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PUBLIC SECTOR STRIKES IN MICHIGAN

It has been the law of Michigan since 1947 that strikes by public employees are explicitly prohibited. Nevertheless, numerous strikes have and do occur, the majority of which involve public school personnel. For examples during the fall of 1988, strikes occurred at two of Michigan's public universities, while nineteen others occurred in seventeen school districts affecting an estimated 57,969 students. The occurrence of public sector strikes in Michigan presents that most difficult of public policy matters: what to do when a simple respect for the rule of law is not sufficient to commend its observance and there exists no effective procedure to compel the same. This **Council Comments** analyzes statutory and judicial developments relative to the incidence of strikes in Michigan and examines possible alternatives. A more detailed treatment of this subject (18 pages) in the form of Report No. 290 is available upon request from the Research Council.

Statutory and Judicial History

The Hutchinson Act

The Hutchinson Act, Public Act 336 of 1947, prohibited strikes by public employees, a prohibition consistently upheld by the courts. The act also contained substantial penalties for its violation. These penalties governed three areas: the termination of employment the placing of conditions upon reemployment, and the imposition of sanctions for inciting a strike.

The Hutchinson Act was amended by Public Act 379 of 1965. The amended statute is now generally known as the Public Employment Relations Act or PERA. The legislative authority to enact PERA derives from Section 48 of Article 4 of the state Constitution, which empowers the Legislature to "enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." PERA is the predominant state statute governing public employment relations in Michigan. State courts have consistently held "that PERA prevails over conflicting legislation, charters, and ordinances in the face of contentions by cities, counties, public universities and school districts that other laws or the Constitution carve out exceptions to PERA." **Local 1383, International Association of Fire Fighters, AFL-CIO v City of Warren**, (411 Mich 642, 654; 1981).

The Incidence of Public Sector Strikes Since 1965

Prior to 1965, public sector strikes in Michigan were so infrequent that no state agency tabulated their occurrence. Thus no reliable data exist to indicate the numbers if any, of public sector strikes that may have occurred in the state prior to 1965 and the types of public employees involved. The effect of PERA on public sector strikes was immediate, however.

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PERA took effect on July 23, 1965. Eleven public sector strikes were recorded between July of that year and June of 1966. Another fifteen strikes occurred the following year. In all, 181 public sector strikes had occurred by the end of the decade. As of November 25, 1988, the state had recorded 820 public sector strikes, an average of just over 34 per year. School district personnel have accounted for 622 of these or 75.9 percent of the total. Another 53 strikes have involved employees at the state's colleges and universities. Thus, strikes involving educational personnel account for 82.4 percent of the total.

Present Methods of Enforcement

Legal Remedies

Section 6 of PERA provides the exclusive legal remedy against public employees who strike in violation of the act. A striking employee is subject to discipline, including dismissal; however, this remedy is limited by the requirement of individual hearings for each disciplined employee who requests it, by the fact that discharging large numbers of striking employees is usually impractical, and by state court decisions holding that discharged employees can be reinstated under certain circumstances which would "effectuate the policies of the act."

Equitable Remedies

An employer can also seek an injunction to order striking employees to refrain from further illegal conduct, but state courts have severely limited the circumstances under which a public sector strike can be enjoined. In the **Holland School District** case, the state Supreme Court held that a showing of irreparable harm must be made in order to enjoin a public sector strike, even though the state's collective bargaining law makes all public sector strikes illegal, whether or not they present a danger to the public.

Alternatives

The policy problem posed by illegal strikes in Michigan has proven difficult to resolve and the state Legislature might wish to make its views on the matter explicit. One option is to retain the status quo in which strikes remain illegal but continue to occur. Retention of the status quo would of course require no legislative action. On the other hand, several proposals dealing with public sector strikes were introduced in the 1987-88 session of the Legislature. While none of these proposals was adopted, their introduction may suggest that the status quo is being viewed as less acceptable than in the past. Should the Legislature choose to act, there are a number of possible alternatives it might consider.

