PUBLIC SECTOR STRIKES IN MICHIGAN

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Introduction

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 example, 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. Since the authority of the Legislature to prohibit strikes is not in question, it cannot reasonably be suggested that public sector strikes occur for the purpose of testing the constitutionality of the prohibition. 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.

When respect for law is not enough to inspire compliance, then resort is usually had to an appropriate court for the purpose of compelling compliance or imposing sanctions, or both. Reliance upon judicial remedies to prevent or end public sector strikes has been misplaced however. From the standpoint of Michigan courts, the violation of the strike prohibition is not, without more, a justification for its enforcement through injunctive relief. Michigan state courts require a showing of irreparable harm in order to enjoin a public sector strike even though the state's collective bargaining law, the Public Employment Relations Act, makes all public sector strikes illegal whether or not they present a danger to the public. Strikes by public employees, especially teachers, seldom present a danger to the public safety, and as such, seldom result in irreparable harm. The Legislature has not mandated that a court enjoin every strike which occurs and Michigan courts have indicated that the Legislature could not constitutionally impose such a requirement, because the decision whether to grant injunctive relief in a given matter has historically been left to the discretion of the courts.

Several other considerations are worthy of note at this juncture. There is the view that public sector strikes do not pose an acute problem for two reasons. First, the average of about 34 such strikes per year since 1965 is not a particularly large number considering the number of bargaining units within the state. Of course when strikes do occur, they can have significance well beyond their numerical tabulation. For example, to the extent that the advancement of public education is an important policy objective, school strikes, though few in number, can be disruptive of the learning process. Secondly there is the view that public employees cannot fully enjoy the fruits of collective bargaining absent the right to strike.

From the vantage point of such perspectives any analysis which is critical of the occurrence of illegal strikes may be viewed implicitly as an attempt to advance the interests of public employers at the expense of public employees. It is possible, however, to examine the matter for the sole purpose of promoting the public's interest in the harmonious resolution of labor differences within the limits established by the Public Employment Relations Act (PERA). Such an examination should <u>also</u> be of equal benefit to the state's public employers and employees.

PERA is the predominant state statute governing public employment relations in Michigan. Citizens Research Council Report No. 283, entitled "The Public Employment Relations Act: Conflicts and Possible Alternatives," (January 1987), examined the extent to which the scope of bargaining under PERA as interpreted by state courts has permitted collective bargaining agreements to override state statutes and local ordinance and charter provisions. This report examines the effects which PERA has had on the incidence of strikes by public employees and possible alternatives.

Part I. Statutory and Judicial History

A. The Hutchinson Act

The authority of the Legislature to prohibit strikes by public employees is a matter of settled law. In the case of **City of Detroit** v **Division 26 of the Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America,** (332 Mich 237; 1952), the constitutionality of the Hutchinson Act was upheld, despite challenges to it on grounds that the act constituted a bill of attainder, that it violated the right of public employees to contract and that it denied them the equal protection of the laws by treating them differently from private sector employees. Regarding the latter point, the state Supreme Court observed that

> [t]here seems to be ample reason and authority for holding that the right of public employees to collectively refuse to render the service for which they are employed differs in legal point of view from the right of private employees to strike, and hence the classification of 'public employees' for the purpose of applicable legislation is valid. (332 Mich at 248.)

The Hutchinson Act, Public Act 336 of 1947, permitted public employees the right to meet and confer with their employers on matters with respect to wages, hours and other terms and conditions of employment. However, public employers were under no legal obligation to bargain with employees. The act also prohibited strikes by public employees. Section 1 of the statute defined a "strike" in a manner requiring both an act and a requisite intent.

The act was "the concerted failure to report for duty, the willful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment..." This act on the part of a public employee had to be conjoined with an intent to bring about "a change in the conditions, or compensation, or the rights, privileges or obligations of employment...."

Section 2 of the act provided that

> [n]o person holding a position by appointment or employment in the government of the state of Michigan, or in the government of any 1 or more of the political subdivisions thereof, or in the public school service, or in any public or special district, or in the service of any authority, commission, or board, or in any other branch of the public service, hereinafter called a 'public employee,' shall strike.

The act 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.

1. Termination of Employment

Section 4 of the act provided that any public employee who violated its provisions was deemed to have abandoned and terminated "his appointment or employment...." In other words, an employee who went on strike was deemed to have quit. Such an individual was no longer "entitled to any of the rights or entitlements thereof, including pension or retirement rights or benefits, except if appointed or reappointed as hereinafter provided."

