

REVIEW

The Unions and the Cities. HARRY H. WELLINGTON AND RALPH K. WINTER, JR. The Brookings Institution, Washington, D.C., 1971. Pp. xiii, 226. \$7.95.

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Lest the point of this book be missed, the authors admonish us in a postscript: "Make no mistake about it, government is *not* 'just another industry.'"¹ Because they view labor problems in public employment as being different from those in industry, the authors conclude it would be inappropriate to extend to public employment all features of private sector collective bargaining.

It may surprise some hard-liners to learn that there could be any serious doubt on this point. Historically, the belief that public employment and private employment are basically different has led to the conclusion that, whatever the merits of collective bargaining in the private sector, the public sector calls for a different approach. For years, concepts of sovereignty and unlawful delegation of governmental authority were used by courts and politicians to justify hostility toward efforts of public employees to organize and bargain collectively. Even Franklin Roosevelt considered a strike by public employees "unthinkable and intolerable."² But as the authors point out, insistence upon full extension of collective bargaining, including strikes, to public employment is fast becoming the conventional wisdom, espoused by Theodore Kheel and other influential commentators.³ The purpose of this book is to reverse that trend, particularly with respect to the cities. It doubtless will become the classic statement of the conservative position on collective bargaining in public employment.

Yet the book is not an attempt to turn back the clock. The authors are much too sophisticated to base their case on outmoded concepts of sovereignty and unlawful delegation of governmental authority; in-

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¹ P. 202 (emphasis in original).

² P. 37.

³ E.g., Kheel, *Strikes and Public Employment*, 67 MICH. L. REV. 931 (1969).

deed, a chapter reviewing the contemporary setting exposes the flaws in those concepts. Rather, the authors seem to consider full-blown public employee unionism undemocratic. The ideal they seek is a political process in which "there is a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision."⁴ The basic premise of the book is that unbridled strike power in the hands of unions of public employees enables them to exert disproportionate political power. This distorts the political process at the expense of other interest groups with equally pressing claims in decisions affecting the level of taxes and allocation of tax dollars. A vivid example is a twelve-hour strike by firemen in Newark that resulted in diverting state urban aid funds, originally authorized for helping the poor, to salary increases for firemen and policemen.

The authors differentiate public and private collective bargaining principally on the ground that a public employee strike is designed to exert political pressure on municipal officials, whereas the private sector strike exerts economic pressure on the employer by depriving him of revenues. Since a public employee strike normally disrupts important services, sometimes endangering health or safety, a large part of the public will press elected officials for a quick settlement with little concern for cost. The effectiveness of this kind of pressure is illustrated by Mayor Lindsay's generous settlement with the United Federation of Teachers on the eve of the 1969 municipal election. Moreover, the public employee strike—unlike strikes in the private sector—does not involve any significant threat of unemployment as a trade-off for increased economic benefits, since demand for the governmental service is relatively insensitive to price. The authors thus see the strike as simply too powerful a lever on governmental decision making.

Many will disagree with this reasoning. Without trying to outline all possible objections here, it is sufficient to note that the authors' premise rests on a rather idealistic conception of municipal government as a sort of impersonal market place for proposals, which are sorted and weighed strictly on their merits, after giving interested parties an opportunity to be heard and giving due regard to the wishes of an uncoerced electorate. Yet, the authors themselves recognize that interest groups other than public employees already have a disproportionate share of political power. Public employees consequently look upon collective bargaining not as a distortion, but rather as a correction of existing imbalances. Their unions would argue that the strike weapon is the only

⁴ P. 24, quoting R. DAHL, A PREFACE TO DEMOCRATIC THEORY 145 (1956).

effective way of remedying existing injustices. Nevertheless, the authors are unwilling to attempt reform by giving an additional group such power, since the losers would be the weakest groups in the community, who may need help the most. And other existing interest groups, generally speaking, do not have anything approaching the effectiveness of the strike as a means for pressing their claims. The authors therefore fear that a full transplant of collective bargaining as it exists in the private sector would institutionalize the power of public employee unions in a way that could result in a permanent subsidy for their membership.

From all this, one might jump to the conclusion that public employee strikes should be outlawed. The authors, however, waver. "One solution . . .," they say, "might well be a ban on strikes, if it could be made effective."⁵ They reject the argument that without the strike weapon, collective bargaining by public employees becomes "collective begging" as, it is said, it would in the private sector. They claim that "the very unionization of public employees creates a powerful interest group . . ."⁶ that can be effective as a political force beyond simply the number of its members. The success of municipal employees in San Francisco and New Haven without the strike weapon is cited. But one wonders whether the "clout" of employees in those cities was due solely to astute politicking, unaided by any awareness among local officials of the latent threat of strike presented by any militant, well-organized group of public employees. Make no mistake about it, the strike and threat of strike are what make collective bargaining effective in both the private and public sectors.

The authors' argument that the power of the strike weapon in the private sector is limited by a rough trade-off between increased benefits for some and decreased employment for others seems weak. In theory this may be correct, but at any bargaining table the possibility of an employment-benefit trade-off is a very mild constraint. The economic benefit is immediate and definite; the danger of unemployment is remote and uncertain.

