. City of Rhineland*, 35 Wis. 2d 209, 214, 151 N.W., 2d 30, 34 (1967).

127. See Comment, *supra* note 21, at 411.

128. *Id.*

129. See Anderson, *supra* note 117, at 275.

130. Address by C.N. Drury, Joint Conference on Collective Bargaining in Federal Public Service, Nov. 20, 1968, as reprinted in 67 MICH. L. REV. at 961.

131. Coulson, PUBLIC SECTOR BARGAINING: ISSUES AND RESPONSIBILITIES 156 (1978).

132. *Id.*

133. *Id.*

134. *Id.*

B. CATEGORY TWO OF THE CALIFORNIA STATUTE

Category Two of the California statute should consist of those services which may be interrupted for a limited period of time. Employees falling within this category are school teachers, emergency medical personnel, public utility and transit workers. This group of public employees would be permitted to strike, but only after extensive impasse resolution procedures have been exhausted. Category Two of the California statute should contain several types of impasse resolution procedures which have proven effective in other states.

1. *Mediation*

Mediation is the intervention of a neutral third party, usually a governmental appointee, in the bargaining process for the purpose of helping the parties reach an agreement.¹³⁵ There is widespread agreement that mediation is the most desirable technique of third party intervention.¹³⁶ Support for mediation stems from the fact that it involves minimal interference with the bargaining process.¹³⁷ In mediation an experienced third party brings a fresh perspective into a dispute and the mediator can be an effective catalyst in moving the parties toward agreement.¹³⁸ The distinction between mediation and arbitration is important to understand. The mediator is generally without authority to make a binding decision, while the arbitrator has the authority to adjudicate and make binding decisions.¹³⁹ In other words, "the essential job of the mediator is to persuade the parties; it is up to the parties to persuade the arbitrator."¹⁴⁰

The real strength of mediation is that the technique often has the effect of educating relatively inexperienced public sector negotiators about the labor bargaining process, and the mediation process helps to familiarize each party with the position of the other party.¹⁴¹ One of the goals of mediation is that the greater understanding achieved through the mediation negotiations will make the parties more willing to settle the dispute as quickly as possible.¹⁴² Mediation has been

135. SMITH, MERRIFIELD & ROTHSCHILD, *COLLECTIVE BARGAINING AND LABOR ARBITRATION* 32 (1970).

136. GRODIN, WOLLETT & ALLEYNE, *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* 269 (1979).

137. *Id.* at 270.

138. *Id.*

139. See SMITH, MERRIFIELD & ROTHSCHILD, *supra* note 135, at 32.

140. *Id.*

141. Gilroy and Sinicropi, *Dispute Settlement in the Public Sector*, U.S. Department of Labor 58 (1972).

142. *Id.*

highly successful in the states which have used the technique to resolve employee grievances. For example, in New York, nearly fifty percent of the public employee disputes going to mediation are settled successfully.¹⁴³ In New Jersey, nearly seventy percent of all public employee disputes going to mediation have been settled.¹⁴⁴ Because of the successful results achieved through mediation, the mediation impasse resolution technique should be required of Category Two public employees for the first thirty days of the strike. However, mediation should not be the only technique available to resolve disputes. Other effective impasse resolution techniques such as fact-finding should also be used.

2. *Fact-Finding*

Fact-finding is another approach to dispute resolution that should be required by the California statute. The public sector has relied heavily on this technique in attempting to resolve impasses in interest disputes.¹⁴⁵

The term "fact-finding" is misleading because it implies that the sole function of the fact-finder is to hear and weigh evidence and make findings of fact. In actuality, fact-finders, after reaching findings, make recommendations to the parties as to what would be a fair settlement of the dispute.¹⁴⁶ Fact-finding requires the parties to gather objective data and present their arguments based on this data. In this forum, an unsubstantiated demand carries little weight.¹⁴⁷ At least twenty states have already adopted some version of fact-finding as a dispute resolution mechanism and approximately ninety percent of the disputes which have involved this method have been resolved without a strike.¹⁴⁸ Even with the resounding success of the mediation and fact-finding techniques, the California statute should still provide the additional safeguard of the cooling-off period.

3. *Cooling-Off Period*

The California statute should provide a cooling-off period if the mediation and fact-finding impasse resolution procedures prove

143. GRODIN, WOLLETT & ALLEYNE, *supra* note 136, at 270.

144. *Id.*

145. *Id.* at 271.