It should be noted that Section 6 of the act permitted a person deemed to have quit his or her employment by striking to request a hearing upon the matter. The hearing was required to commence within ten days of the date upon which the person last received compensation. However, Section 6 was written so as to require the person requesting the hearing to bear the burden of proof by establishing "that he did not violate the provisions of this act."

2. Conditional Reappointment

Section 5 provided that a person who "knowingly" violated provisions of the act could nevertheless be reappointed to public service. but only upon the condition that

> (a) His compensation shall in no event exceed that received by him immediately prior to the time of such violation;
>
> (b) The compensation of such person shall not be increased until after the expiration of 1 year from such appointment or reappointment: employment or re-employment; and
>
> (c) Such person shall be on probation for a period of 2 years following such appointment or reappointment, employment or re-employment, during which period he shall serve without tenure and at the pleasure of the appointing officer or body.

3. Incitement of Strikes

Section 8 provided sanctions against third parties such as labor organizations that incited public employees to strike. The section provided that any person not a public employee who knowingly incited others to strike would be "deemed to be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment for not to exceed 1 year, or by a fine of not less than $100.00 nor more than $1000.00, or both such fine and imprisonment in the discretion of the court."

B. The Public Employment Relations Act: An Attempt to Modernize Public Employment Relations

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).

PERA was introduced on April 14, 1965 as House Bill 2953 and was referred to the labor committee. The House passed the bill without debate on May 27 by a vote of 68 to 32, although one member who voted against it stated that the labor committee had been given only ten minutes to examine the bill before debate was cut off. The bill was amended in the Senate and passed on June 16 by a 34 to 1 margin. The House concurred in the amendments on June 21 by a vote of 90 to 6 and the bill was signed into law.

PERA effected two significant alterations in the law then existing. First, the meet and confer system under the Hutchinson Act was replaced by a collective bargaining system under which both public employers and unions were legally obligated to bargain collectively. Section 15 of PERA imposed upon public employers and public unions the mutual obligation to bargain in good faith on matters "with respect to wages, hours, and other terms and conditions of employment…" This language was patterned after the National Labor Relations Act which governs labor relations in the private sector.

(In **Van Buren Public School District** v **Wayne Circuit Judge,** (61 Mich App 6; 1975), a Court of Appeals panel held that subjects of bargaining under PERA must be construed "more expansively" than under the federal law after which it was patterned because PERA prohibits public employees from striking. Such a proposition finds no support in the language of the statute itself. The use of the strike prohibition as a justification for more expansively interpreting PERA was ironic for two reasons. First, the prohibition is routinely ignored. Secondly, there is no right to strike in the private sector either over matters which are not mandatory subjects and one question at issue in the **Van Buren** case was whether the school district's decision to subcontract its bus service was a mandatory subject of bargaining.)

Secondly, while PERA retained the ban on strikes — and retained verbatim the Hutchinson Act definition of what constituted a strike and the definition of public employee — PERA did repeal the provisions of the Hutchinson Act which governed the termination of employment, the placing of conditions upon reemployment, and the imposition of sanctions for inciting a strike. The "discipline-discharge" provisions of Section 6 of PERA, which were substituted for the repealed sanctions, are of no practical effect for the reasons set forth in **Part II** below.

1. 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 number, 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. (See **Table 1.**)

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.

Table 1

Public Sector Strikes in Michigan 1965-1988

	Police	Fire	School Districts	Colleges and Universities	All Others	Total
1965	0	0	11	0	0	11
1966	0	0	6	0	9	15
1967	0	0	45	0	7	52
1968	0	0	25	0	14	39
1969	0	0	58	0	6	64
1970	1	0	26	6	11	44
1971	0	0	11	3	5	19
1972	0	0	18	2	2	22
1973	0	0	56	4	5	65
1974	0	0	27	2	16	45
1975	0	0	9	3	8	20
1976	0	0	8	4	8	20
1977	0	0	16	2	11	29
1978	0	0	35	4	6	45
1979	0	0	72	5	10	87
1980	0	0	48	3	10	61
1981	0	0	12	2	5	19
1982	0	0	23	0	1	24
1983	0	0	43	1	2	46
1984	0	0	14	4	1	19
1985	0	0	7	2	1	10
1986	0	0	10	3	5	18
1987	0	0	23	0	1	24
1988	0	0	19	3	0	22
Total	1	0	622	53	144	820

Source: 1965-1969, Department of Labor Annual Reports; 1970-1988, Michigan Employment Relations Commission Bi-Weekly Work Stoppage Reports, through November 25, 1988.

