

1977

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Frederick R. Kozak
University of Richmond

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Recommended Citation

Frederick R. Kozak, *Public Employee Collective Bargaining in Virginia: Perspectives and Direction*, 11 U. Rich. L. Rev. 431 (1977).
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COMMENT

PUBLIC EMPLOYEE COLLECTIVE BARGAINING IN VIRGINIA: PERSPECTIVES AND DIRECTION

*Collective bargaining for public employees can cause a number of problems, but the failure to examine seriously this possibility is an invitation to even greater problems. Conditions have changed and continue to change in the field of public employment. It is unwise to fail to recognize these changes and even more unwise to fail to respond to them.*¹

In order to appreciate the problems and challenges presented by public employee collective bargaining, one should first consider the tremendous growth of the public sector in recent decades. In 1946, there were approximately six million persons employed at all levels of government.² By 1974, the total stood at nearly fifteen million.³ The number of state and local government employees rose from about three and one-half million in 1946, to over eleven and one-half million in 1974.⁴

With this increase in the number of public employees, union membership has become an important issue in public sector labor relations. As of 1972, about fifty-two percent of all federal employees were covered by union agreements and about one million were union members.⁵ In state and local governments in 1972, about twenty-eight percent of all employees were covered by union agreements and over two and one-half million belonged to unions.⁶ The reasons given for public employee unionism range from the usual practical and economic considerations, to a desire to contribute to the decision-making process.⁷

Public employee unionism and collective bargaining are thus realities of modern government administration. The situation has triggered considera-

1. COMMISSION TO STUDY THE RIGHTS OF PUBLIC EMPLOYEES, INTERIM REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, H. DOC. NO. 28, at 21 (1975) (statement of J. Samuel Glasscock) [hereinafter cited as STUDY COMMISSION].

2. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS BULL. NO. 1865 (1975) [hereinafter cited as HANDBOOK]. The numbers of public employees in 1946 were 2.434 million federal and 3.567 million state and local (0.804 million state and 2.762 million local).

3. *Id.* The numbers of public employees in 1974 were 2.874 million federal and 11.794 million state and local (3.155 million state and 8.639 million local).

4. *Id.*

5. *Hearings on H.R. 12532, H.R. 7684 and H.R. 9324 Before a Special Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess.* 71 (1972).

6. *Id.*

7. See Brown, *Public Sector Collective Bargaining: Perspectives and Legislative Opportunities*, 15 WM. & MARY L. REV. 57 (1973) [hereinafter cited as *Public Sector*].

ble response at both the state and national levels.⁸ The purpose of this comment is to analyze how other jurisdictions have dealt with collective bargaining in the public sector and compare this to the existing judicial and legislative posture on the issue in Virginia.

NATIONAL RESPONSE

In 1959, Wisconsin became the first state to pass legislation authorizing public employee collective bargaining.⁹ Federal action followed in 1962 when President Kennedy extended organizational and collective bargaining rights to federal employees.¹⁰ Executive Order No. 11,491, issued in 1969, added further provisions and created a Federal Labor Relations Council to administer the procedures already established.¹¹

On the state level, legislative action has developed rapidly in the past decade. There are now thirty-six states with some form of legislation expressly authorizing collective bargaining in the public sector.¹² Statutes authorizing mutual collective bargaining for all state and local employees are in force in twenty-three states.¹³ Another thirteen states have separate laws covering one or a number of specific groups of employees.¹⁴

There are thirteen states which have no bargaining legislation.¹⁵ The case law in four of these states prohibits public employees from bargaining

8. For an overview of the area, a list of cases and a bibliography, see H.D. JASCOURT, *PUBLIC SECTOR LABOR RELATIONS: RECENT TRENDS AND DEVELOPMENTS* (Council of State Governments pub. 1975) [hereinafter cited as *TRENDS AND DEVELOPMENTS*].

9. WIS. STAT. ANN. § 111.70 (1974) (authorizing municipalities to collectively bargain with their employees).

10. Exec. Order No. 10,988, 3 C.F.R. 521 (1959-63 Compilation), *revoked*, Exec. Order No. 11,491, 3 C.F.R. 254 (1974), 5 U.S.C. § 7301 (1970). This was a comprehensive order which guaranteed the right to negotiate a written contract, established election procedures and unfair labor practices, contained a strong management rights clause, placed wages and hours outside the scope of collective bargaining and established advisory arbitration for grievances.