146. *Id.*

147. *Id.*

148. Gilroy and Sinicropi, *supra* note 141, at 58.

unsuccessful.¹⁴⁹ During the cooling-off period the parties would be expected to continue bargaining.¹⁵⁰ In the event the dispute is not settled during the cooling-off period, the workers, in accordance with *County Sanitation*, would enjoy a limited right to strike.

C. CATEGORY THREE OF THE CALIFORNIA STATUTE

All public employees who do not fall within either of the above two categories will be included in Category Three of the California statute. These "nonessential" employees will be given the absolute right to strike after certain impasse resolution procedures have been exhausted. The impasse procedures are necessary because even strikes by the most "nonessential" public employees such as city park gardeners and mail room workers could eventually have a harmful effect on the public.¹⁵¹ In addition to the mediation, fact-finding and cooling-off methods, there are two other methods which might be appropriately used in Category Three. These two methods have been termed the "nonstoppage strike" and the "graduated strike."

1. Nonstoppage Strike

The nonstoppage strike could be declared by a public employee union after all other impasse resolution procedures had failed to produce a settlement.¹⁵² Employees would be obliged to continue working full-time but a portion of their wages would be deposited in a special fund.¹⁵³ In addition to paying regular wages, the employer would also be required to deposit into the special fund an extra amount equal to the amount given up by the employees.¹⁵⁴ The union would have the option of increasing the amount put into the fund by ten percent every two weeks.¹⁵⁵ This type of strike would put financial pressure on both public officials and public employee unions without disrupting the flow of public services.¹⁵⁶

149. Anderson, *supra* note 23, at 950.

150. *Id.*

151. Hanslowe and Acierno, *supra* note 19, at 1069.

152. Bernstein, *supra* note 2, at 470.

153. *Id.*

154. *Id.*

155. *Id.* at 473.

156. *Id.*

2. *Graduated Strike*

If the nonstoppage strike proves unsuccessful, the next step would be the graduated strike. In a graduated strike, the union would call work to halt in stages.¹⁵⁷ For example, during the early stages of the strike, the employees would not work for one full day.¹⁵⁸ Of course, the employees, take-home pay would be cut proportionately. The value of this type of work stoppage would be to give the public a taste of reduced service without the shock of total deprivation.¹⁵⁹ If the graduated strike proved unsuccessful, public employees would be free to engage in a full scale labor strike.¹⁶⁰

D. *Post Strike Determination*

One problem with the application of a statute delineating a limited right to strike is the difficulty in determining the essentiality of many public services in advance.¹⁶¹ The opinion of the court in *County Sanitation* stated that “essential” public employees could be prohibited from striking. However, the court did not state at what point the determination of essentiality is to be made.¹⁶²

In those cases where essentiality can only be determined after a strike is in progress, the courts or an impartial agency should be given the power to designate certain services as “essential” after the strike has begun.¹⁶³ The injunction has become a standard tool of state and local governments for implementing a “no strike” policy in the public sector.¹⁶⁴ State anti-injunction statutes, prohibiting or limiting the use of injunctions in labor disputes have been held to have no application in the public sector.¹⁶⁵ California courts should be expressly given the power to enjoin strikes by public employees in situations where the strike presents a clear and present danger to the public health or safety.

Conclusion

This comment has focused upon the “essential public services” ex-

157. *Id.* at 474.

158. *Id.*

159. *Id.* at 475.

160. *Id.*

161. See Anderson, *supra* note 23, at 952.

162. 38 Cal. 3d at 585, 699 P.2d at 854, 214 Cal. Rptr. at 443.

163. See Anderson, *supra* note 23, at 950.

164. *Id.*

165. *Id.*

ception to the California Supreme Court's holding in *County Sanitation District v. Los Angeles County Employees Association* which granted public employees a limited right to strike. While the *County Sanitation* holding granted a limited right to strike, the court did not elaborate on which public employees would not be allowed to strike. This comment has illustrated that while it is relatively easy to gain consensus that police and fire protection are "essential" services, and some minor clerical jobs are not, that there is no consensus on what constitutes an "essential public service."

The statutes of other states, such as Pennsylvania, Hawaii and Alaska, provide important guidance on how to deal with the problems which will soon face the California legislature. California would be wise to use a modified version of the three category approach used in Alaska. By providing mandatory special impasse procedures such as arbitration, mediation and fact-finding, the California Legislature can assure that crippling public employee strikes will only occur as a last resort. If the proposed statute is followed, both public employee unions and public employee management will benefit. The unions will be provided with tools which will force management to engage in meaningful collective bargaining and the free flow of "essential" public services will be preserved.

Gregory Thomas Fain