2. The Advisory Committee on Public Employee Relations

In 1966, the Governor of Michigan appointed a five member advisory committee to examine the effects of PERA on public employment relations and on the incidence of strikes. In February 1967, the advisory committee issued a report containing a number of recommendations, three of which related to strikes. First, it was recommended that Section 1 of PERA be amended to clarify that the individual withholding of services did not come within the definition of a strike. The proposed alteration was unnecessary and in any event has not been made by the Legislature. The apparent ambiguity of Section 1 regarding individual employee actions disappears when the act is read as a whole. Section 6 states that a public employee is deemed to be on strike who engages in "concerted action with others."(Emphasis supplied.)

Secondly, the committee recommended that language be added to the act making clear "that the strike prohibition includes, in addition to concerted action by employees, action taken by a labor organization in calling, instigating, or assisting a strike, or failing to take appropriate action to end a strike." As already noted, the provision of the Hutchinson Act which provided penalties against third parties who incited strikes was repealed when PERA was enacted and the Legislature has not subsequently amended PERA in this regard.

Finally, the committee recommended that the granting of injunctive relief be mandatory when a strike occurred or was threatened, before all applicable statutory procedures for resolving the dispute had been exhausted. The Committee added that the "granting of injunctive relief in other contexts (e.g., where statutory procedures have been exhausted) should be stated to be available in accordance with traditional 'equity' principles." (Emphasis in original.) As will be examined below, the state Supreme Court subsequently held that the decision of whether to grant injunctive relief was in all instances a matter to be decided by the courts.

3. The Holland School District Case

Several legal issues with respect to public sector strikes were unresolved at the time the advisory committee issued its report. The first was whether injunctive relief was still available to terminate a strike or whether the discipline-discharge provisions contained in Section 6 of PERA were the exclusive remedy. Secondly, there was the issue whether PERA prohibited a strike resulting from the refusal of an employer to bargain in good faith. Finally there was the question whether school personnel who had not entered into a contract specifying the starting date of the ensuing school year were in fact on strike. A majority of the state Supreme Court subsequently addressed the first issue conclusively, the second issue in a manner which still invites interpretation, and the last issue not at all.

The application of the statutory strike prohibition was addressed by the state Supreme Court in **Holland School District** v **Holland Education Association,** (380 Mich 314; 1968), a case in which the authority of the Legislature to prohibit strikes by public employees was reaffirmed. In the **Holland School District** case, striking teachers and their union appealed from a circuit court decision granting an injunction requested by the school district.

The union argued that the employment termination procedures contained in PERA prevented a court from enjoining a public sector strike. Section 6 of PERA provides a procedure whereby a public

employee found to have violated the act can be discharged, subject to specified procedural safeguards. While the Court acknowledged that the provisions of Section 6 constituted the exclusive legal remedy, it held that "[PERA's] provisions for discipline of striking public employees and review procedure for them cannot be interpreted to imply removing the historical power of courts to enjoin strikes by public employees." (380 Mich at 325.) The Court severely limited the conditions under which a public sector strike could be enjoined, however.

The mere fact that a strike occurred in violation of the law, which was apparently the sole basis under which the circuit court had issued its injunction, was not sufficient. The Court held that a showing of irreparable harm was also necessary. The Court noted that it was contrary to public policy in Michigan to enjoin a strike, absent a showing of violence, irreparable harm or breach of the peace, and cited in support thereof the case of **Cross Company** v **UAW Local No. 155 (AFL-CIO),** (371 Mich 184; 1963). The **Cross Company** case dealt exclusively with a private sector labor dispute, however, and not with public employees. In applying the test traditionally used in the private sector, the Court ignored the fact that private sector employees have a clear statutory right to strike while PERA specifically denied such a right to public sector employees. The **Holland** Court dissolved the injunction and remanded the matter to circuit court for a determination of whether the school district had violated the statute by failing to bargain in good faith as the union had alleged and whether an injunction should issue.