11. 3 C.F.R. 254 (1974), 5 U.S.C. § 7301 (1970).

12. LABOR-MANAGEMENT SERVICES ADMINISTRATION, DIVISION OF PUBLIC EMPLOYEE LABOR RELATIONS, U.S. DEP'T OF LABOR, *SUMMARY OF STATE POLICY REGULATIONS FOR PUBLIC SECTOR LABOR RELATIONS* (1975) [hereinafter cited as *STATE SUMMARY*]. State statutes vary widely in the manner in which they deal with basic provisions and procedures associated with collective bargaining. For a discussion of the ways these statutes differ on issues of coverage, administrative machinery, representation questions, bargaining obligations, impasse procedures, strike resolution and union security arrangements, see *Public Sector*, *supra* note 7, at 63-78.

13. *STATE SUMMARY*, *supra* note 12.

14. *Id.* The most common groups singled out for separate legislation are teachers, police officers and fire fighters.

15. *Id.*

collectively absent express statutory authority.¹⁶ In the rest of the states lacking legislative guidelines, courts have upheld the validity of voluntary collective bargaining.¹⁷ One state has a statute which expressly prohibits public sector collective bargaining.¹⁸

Most of the statutes authorizing public employees to bargain collectively include provisions which expressly prohibit strikes.¹⁹ A limited right to strike is recognized, however, in seven states.²⁰ Where this right exists, only non-essential employees are allowed to strike; even then, the activity may be enjoined if it poses a threat to the public health or safety.²¹

Public employee labor relations affect government at all levels throughout the country. Problems in this area may be of national as well as local consequence. If state action is sluggish or inadequate to handle the situation, Congress may step in to preempt state authority. Indeed, proposals for federal legislation covering both state and federal employees regularly appear in Congress.²² The bills introduced suggest action ranging from the creation of a federal public sector labor relations board,²³ to extending the National Labor Relations Act to cover all state and local employees.²⁴

PUBLIC SECTOR LABOR RELATIONS IN VIRGINIA

Like most other states, Virginia law expressly prohibits public employee strikes.²⁵ The Code is silent, however, on the general question of collective bargaining in the public sector.²⁶ This silence has raised several questions as to: (1) whether public employees in Virginia have a constitutional right to organize and join unions; (2) whether public employees have a constitutional *right* to bargain, or public employers a *duty* to bargain and (3) whether agreements reached through voluntary bargaining are legally enforceable.²⁷

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* "Non-essential" employees are those whose presence is not required to maintain the health and safety of the community.

22. TRENDS AND DEVELOPMENTS, *supra* note 8, at 10.

23. H.R. 1488, 94th Cong., 1st Sess. (1975).

24. H.R. 77, 94th Cong., 1st Sess. (1975). For a discussion of such legislation and considerations of federalism, see Petro, *Sovereignty and Compulsory Public-Sector Bargaining*, 10 WAKE FOREST L. REV. 25, 40, 160 (1974) [hereinafter cited as *Sovereignty*].

25. VA. CODE ANN. § 40.1-55 (Repl. Vol. 1976).

26. The one exception is that public transit employees have been granted statutory bargaining rights. VA. CODE ANN. § 15.1-1357.2 (Cum. Supp. 1976).

27. See Brown, *Public Sector Collective Bargaining: An Emerging Reality*, 2 VA. B.J. 7

The Right to Organize

The right of public employees to join unions was first confronted by the Supreme Court of Virginia in 1935.²⁸ In that case, the court denied fire fighters in the City of Norfolk the right to join unions. The issue came up again in 1955 before the Law and Chancery Court of the City of Norfolk,²⁹ and the trial court followed the earlier court decision that local governments could bar fire fighters from unionizing, adding that Virginia's right-to-work law did not apply to public employees.³⁰

In 1946, the General Assembly adopted Senate Joint Resolution 12³¹ which stated that it was against the public policy of Virginia for any public employer to recognize or negotiate with a labor union acting as a representative of any public employees.³² The Resolution did allow public employees to form organizations not affiliated with any labor union to discuss conditions of employment. While Senate Joint Resolution 12 has sometimes been treated by public employers as a definitive statement of the law in Virginia,³⁴ the courts have held that it is merely a statement of public policy and does not carry the force of law.³⁵

The viability of these early Virginia decisions and Senate Joint Resolution 12 was seriously undermined by federal court decisions recognizing the constitutional right of public employees to organize.³⁶ In several 1970 opinions, the Attorney General of Virginia acknowledged that public employees do have the right to unionize,³⁷ and, in 1971, a federal district

(1976). This article also suggests the role an attorney might play in public sector bargaining relationships in Virginia.