In any event, the authors recognize that even with a prohibition, some strikes may be inevitable in public employment. To temper any such prohibition, they recommend various postimpasse procedures, such as fact-finding with recommendations, binding arbitration (including the "one or the other" variety), ad hoc legislative settlement (called "legislative finality"), and choice among a variety of available

⁵ Pp. 31-32.

⁶ P. 169.

procedures. The strengths and weaknesses of each are carefully analyzed, with recommendations for maximizing their effectiveness.

Still, the authors do not commit themselves to an all-out strike prohibition, simply because "the strike ban, wise as it is in theory, will not work in all places at all times."⁷ Only when a strike constitutes an immediate threat to public health and safety (should this be public health *or* safety?) do they find it clear that it should be outlawed. For nonemergency situations, the authors recommend various arrangements to lessen the impact of strikes and to make the costs of settlement more visible.

The major contribution of this book lies in the thinking summarized above. Like it or not, the analysis of the differences between collective bargaining in the private and public sectors opens our eyes to the possibility that the existing political process could be altered radically by wholesale importation of the strike weapon. This alone compels re-examination of preconceived notions about collective bargaining in public employment. But the book does much more than this. It compresses into some two hundred pages a mass of detail about the kind of regulation called for by the authors' theoretical base. The goal of such regulation is to ensure that public employee unions do not gain a permanent competitive advantage over other interest groups in pressing claims on the government. Because of a desire for diversity to meet local needs, the authors reject the possibility of federal regulation, but they do consider a mandatory recognition procedure an essential minimum for all states.

One of the regulatory problems noted is the greater pressure in public employment to expand the scope of bargaining because of the interest of professional employees—not often organized in the private sector—in changing the nature of the governmental service provided. Thus, school teachers want to bargain about curriculum reform, social workers about welfare policy. These are politically controversial issues. The authors therefore consider the possibility of regulating the scope of bargaining by statute, controlling it by involving community groups in "multiparty bargaining" over subjects that relate to the nature of services provided, or monitoring its scope through commissions of disinterested citizens. Other technical subjects dealt with include the right to join a union, representation election procedures, unit determination, union security, and administration of the collective agreement. One chapter is devoted to the subject of organizing the public employer for bargaining and another to the possibility of restricting the functions

7 P. 201.

of local government. These sections, which many readers will want to skim, will appeal primarily to unionists and public officials involved with the practical problems of public employee bargaining, and to draftsmen of legislation regulating it.

This is not, then, a book strictly for lawyers. It can be read with profit by political scientists, economists, and social scientists, as well as public employees, public officials, union representatives, and indeed, all citizens concerned about our "urban crisis." It is ideally suited for use in seminars on labor relations or local government, since it synthesizes all of the major issues and arguments scattered in an outpouring of writing on this timely subject.

The style of the book, however, may not have universal appeal. It is not easy reading. The first chapter is particularly rough going, due in part to the jargon of economic theory. Plain-talking toilers in the vineyard of labor relations may be turned off by terms such as "public sector model," "paradigm," "quantum," "monopsony power," and "product inelasticity," not to mention a recondite verb like "adumbrate." Perhaps in an effort to be less ponderous in later chapters, the authors resort to a few strained metaphors, such as costs "hidden in the bowels" of a municipal budget, which are more distracting than enlightening.

Spare as it is, the book is not without needless repetition—of the basic thesis,⁸ of references to Mayor Lindsay's 1969 settlement with the teachers' union to support a repeated conclusion,⁹ and of a discussion of the inelastic demand problem¹⁰—all without reference to prior coverage. The postscript, based on a statement by the president of the New York Firefighters Association,¹¹ makes the same contrast between expenditures for welfare and fire protection made earlier in a quotation from a rank-and-file fireman preceding the book's introduction.¹² Each is a purely makeweight illustration of the main thrust of the book; they add nothing except to portray firemen in a bad light. And the exhortation of the postscript, quoted in the opening sentence of this review, seems oddly out of place in such a scholarly work.¹³

⁸ Pp. 25, 30, 40-41, 167, 196.

⁹ Pp. 31, 60 n.3, 195 n.10.

¹⁰ Pp. 18-20, 194-95. This duplication, and perhaps those mentioned in notes 8 and 9 *supra*, may be attributable to the fact that the chapters in which they occur originally appeared in somewhat different form in two separate law review articles. See Wellington & Winter, *The Limits of Collective Bargaining in Public Employment*, 78 YALE L.J. 1107 (1969); Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 YALE L.J. 805 (1970).

¹¹ P. 202.

¹² P. 1.

¹³ The tabulation in an appendix of state public employee relations laws has limited usefulness. It contains no citations to the relevant statutes and judicial decisions. The head-

These shortcomings, however, do not seriously detract from the book's value in providing new insights to the vital problems raised by the growing demands for collective bargaining by municipal employees.

ings and entries are too cryptic to be very informative and, in at least one case, seem misleading. No entry is made on the line for Kansas teachers under the heading "Strike prohibition," indicating the absence of any legal restriction. The governing statute provides, however, that: "Nothing in this act shall be construed to authorize a strike by professional employees." KANS. STAT. ANN. 72-5423(b) (Supp. 1971).