The Court likewise rejected the union's argument that since it had not entered into a new contract, its members were not public employees as defined by the act, and thus could not be on strike. This argument was based on the language of Section 569 of the school code (now Section 1231 of the school code of 1976, as amended) that teachers must be hired by written contracts signed by a majority of the local school board, a requirement first adopted by the Legislature in 1929. The Court held that its decision in **Garden City School District** v **Labor Mediation Board,** (358 Mich 258; 1959), was conclusive of the matter. The **Garden City** case had held that the State Labor Mediation Board did have jurisdiction to mediate a salary dispute between a school district and its teachers in advance of contracts being signed. Thus the Court noted in the **Holland School District** case that

> [i]f teachers, as we have held, are subject to the provisions of the Hutchinson act dealing with the mediation of grievances in advance of signing written contracts, we can hardly hold with consistency that they are not subject to the no strike provisions of the same act for the same purpose. We are constrained to hold that appellants were 'employees' within the terms of the act. (380 Mich at 323-324; emphasis in original.)

Even had the union's contention been accepted, it may have had an unintended effect. If the teachers were not public employees as defined by the act then the school board would have been under no statutory obligation to bargain in good faith with their representative. Section 15 of PERA states that a "public employer shall bargain collectively with the representatives of its employees as defined in section 11,11 which in turn defines "bargaining representative" as the individual or labor organization "designated or selected for purposes of collective bargaining by the majority of the public employees," in the appropriate bargaining unit. (Emphasis supplied.)

4. Matters Which Remain Unresolved

The latter argument advanced by the union in the **Holland School District** case was similar to one still maintained by some with respect to public school teachers, namely that PERA does not prohibit concerted activity which occurs after the expiration of a contract but prior to the signing of a new contract. While it is said in support of this argument that this category of strikes is not illegal, this is incorrect since PERA prohibits all strikes. Rather, if the logic of the argument is sound — that services are not being withheld because no agreement has been reached regarding the date upon which those services are to commence — then PERA is not violated because no strike has occurred.

This argument was stated most succinctly in the **Holland School District** case in an opinion which concurred in the result — that the injunction be dissolved — but differed as to the rationale. The concurring opinion noted that

> [u]ntil written contracts of employment were executed, [the school teachers] were under no obligation to report for duty; they could not absent themselves from their positions, for they had none; they could not stop work, for they had not begun yet to work, nor had they agreed even to work; and, finally, they could not abstain from performing the duties of employment for any purpose, for they had not assumed yet any such duties. (380 Mich at 328.)

The resolution of this argument depends upon when teachers are "required" to report to work. The problem is endemic to those classes of public employees, such as teachers or school bus drivers, who work less than a full calendar year.

State law does not require that school begin by a given date. The state currently does requires that a school district provide a specified number of instruction days each year but this requirement is not an absolute. As the requirement was recently interpreted, a school district may be denied one day of state aid for each day it falls short of the requirement, but it cannot be required to reschedule the days lost. **State Board of Education** v **Houghton Lake Community Schools,** (430 Mich 658; 1988). While it can be inferred perhaps that the provision in the annual school aid act requiring a membership count on the fourth Friday after Labor day assumes that school will commence in September, this provision relates only to fixing the amount of state aid which an in-formula school district is entitled to receive.

Thus the date upon which school begins is treated as a condition of employment to be determined in the course of bargaining. Conditions of employment are mandatory subjects of bargaining. A mandatory subject is one upon which, when brought up by either party, both parties are obligated to bargain. The failure to bargain in good faith upon a mandatory subject of bargaining constitutes an unfair labor practice.

Whatever the technical merits of the argument that public school teacher s are incapable of withholding their services until the starting date of school is fixed by contract, the practical reality is that the parties retain the expectation that certain contractual provisions will continue to be observed until a successor agreement can be signed. For example, public employees generally continue to receive fringe benefits such as health insurance even after the expiration of a contract. It is not inconceivable then that a school district, even absent a signed agreement might reasonably expect its employees to report

for work in the fall, perhaps upon the same date that school had commenced the year before.

Secondly, a public employer which is not subject to binding dispute resolution procedures, can unilaterally determine a condition of employment after having bargained in good faith to impasse. Under both PERA and general principles of labor law, the duty to bargain in good faith imposes no corresponding duty to arrive at an agreement, nor does it dictate the precise terms of any agreement reached. When parties bargain in good faith to impasse without reaching agreement, the statutory obligation imposed by PERA is satisfied. Unilateral action may then be taken by the public employer, provided it is consistent with the last offer of settlement. Therefore, a school district, having bargained to impasse over the starting date could unilaterally fix it, so that the concerted failure of teachers to report would constitute a strike. (Should impasse be reached on a mandatory subject, and either party requests fact finding from the Michigan Employment Relations Commission (MERC), the state agency which administers PERA, unilateral action may not be taken until impasse is also reached with respect to the fact finder's report.)