28. *Carter v. Thompson*, 164 Va. 312, 180 S.E. 410 (1935).

29. *Verhaagen v. Reeder*, Law No. C.447 (Ct. of L. and Ch. of the City of Norfolk, 1955), *appeal denied*, 198 Va. 1xxix (1956), *cert. denied*, 353 U.S. 974 (1957).

30. *Id.*

31. S.J. Res. 12, 1946 Va. Acts 1006.

32. *Id.*

33. *Id.*

34. Address by Attorney General of Virginia Andrew P. Miller, Conference on Labor-Management Relations in the Public Sector, Oct. 16, 1975, at 3-4 [hereinafter cited as Address].

35. *Fire Fighters Local 794 v. City of Newport News*, 307 F. Supp. 1113, 1115 (E.D. Va. 1969). See also H.J. Res. 108, Va. Gen. Assembly (1976), which proposed that S.J. Res. 12 no longer reflected the public policy of Virginia. H.J. Res. 108 was referred to the Committee on Labor and Commerce and was carried over to the 1977 session.

36. See generally *American Fed'n of State Employees v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969) (three-judge court); Comment, *The Unclear Boundaries of the Constitutional Rights, Public Employees*, 44 U.M.K.C. L. REV. 389, 400 (1976).

37. 1969-70 VA. ATT'Y GEN. OP. 158, 231.

court in Virginia held a local ordinance forbidding fire fighters' organizations to affiliate with a labor union unconstitutional because it denied employees the right to associate.³⁸ Finally, the Virginia right-to-work law was amended so that it now clearly provides that public employees have the right to join unions.³⁹

The Right of Employees and the Duty of Employers to Bargain Collectively

Granted the right to join unions, the question remains whether public employees in Virginia may collectively bargain. Absent statutory language, the primary source of guidance on the issue has been Attorney General's Opinions.⁴⁰ The Attorney General has summarized his position as follows:

1. Absent express legislative authority to do so, public employers in Virginia cannot collectively bargain with their employees;
2. Public employers have the authority to meet with their employees to discuss matters of mutual interest and adopt agreements embodying the points agreed upon in the discussions;
3. The public employer must retain the right to make the final decision in such matters;
4. If discussions are held with one group of employees, the right to be heard cannot be denied to other groups of employees or individual employees; and
5. If discussions are held with a governing body or a schoolboard, they must be open to the public; if they are conducted by employees of such governmental entities, they need not be open.⁴¹

The right of public employees in Virginia to bargain collectively has been considered in two federal court decisions.⁴² The Attorney General has stated that these decisions are consistent with his position that public employees do not have the right, and public employers do not have the authority, to collectively bargain.⁴³ In one of these cases the court did state that public employees do not have a constitutional right to bargain collec-

38. *Carroll v. City of Norfolk*, Civil No. 524-70-N (E.D. Va., April 20, 1971).

39. VA. CODE ANN. §§ 40.1-58 *et seq.* (Repl. Vol. 1976).

40. *See* 1974-75, ATT'Y GEN. OP. 78; *id.* at 22; *id.* at 76; 1969-70 VA. ATT'Y GEN. OP. 158; *id.* at 231.

41. Address, *supra* note 34, at 11.

42. *Teamsters Local 822 v. City of Portsmouth*, Civil No. 75-184-N (E.D. Va., Aug. 11, 1975); *Fire Fighters Local 794 v. City of Newport News*, 339 F. Supp. 13 (E.D. Va. 1972).