The Legislature Could Retain the Strike Prohibition and Provide Effective Statutory Enforcement Procedures

Should the Legislature determine that the prohibition of strikes in the public sector continues to be appropriate public policy, then it would seem reasonable to implement

such a policy through an effective enforcement mechanism. As it currently stands, the prohibition is no more than a parchment barrier, and as such, of no more effect. Since the current basis of the prohibition is statutory, it would seem reasonable that any means of enforcement be statutory as well, particularly in light of the limitations upon equitable relief. Statutory sanctions against striking are generally directed against individuals who engage in concerted activity as defined by statute, or against the employee organization to which they belong, or against both. Florida's public employment relations law places substantial penalties at the public's disposal to deal with illegal strikes.

The Legislature Could Legalize Strikes for Non-Essential Employees

Alternatively, the Legislature could repeal the ban on public sector strikes. The argument has been advanced that without the right to strike, public sector employees are at a disadvantage in bargaining with their employer. Any such disadvantage is diminished of course to the extent that strikes occur despite lawful authority. However, if strikes are inevitable, it would seem appropriate that this fact should be faced squarely so that the laws of the state will not be flouted.

The legalization of strikes need not be particularly disruptive since the right to strike, when granted, is usually limited in two ways. First compliance with statutory dispute resolution procedures is often a precondition to its lawful exercise. These dispute resolution procedures typically take the form of mediation and fact-finding after good faith bargaining has resulted in impasse. Thus a union is prevented from acting unilaterally by going on strike until other options have first been exhausted.

Secondly, the right to strike is seldom extended to all public employees. In Michigan for example, two classes of essential public employees -- municipal police and firefighter personnel -- already enjoy the alternative dispute resolution procedure of compulsory interest arbitration. (See Citizens Research Council Report No. 279, entitled "Compulsory Arbitration in Michigan," January 1986.) Thus the legalization of strikes could be extended by statute only to those classes of public employees considered to be non essential. Some academic literature in the field of public sector labor relations has suggested that such an approach is disingenuous because it grants the right to strike to public employees whose services can most easily be done without, while prohibiting it to those employees, who because of the essential nature of the services they provide, can strike most effectively. Nevertheless a number of states have gone in this direction. Both Hawaii and Pennsylvania permit strikes to occur after impasse resolution procedures have been exhausted.

The Legislature Could Define What Constitutes Irreparable Harm

While the Legislature has declared all public sector strikes to be illegal, state courts will enjoin only those strikes which would cause irreparable harm. The Legislature could, however, statutorily enumerate those conditions which would in its opinion give rise to a rebuttable presumption of irreparable harm. For example, the Legislature could declare such a presumption established if it were shown that a public sector strike had caused: (1) scheduled instruction at a public school or university to be delayed or disrupted for a specified number of days; (2) a lack of snow removal by road

crews for a specified number of days during the winter; or (3) a lack of garbage or refuse removal by public employees for a specified number of days during the summer.

The Legislature Could Adopt Compulsory Arbitration for Public Employees Generally

Public Act 312 of 1969, as amended, provides compulsory interest arbitration for municipal police and firefighter personnel, and emergency medical service and telephone operator personnel employed by a municipal police or fire department. Act 312 of 1969 is supplementary to PERA. Thus under Act 312, either party may submit to compulsory arbitration any matter which would be a mandatory subject of bargaining under the collective bargaining statute. The Legislature might extend the provisions of Act 312 to other public employees.

The argument is made that the prohibition against strikes by public employees is particularly unfair because the concerted withholding of services is the only significant unilateral action that unions have at their disposal. It is noted in this regard that public employers can act unilaterally once the parties have bargained in good faith to impasse. Therefore, one advantage of extending compulsory arbitration to public employees generally would be to address this suggested imbalance because compulsory arbitration precludes both employers and employees from taking unilateral action. In place of unilateral action, Act 312 substitutes a tripartite panel (composed of an employer representative, an employee representative, and a neutral arbitrator appointed by the state) which renders a decision on each matter in dispute.

On the other hand, a disadvantage cited with respect to Act 312 is that often negotiating parties do not make a genuine effort to resolve their differences through good faith bargaining because one or both of them may anticipate a more favorable resolution from compulsory arbitration. The Legislature might substantially limit this chilling effect on the collective bargaining process, however, by making other dispute resolution procedures -- such as mediation and fact-finding -- conditions precedent to compulsory arbitration.