The fact that some public employees work less than a full calendar year has an additional effect, by removing an incentive. which often makes striking economically unattractive. Normally for each day that a strike continues, economic loss is suffered by the employer due to disruption of production and by the employees due to a loss of wages. But this economic loss which is a consideration in most strikes, is absent with respect to school strikes. Assuming that a school strike which begins in the fall does not continue for more than several months, there will remain sufficient time (legal holidays and Sundays excepted) to provide the required 180 instruction days before the next school year begins. The school calendar is merely shifted and employees work, and receive pay for, the same number of days as would have been the case had the strike not occurred. Thus, were public sector strikes not illegal, the only practical effect of a strike involving school personnel might be to inconvenience those parents and students who had anticipated that school would commence earlier.

Part II. Present Methods of Enforcement

A. Legal Remedies

Statutory. Section 6 of PERA provides the exclusive legal remedy against public employees who strike in violation of the act. **Holland School District** v **Holland Education Association,** (380 Mich 314; 1968). A striking employee is subject to discipline, including dismissal, but several factors limit the effectiveness of Section 6 as an enforcement mechanism.

First, an employer must conduct an individual hearing for each employee who requests it due to discharge or other discipline. An employee can request a hearing within ten days after discipline is imposed, this provision of PERA superseding the requirement of the Teachers' Tenure Act that a hearing be conducted before discipline is imposed on teachers. **Rockwell** v **Crestwood School District Board of Education,** (393 Mich 616; 1975).

The purpose of a Section 6 hearing under the Hutchinson Act was to afford an employee the opportunity to establish that he did not violate the provisions of the act. The language of Section 6 now reads in pertinent part that an employee "shall be entitled to a determination as to whether he did violate the provisions of this act." Thus, the present purpose of a Section 6 hearing "is to determine whether the

employer correctly identified the particular employee as a violator of the act's prohibition against striking." (393 Mich at 640.)

Secondly, because a strike by definition involves more that one employee, usually many more, discharging large numbers of striking employees and hiring suitable replacements is not a practical solution. It can be so disruptive and protracted a process that an employer is unlikely to resort to it unless there is no suitable alternative. During the 1974-75 school year for examples approximately 207 teachers went on strike in the Crestwood school district. One hundred and eighty-four of the teachers did not report for work by the deadline imposed by the school district and were terminated, although sixteen of them were eventually reinstated. The last of the Section 6 hearings were not concluded until the early part of 1979.

Even when an employer complies fully with Section 6 and correctly identifies an employee as having been on strike, the authority of the employer to discipline or dismiss an employee remains subject to the jurisdiction of the Michigan Employment Relations Commission. As the state Supreme Court further noted in the **Crestwood** case,

> Even if it should be determined in Section 6 hearings that particular teachers have violated the provisions of the PERA by striking and these determinations are sustained on review, if MERC orders reinstatement of striking teachers because it determines that affirmative action will best 'effectuate the policies of the act, and that determination is sustained on reviews the teachers shall be reinstated. (393 Mich at 641.)

The Court indicated that one circumstance justifying reinstatement would be proof that a cause of a strike was the commission by the employer of an unfair labor practices the occurrence of which the commission is authorized to ascertain under Section 16 of the act. Some have interpreted this portion of the Court's holding to suggest that an unfair labor practice strike is not prohibited under PERA. The better view of the Court's holding is that while such a strike is likewise prohibited, conduct on the part of an employer amounting to an unfair labor practice may preclude the employer from exercising the statutory right of discharge under Section 6 or require reinstatement of employees already discharged.

Other Legal Remedies. In the case of **The Lamphere School** v **Lamphere Federation of Teachers,** (400 Mich 104; 1977), the state Supreme Court declined to permit a school district to maintain a civil action for damages against a teachers union which called a strike. The school district claimed in pertinent part that the teachers' federation had tortiously interfered with the existing contractual relationship between the school district and its teachers. The school district argued that a civil tort action was necessary because the sanctions in Section 6 are directed against individuals who strike, as opposed to the employee organization to which they belong.