43. Address, *supra* note 34, at 14.

44. *Fire Fighters Local 794 v. City of Newport News*, 339 F. Supp. 13 (E.D. Va. 1972). The constitutional right to organize and join unions has not been extended to include the right to

tively.⁴⁴ Both cases obscured, however, the issue of the employer's authority to bargain by holding that absent any legislative mandate public employers in Virginia are under no *duty* to bargain.⁴⁵ In concluding that a public employer can refuse to bargain collectively, the courts raised, by implication, the issue of whether a public employer may, if it chooses, bargain collectively with its employees.⁴⁶

The Legal Enforceability of Voluntary Collective Bargaining Agreements in the Public Sector

For some time now, at least nineteen local governing bodies within Virginia have been operating under collective bargaining agreements with some of their employees.⁴⁷ The validity of such agreements was tested in a recent Virginia case.⁴⁸ The agreements involved in *Commonwealth v. Board of Supervisors of Arlington County*⁴⁹ recognized the ultimate authority of the county board and the school board to make all final decisions preserved the right of individual employees to be heard, and specifically

collectively bargain. *Indianapolis Educ. Ass'n v. Lewallen*, 72 L.R.R.M. 2071 (7th Cir. 1969); *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969)(three-judge court); *Melton v. City of Atlanta*, 324 F. Supp. 315 (N.D. Ga. 1971) (three-judge court).

45. *Teamsters Local 822 v. City of Portsmouth*, Civil No. 75-184-N (E.D. Va. Aug. 11, 1975); *Fire Fighters Local 794 v. City of Newport News*, 339 F. Supp. 13 (E.D. Va. 1972).

46. *Id.*

47. STUDY COMMISSION, *supra* note 1, at 15.

48. Two cases were actually involved. *Commonwealth v. Board of Supv'rs of Arlington Cty.* At Law No. 18747 (Arlington Co. Cir. Ct., Oct. 1, 1976); *Commonwealth v. County School Bd.*, At Law No. 18748 (Arlington Co. Cir. Ct., Oct. 1, 1976)[hereinafter both cases will be referred to under the former style]. American Federation of State, County and Municipal Employees (AFSCME) Local 2407 is a voluntary association of approximately 500 county employees. The county has established a set of procedures whereby its non-managerial employees can, if they choose, form an employee organization for the purpose of meeting and conferring with the county in a good faith endeavor to reach an agreement concerning hours, wages and other terms of employment. In 1973, AFSCME Local 2407 negotiated a three-year agreement with the county. The county board ratified the agreement on June 5, 1973. Since the agreement expired on June 30, 1976, the parties negotiated a new two-year agreement. Brief for Respondents at 2, 4, *Commonwealth v. Board of Supervisors of Arlington Co.*, At Law No. 18747 (Arlington Co. Cir. Ct., Oct. 1, 1976).

For approximately ten years, the Arlington School Board has been negotiating wages, hours and working conditions for its teachers with its teachers' organization, the Arlington Education Association. If and when such negotiations produce mutual agreement, a written contract is prepared and executed by the school board and the employee representative. Brief for Respondents at 3, *Commonwealth v. County School Bd.*, At Law No. 18748 (Arlington Co. Cir. Ct., Oct. 1, 1976).

The purpose of these and other such agreements is to promote the efficiency of public services. See generally *Teachers Local 858 v. School District*, 314 F. Supp. 1069 (D. Colo. 1970).

49. At Law No. 18747, 18748 (Arlington Co. Cir. Ct., Oct. 1, 1976).

prohibited the employee organization from doing anything which would directly or indirectly authorize, cause, encourage, engage in or condone any strike.⁵⁰

The Commonwealth contended that the agreements were unlawful, void and unenforceable.⁵¹ The issue presented to the court was whether, absent any express statutory authorization or prohibition, a county board or a school board may adopt agreements⁵² reached through voluntary meetings with an employee organization.⁵³

Following a trend established in other jurisdictions,⁵⁴ the Arlington court ruled that the agreements were valid on the basis of implied authority.⁵⁵ The court observed that express constitutional⁵⁶ and statutory⁵⁷ provisions

50. *Id.*

51. *Id.*

52. The court did not refer to the agreements as collective bargaining. Collective bargaining is a phrase of art in the private sector, usually connoting the right to strike. The term raises ambiguities when used in the context of public employee labor relations. The Arlington court observed that there is no precise definition of collective bargaining, but if

collective bargaining merely connotes the process by which the principal respondents confer with employee representatives in an effort to reach an accord regarding wages, hours, and working conditions, then it is not inappropriate. However, if the term contemplates or includes the right to strike upon inability to agree; procedures for penalizing a party who refused to bargain in good faith or who engages in other unfair labor practices; then it would be completely inapposite as applied to the agreements in these cases.