The Court held that since the Legislature had intended Section 6 to be the exclusive legal remedy, it would be violative of public policy to judicially create such a cause of action. In so holding, the Court also rejected the argument that such a remedy was necessary, noting that "[t]o somehow infer .... that the PERA only applies to public employers and public employees, but not to the public employees' bargaining unit, is specious." (400 Mich at 105.) The point which the school district apparently sought to advance however, was not that Section 6 did not apply to employees — individually or collectively — but rather that it did not apply to a third party acting as exclusive representative. While the point

did not succeed, oddly enough it appeared to find support in the Court's passing reference that "the Legislature deleted the only section, section 8, of the Hutchinson Act which permitted remedies against third parties, such as unions." (400 Mich at 106; emphasis supplied.)

B. Equitable Remedies

1. Concerning the Nature of Equitable Relief

Section 5 of Article 6 of the Michigan Constitution requires that to the extent practicable, the distinction between law and equity proceedings be abolished. This gave a constitutional stamp of approval to the state's judicature act of 1961 which abolished the same procedural distinctions. 1 Official Record, Constitutional Convention 1961, at 1289. Section 5 did not, however, abolish the distinction between law and equity. **Holland School District** v **Holland Education Association,** (380 Mich 314; 1968). The distinction is important since a court sitting in equity has greater discretion in fashioning a remedy.

An injunction, which is a form of equitable relief, is when distilled to its essence, an order by a court directing an individual to perform an act (mandatory) or directing an individual to refrain from acting (prohibitory). Courts are reluctant to issue mandatory injunctions an example of which would be an order to striking employees to return to work, the concern being that the authority of the court would be flouted if the mandatory injunction was ignored. There is also an element of involuntary servitude when strikes are involved in that the purpose of the injunction is to force an employee to resume work against his or her will. To avoid these difficulties, courts usually resort to the sophistical device of wording the injunction in prohibitory fashion, such as that striking employees refrain from further illegal conduct.

Injunctive relief is directed against the person, is enforced through a court's contempt power and is of three general types: temporary restraining orders, preliminary injunctions and permanent injunctions. They are distinguished by the length of their duration and the imminence of the harm sought to be averted.

A **temporary restraining order** is issued where the harm to be averted is not only irreparable, but is so imminent that a hearing cannot be convened on the matter. It is therefore possible for a temporary restraining order to issue without notice to the party against whom it is directed (**ex parte**). Michigan rules of court limit the duration of a single temporary restraining order to fourteen days. Because of the **ex parte** nature of a temporary restraining order, it usually must comport with strict procedural requirements to ensure due process. For example, the court may require the person seeking the temporary restraining order to post a bond to cover costs in the event it is later found that the person against whom the order was directed was wrongfully restrained.

A **preliminary injunction** is issued after a truncated hearing involving both parties, the harm to be averted not being so imminent as to justify a temporary restraining order. The hearing is not upon the underlying merits of the controversy, but on the question of whether the preliminary injunction should issue. A preliminary injunction expires upon the date specified within it. The purpose of both temporary restraining orders and preliminary injunctions is to preserve the status quo of the controversy until a hearing can be had on the merits.

A **permanent injunction** is generally issued after a full hearing on the merits of the controversy. While potentially permanent in duration, a permanent injunction as a practical matter lasts only so long as the underlying controversy.

2. Application of Equitable Relief to Private Sector Labor Disputes

The summary nature with which injunctive relief can be granted, as well as the means by which it can be enforced through contempt proceedings, means that the due process rights of the party against whom an injunction is directed may not receive adequate protection. Similar considerations at the federal level led to enactment of the Norris-LaGuardia Act, which prohibits federal courts from issuing **ex parte** injunctive relief in labor dispute cases, except upon sworn testimony that police are unable or unwilling to maintain the public peace. Generally a court attempts to weigh the harm to be suffered by the party seeking the injunction, should it be denied, against the harm to be suffered by the party against whom the injunction would be directed, should the injunction be erroneously granted.

The concern that a party's due process rights be adequately protected was addressed in the case of **Cross Company** v **UAW Local No. 155 (AFL-CIO)**, (371 Mich 184; 1963). The state Supreme Court noted that

> no judicial officer should ever exercise, without the most careful reflective thought, the ominous power of injunction which commands obedience by withdrawal of traditional judicial safeguards of jury trial and substitution of summary contempt procedures, for once having issued, assuming jurisdictional right, such injunctions whether providently or improvidently issued must be obeyed and judicially enforced. (371 Mich at 195; emphasis in original.)

In the **Cross Company** case, the company sought and was granted a temporary restraining order to enjoin the union from picketing. The company had refused to bargain with the union, despite the union having been certified as the exclusive representative and the temporary restraining order was issued without prior notice to the union or its officers, even though their whereabouts-were known.

Secondly, because of the delicate nature of the collective bargaining relationship, courts are hesitant to act in a manner which appears other than impartial. It was noted above that the purpose of temporary restraining orders and preliminary injunctions is to preserve the status quo of the controversy until a hearing can be had on the merits. An injunction issued in the midst of labor strife may,, however, alter rather than preserve the status quo of the underlying controversy, leading to the perception that the court favors the position of one party at the expense of the other. The Court noted, again in the **Cross Company** case, that

> often there is no status quo to maintain in such fluid and dynamic relationships and, so, any judicial act of grant or forbearance of injunctive relief inevitably results in the voluntary or involuntary servitude of the court as an adherent of one side or the other, — at least in the minds of the parties directly involved and also in the minds of the public.... (371 Mich at 194-195; emphasis in original).

3. Application of Equitable Relief to Public Sector Labor Disputes

The context of the **Cross Company** case was the private sector, where employees enjoy a statutory right to strike. When limited to that context, it is understandable that courts would be reluctant to enjoin employees from exercising a legal right, absent a showing of irreparable harm or danger to the public safety. Otherwise a court might, through "the ominous power of injunction," strengthen the bargaining position of one party by restraining the other, Such concerns should not arise, however, where the Legislature has concluded as it has in the public sector, that striking per se is violative of public policy. Had it been the intent of the Legislature to prohibit only those strikes which resulted in irreparable harm or danger to the public safety, it could have done so. Nor is it a valid concern that by enjoining a public sector strike the status quo of the bargaining environment might be disrupted. The status quo should properly encompass only those conditions which the negotiating parties, or either of them, can legally maintain.

The limitations which Michigan courts have imposed upon themselves in issuing injunctions render equitable relief particularly unreliable as a means of preventing illegal strikes. Furthermore, Michigan courts have indicated that the Legislature cannot constitutionally require that an injunction be issued whenever a public sector strike occurs, the decision whether to grant injunctive relief in a given matter being historically left to the discretion of the courts. The state Supreme Court noted in the **Holland School District** cases that "[t]o attempt to compel, legislatively, a court of equity in every instance of a public employee strike to enjoin it would be to destroy the independence of the judicial branch of government." (380 Mich at 325.) Courts in other states have found no constitutional infirmity in a legislative requirement that all illegal strikes be enjoined. For example, the Florida statute which prohibits public sector strikes, states that the circuit court, after notice and a hearing, "shall" tempo-

Part III. 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 hands 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.

A. 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 is an example of a state which provides sanctions against both employees and employee organizations engaging in illegal strikes.

Florida. Section 6 of Article 1 of the Florida Constitution provides that the right of employees to bargain collectively shall not be abridged and that public employees shall not have the right to strike. A Florida statute prohibits both public employees and employee organizations from striking and makes it an unfair labor practice to participate in a strike, either by instigating or supporting it.

Under Florida's Public Employee Relations Act, a public employer can file suit in circuit court if his or her employees are involved in or would be affected by an actual or imminent strike. If, after notice is served to all interested parties, a prima facie case is made out that a strike has occurred or is imminent, the court must temporarily enjoin the strike pending a final hearing.

An employee organization is liable for any damages suffered by the public employer as a result of an illegal strike and any judgment may be satisfied by attaching or garnishing union dues, but such an action cannot be brought until all other proceedings pending at the time of the strike or within 30 days thereafter have been adjudicated. In assessing the amount of damages the court must consider any extent to which the employer's actions may have provoked the strike.

The Public Employees Relations Commission is authorized to seek an injunction on its own initiative, even if a public employer chooses not to do so, and may, after a hearing order the termination of an employee found to have violated the statute. A violator can be rehired, but only under restrictions similar to those which were found in Michigan's Hutchinson Act: the employees first six months of

reemployment are served under probation without tenure, and his or her compensation cannot exceed that in effect when the violation occurred and cannot be increased for one year.

The commission may also levy fines against an employee organization — up to $20,000 for each calendar day a strike lasts — or determine the approximate cost to the public due to each day of a strike and fine an organization an amount equal to such cost even if it exceeds $20,000 a day. The commission has made use of both provisions on occasion. For example, in 1975, it fined a teachers' union $40,000 for a two day strike. In 1980, the commission ended a three day police strike by issuing a consent order under the terms of which officers accepted a percentage salary reduction for one year. The commission estimated the economic value of the consent order to be $180,000.