Id. at 3.

53. *Commonwealth v. Board of Supv'rs of Arlington Cty.*, At Law No. 18747, 18748 (Arlington Co. Cir. Ct., Oct. 1, 1976).

54. In the absence of express statutory authority, several recent cases have upheld the validity of agreements between school boards and employee organizations on the basis of implied authority. See *Dole, State and Local Public Employee Collective Bargaining in the Absence of Explicit Legislative Authorization*, 54 IOWA L. REV. 539 (1969). See also *Chicago Div. of Ill. Educ. Ass'n v. Board of Educ.*, 76 Ill. App. 2d 456, 222 N.E.2d 243 (1966); *Louisiana Teachers Ass'n v. Orleans Parish School Bd.*, 303 So. 2d 564 (La. App. 1974), *cert. denied*, 305 So. 2d 541 (La. 1975); *Dayton Classroom Teachers Ass'n v. Dayton Bd. of Educ.*, 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975). A number of courts has gone on to say that although the public employer has no duty to bargain collectively, it may do so, if it chooses, on the basis of implied authority. *Cook County Police Ass'n v. City of Harvey*, 8 Ill. App. 3d 147, 289 N.E.2d 226 (1972); *State Bd. of Regents v. United Packing House Workers Local 1258*, 175 N.W.2d 110 (Iowa 1970). *But see Board of Educ. v. Scottsdale Educ. Ass'n*, 17 Ariz. App. 504, 498 P.2d 578 (1972).

55. *Commonwealth v. Board of Supv'rs of Arlington Cty.*, At Law No. 18747, 18748 (Arlington Co. Cir. Ct., Oct. 1, 1976).

56. VA. CONST. art. VIII, § 7 provides that the supervision of schools in each school division shall be vested in a school board.

57. General powers and responsibilities of local school boards are set out in VA. CODE ANN. §§ 22-1 to -358 (Repl. Vol. 1973). The general power of county boards to manage their affairs is contained in VA. CODE ANN. § 15.1-689 (Repl. Vol. 1973).

make the school board an independent local agency empowered with a general mandate to maintain and operate an efficient school system.⁵⁸ Specific grants of power authorize,⁵⁹ *inter alia*, the school board to employ teachers and enter into written contracts.⁶⁰ The court decided that the power to enter into the challenged agreements was implied from the general power to discharge statutory responsibilities and the specific power to enter into employment contracts.⁶¹

According to the *Arlington County* decision:

[T]he policy and agreements in each case, if not expressly authorized by the statutory authority given are impliedly authorized and should be upheld unless they are clearly contra to the public policy of this Commonwealth.⁶²

The public policy guidelines regarding collective bargaining agreements for state employees consist of Senate Joint Resolution 12 and Virginia Attorney General's Opinions. Considering Resolution 12 in the light of subsequent court decisions and statutory enactments,⁶³ the circuit court did not see it as a bar to the validity of the collective bargaining agreements.⁶⁴

The Attorney General's position has not been entirely clear. In 1970, he recognized that if a public employer negotiated, it would have to do so on the basis of implied authority, but since this rationale had met with little favor as a legal principle, he advised that the better practice would be to enact enabling legislation if bargaining was desired.⁶⁵ In another opinion he stated that although a school board could meet and discuss working conditions with employee organizations, any agreements reached would be of "doubtful enforceability."⁶⁶ In 1974, the Attorney General observed that there is no law in Virginia which specifically prohibits or permits public sector collective bargaining.⁶⁷ He advised, however, that the authority to

58. *Commonwealth v. Board of Supv'rs of Arlington Cty.*, Law No. 18747, 18748 (Arlington Co. Cir. Ct., Oct. 1, 1976).

59. VA. CODE ANN. § 22-203 (Repl. Vol. 1973) states the power of school boards to employ and dismiss teachers. VA. CODE ANN. § 22-217.2 (Repl. Vol. 1973) requires school boards to make written contracts with teachers.

60. *Commonwealth v. Board of Supv'rs of Arlington Cty.*, Law No. 18747, 18748 (Arlington Co. Cir. Ct., Oct. 1, 1976).

61. *Id.*

62. *Id.* at 14.

63. See p. 434 *supra*.

64. *Commonwealth v. Board of Supv'rs of Arlington Cty.*, Law No. 18747, 18748 (Arlington Co. Cir. Ct., Oct. 1, 1976).

65. 1969-70 VA. ATT'Y GEN. OP. 158.

66. *Id.* at 232.

67. 1974-75 VA. ATT'Y GEN. OP. 77.

bargain collectively cannot be implied from general powers granted localities.⁶⁸ In a later opinion he again stated his position that a public employer may not collectively bargain absent express statutory authorization, but it may adopt agreements reached through discussions with employees provided it retained the right to make final decisions over such matters.⁶⁹

The court decided that the *Arlington County* agreements substantially conformed to the kind of agreements the Attorney General indicated public employers could make with their employees.⁷⁰ The *Arlington* court ruled, therefore, that upholding the legality of the agreements did not violate the public policy of Virginia.⁷¹

Another argument raised by the Commonwealth in *Arlington County* was that the agreements represented an unlawful delegation of legislative responsibility. The court rejected that argument in view of the fact that the public employer retained the right of final decision on all agreements. Furthermore, under the agreements, the public employer had the right to decide not to agree at all. The agreements were voluntary and the employer did not surrender any decision-making authority. Therefore, there was no unlawful delegation of legislative prerogative.⁷²

In the absence of legislative guidelines, then, the Virginia courts have fashioned a piecemeal collection of public employee rights. The courts have recognized that "[t]he grant of approval to organize and associate without the corresponding grant of recognition may well be an empty and meaningless gesture. . . ."⁷³ In an attempt to deal with this situation, the court in *Arlington County* took the first step toward establishing in Virginia the public employer's implied authority to bargain collectively with its employees. Although the courts have been pressed into service in this area, it has been strongly suggested that the "employer-employee relationship in the government sector is a legislative matter."⁷⁴

68. *Id.*

69. *Id.* at 22.

70. *Commonwealth v. Board of Supv'rs of Arlington Cty.*, Law No. 18747, 18748 (*Arlington Co. Cir. Ct.*, Oct. 1, 1976).

71. *Id.* The *Arlington County* decision will be appealed to the Virginia Supreme Court. The courts in nine of the thirteen states without enabling legislation have upheld the validity of voluntary collective bargaining agreements. Despite the ruling in *Arlington County* that the agreements do not violate public policy, however, the weight of the Attorney General's Opinions indicate his belief that enabling legislation is a prerequisite to lawful collective bargaining in the public sector. The Virginia Supreme Court may take this to be the prevailing state of public policy and decline to enforce the agreements without legislative authority.

72. *Id.* at 18.

73. *Richmond Educ. Ass'n v. Crockford*, 55 F.R.D. 362, 364 (E.D. Va. 1972).

74. *Fire Fighters Local 794 v. City of Newport News*, 339 F. Supp. 13, 17 (E.D. Va. 1972).

RECENT LEGISLATIVE ACTION IN VIRGINIA

In response to the increased activity in the field of public employee labor relations, the General Assembly in 1972 created a commission to study the rights of public employees.⁷⁵ Of the several recommendations offered by the commission in its 1973 report, two were enacted into law. The first placed public employees within the coverage of Virginia's right-to-work law;⁷⁶ the second created a grievance system for public employees.⁷⁷

Other legislative proposals seeking to establish a labor relations law were defeated in 1973. The defeated proposals included three variations of a meet and confer bill,⁷⁸ and another bill⁷⁹ which would have legalized collective bargaining contracts between public employers and public employees. Similar enabling legislation⁸⁰ has been proposed in 1974, 1975 and 1976; none has made it out of committee.

75. H.J. Res. No. 122, 1972 Va. Acts 1645.

76. VA. CODE ANN. § 40.1-58 *et seq.* (Repl. Vol. 1976).

77. *Id.* § 15.1-7.1 (Cum. Supp. 1976).