Public sector strikes in Florida since adoption of its statute in 1974 are shown in **Table 2.** Of the twenty one strikes which have been recorded, twelve of them lasted less than one week. The length of the remainder could not reliably be ascertained.

Table 2

Public Sector Strikes in Florida 1975-1987

	Police	Fire	School Districts	Colleges and Universities	All Others	Total
1975	1	0	1	0	1	3
1976	0	0	0	0	3	3
1977	0	0	0	0	0	0
1978	0	0	0	0	2	2
1979	0	1	0	0	3	4
1980	2	1	0	0	2	5
1981	0	0	0	0	0	0
1982	0	0	0	0	1	1
1983	0	0	0	0	0	0
1984	1	0	0	0	0	1
1985	0	0	0	0	0	0
1986	0	1	0	0	0	1
1987	1	0	0	0	0	1
Total	5	3	1	0	12	21

Source: Florida Public Employees Relations Commission, "History of of Strikes in Florida;" CRC calculation.

B. 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. Courts in a number of states have noted that it is the relationship of public employees to the general public that justifies prohibiting strikes, the purpose being to protect the public from a disruption of services rather than to provide an employer with a tactical advantage. However, if strikes are inevitable, it would seem appropriate that this fact should be fated squarely so that the laws of the state will not be flouted.

The legislative intent behind retaining the strike prohibition, while repealing the penalties which made it effective, is not known. It has been suggested that the Legislature may have tacitly intended to de facto legalize strikes. This argument is based in part on the view that while the public may tolerate an occasional public sector strike, it is not willing to accept the notion that public employees should have the right to strike. Should this argument be accurate, legalizing strikes would be a more ingenuous manner by which to accomplish the same result.

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. 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, such as Hawaii and Pennsylvania, have gone in this direction.

Hawaii. Section 11 of chapter 89 of the Hawaii statutes, dealing with collective bargaining in public employment, provides impasse resolution procedures of mediation and fact finding. Once those impasse resolution procedures have in good faith been complied with, a strike can legally occur under Section 12, provided the employees: (1) are in an appropriate bargaining unit certified by the state labor relations board; (2) are not covered by binding arbitration; and (3) are not deemed to be essential employees.

Section 12 also requires a public employer to institute an action in court if the employees or their organization strike in violation of the act, or if there is reasonable cause to believe a violation is imminent. Jurisdiction is conferred upon the circuit court to hear and dispose of petitions for injunctive

relief. In the case of **Hawaii Public Employment Relations Board** v **Hawaii State Teachers Association,** (511 P2d 1080; 1973), the Hawaii state Supreme Court held that a showing of irreparable harm was not a precondition for injunctive relief.

Pennsylvania. Pennsylvania's Public Employee Relations Act also permits strikes by public employees after mediation and fact finding have been exhausted. Otherwise a strike is illegal, even if precipitated by an unfair labor practice on the part of the employer. Guards at prisons and mental hospitals, and employees deemed essential to the operation of the courts have no right to strike, but have a right to binding arbitration after mediation has been exhausted. The failure of the negotiating parties, or either of them, to submit to these dispute resolution procedures constitutes a failure to bargain in good faith. A strike which occurs after statutory procedures have been exhausted, can still be enjoined, but only if it is shown to create "a clear and present danger or threat to the health* safety or welfare of the public."

Section 801 of the act permits the negotiating parties to request mediation if negotiations have continued for twenty-one days and no agreement has been reached. In any event, the parties are required to seek mediation not later than 150 days prior to the employer's "budget submission date," which is defined as that date "by which under law or practice a public employer's proposed budget, or budget containing proposed expenditures applicable to such public employer is submitted to the Legislature or other similar body for final action." Mediators are supplied by the state Bureau of Mediation.

Should the impasse not be resolved by mediation within twenty days, but not later than 130 days prior to the employer's budget submission date, the Bureau of Mediation must notify the Pennsylvania Labor Relations Board, which has the statutory discretion to appoint either a one- or three-member fact finding panel. In effect, the parties have a maximum of twenty days to resolve their impasse through mediation before the Board can impose fact finding. The statute requires publication of the fact finder's report should the parties not accept the conclusions contained in it.

C. 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.

D. 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 MERC) which renders a decision on each matter in dispute.

On the other hand, a disadvantage occasionally 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.