78. H.B. 1768, H.B. 1808, S.B. 906, Va. Gen. Assembly (1973).

79. H.B. 1891, Va. Gen. Assembly (1973).

80. The initial legislation has evolved and been refined into two proposals, the Public Labor-Management Relations Act (meet and confer bill), and the Public Labor-Management Contracts Act. In general, the legislation would accomplish the following:

- (1) Provide for an omnibus definition of a public employee in order to give broad effect to the recommended legislation;
- (2) prohibit strikes in the public sector; provide for an omnibus and broad definition of a strike; create a broad presumption that employees absent or abstaining from work during a strike are engaging in a strike and further provide that the employees in violation of the strike prohibition be penalized as provided under the public employer's personnel rules;
- (3) create a cause of action in favor of a public employer which suffers damages caused by an employee organization acting in violation of the strike prohibition;
- (4) provide for injunctive relief against conduct violative of the strike prohibition and establish factors for a court to consider when determining the contempt penalty for noncompliance with its orders;
- (5) permit the imposition of the loss of pay of two days pay for each day of a violation and permit the employee to be placed on probation for a one-year period;
- (6) permit the public employer to impose additional penalties in its personnel rules for the violation of the strike prohibition;
- (7) permit localities and other public employers to decide whether they wish to undertake contract negotiations with public employees or their representatives;
- (8) require that contracts between public employers and public employee's organizations expressly shall provide for the retention of management prerogatives;
- (9) provide that contracts between public employers and public employees' organizations are not to be binding until approved by the governing body of the public employer;
- (10) permit a public employee to take his grievances directly to his employer provided that the employer allows this and any resulting adjustment is not inconsistent with any contract governing the rights between the public employer and the public employees.

STUDY COMMISSION, *supra* note 1, at 14-15.

Opposition to these Virginia proposals echoes the traditional objections to public sector collective bargaining.⁸¹ The basic argument is that collective bargaining is meaningless unless supported by the right to strike; that despite express statutory prohibition states which have adopted collective bargaining or meet-and-confer legislation have experienced an increase in strikes;⁸² that collective bargaining thus invites strikes⁸³ and that therefore public sector collective bargaining is incompatible with governmental sovereignty.

The threat to governmental sovereignty assumes two forms.⁸⁴ One is that labor unions, utilizing the strike weapon, will overpower democratically elected governments and dictate policy.⁸⁵ The other danger is that if disputes are submitted to compulsory arbitration as an alternative to the strike, the final decision regarding the wages and working conditions of public employees will rest in the hands of a panel of arbitrators. Since the wages of public employees affect the economic burden placed on taxpayers, and since the power to tax is vested solely in the legislature, compulsory arbitration thus constitutes an illegal delegation of legislative power.

The damage potential of public employee unionism is heightened by the inherent differences in the public and private sectors. The capacity of private sector unions to inflate costs and prices is limited by profit-seeking, supply and demand. Such market checks, however, do not prevail in the public sector. Government agencies are not bound by the duty to make a profit. Furthermore, government agencies are often the sole providers of

81. *Id.* at 5-8.

82. In 1960, there were thirty-six strikes by government employees. The first appreciable increase in strike activity came in 1966, when there were 133 strikes. This was about the time when many states were enacting collective bargaining legislation. In 1973, there were 387 strikes by public employees. The number of strikes at various levels of government was as follows: federal-1; state-29; county-40; city-95; school district-210; other local government-14. HANDBOOK, *supra* note 2.

83. In the federal sector, where executive orders have established comprehensive bargaining procedures, there were only eight strikes in the eight year period from 1966-1973. HANDBOOK, *supra* note 2. One might hypothesize that the increase in strikes among state and local employees was due to the rapid growth in the number of these employees and the lack of uniform, sophisticated legislation to deal with their problems.

84. See *Sovereignty*, *supra* note 24, at 103-07, 138-39.

85. Several of our nation's greatest cities can attest to the potential danger of public employee strikes and the economic burden of unchecked union demands. The San Francisco Board of Supervisors, however, obeying the mandate of voters, recently cut back employee pay scales and demonstrated government's ability to stand up to the unions. 122 CONG. REC. E2,411 (daily ed. May 6, 1976). Some members of Congress recognize that the purpose of public sector bargaining legislation is to prevent such confrontations by providing a systematic approach of reaching agreements and settling disputes. 121 CONG. REC. E5,295 (daily ed. Oct. 7, 1975) (remarks of Rep. Mineta).

essential services; the brief interruption of which carries the danger of extensive harm to the community. "The extortionate possibilities open to public sector unionization are thus extraordinary in comparison with those available to private-sector unions."⁸⁶

In addition to these general considerations, Virginia legislators opposing collective bargaining feel that public employee problems are solvable under existing state law.⁸⁷ They point out that House Joint Resolutions Nos. 207, 208 and 209⁸⁸ further provide for periodic evaluation of wages and working conditions, require every public employer to include its employees in the development of policies which affect working conditions and require that public employees be compensated in proportion to their service to the public.

Proponents of the Virginia proposals authorizing collective bargaining argue that the legislation is not a threat to the authority of the Commonwealth and its local bodies.⁸⁹ No governing body is required or compelled to reach any agreement; the legislation merely provides that if an agreement is reached it is a valid agreement if done pursuant to the terms of the bill. Final approval of all agreements is reserved to the governing body. Advocates of the bill further contend that the stringent sanctions enforcing the strike ban will prove an effective deterrent to such activity.⁹⁰

On a theoretical plane, supporters of collective bargaining feel that state employees, as citizens, are entitled to the same rights and privileges, excluding the right to strike, enjoyed by privately employed persons. Due to the increased number of public employees, individual bargaining is feeble and impractical. Enlightened management principles notwithstanding, advocates of collective bargaining are convinced that public employee rights cannot be fully realized without legislation.⁹¹

EPILOGUE — THE VIRGINIA SUPREME COURT SAYS NO TO COLLECTIVE BARGAINING

On January 14, 1977, the Virginia Supreme Court⁹² reversed the decision of the trial court in the *Arlington County* case.⁹³ The court ruled unanimously that the Arlington County Board of Supervisors and School Board

86. *Sovereignty*, *supra* note 24, at 62.

87. The laws referred to are the public employee grievance procedures and the amendment to Virginia's right-to-work law giving public employees the right to join unions. *See* p. 440 *supra*.

88. H.J. Res. Nos. 207, 208 and 209, Va. Gen. Assembly (1973).

89. STUDY COMMISSION, *supra* note 1, at 16-19.

90. *See* note 80 *supra*.

91. STUDY COMMISSION, *supra* note 1, at 19.

92. *Commonwealth v. County Bd.*, Record No. 761421 (Va. Sup. Ct., Jan. 14, 1977).

93. *Commonwealth v. Board of Supv'rs of Arlington Cty.*, at Law No. 18747, 18748 (Arlington Cty. Cir. Ct., Oct. 1, 1976).

do not have the implied power to engage in collective bargaining with their employees.⁹⁴ The policies of the local boards permitting collective bargaining are therefore invalid and the agreements reached through collective bargaining are void.⁹⁵

In determining whether the boards' policies permitted and the agreements constituted collective bargaining, the court considered three factors: (1) the prohibition of strike activity; (2) the preservation of the right of individual employees to be heard and (3) the recognition of the ultimate authority of the local boards to make all final decisions.⁹⁶ The trial court said that these three qualifications were adhered to in the boards' policies and thus the contracts did not constitute collective bargaining agreements.⁹⁷

The supreme court, however, decided that although the policies and state law prohibit strikes,⁹⁸ the other two conditions were not met. The boards' policies purported to preserve the right of an individual employee to represent himself or to select his own representative in negotiations and grievance procedures, but this right was effectively curtailed once the organization was recognized as the exclusive bargaining representative of all employees.⁹⁹ In addition, the court determined that the boards had relinquished some final decision making power to the employee organizations, particularly in regard to the effect of commitments made in the agreements and the freedom of the boards to modify the agreements.¹⁰⁰

These considerations led the court to conclude that, in fact, the contracts were collective bargaining agreements. The court admitted that:

It is doubtless true that the collective bargaining involved here does not bear all the characteristics attributable to that term in the industrial sector. But there can be no question that the two boards involved in this case, by their policies and agreements, not only have seriously restricted the rights of individual employees to be heard but have also granted to labor unions a substantial voice in the boards' ultimate decision in important matters affecting both the public employer-employee relationship and the public duties imposed by law upon the boards.¹⁰¹

The court then turned to the question of whether the local boards had

94. *Commonwealth v. County Bd.*, Record No. 761421 (Va. Sup. Ct., Jan. 14, 1977) at 26.
95. *Id.*

96. *Id.* at 14-17.

97. *Commonwealth v. Board of Supv'rs of Arlington Cty.*, at Law No. 18747, 18748 (Arlington Cty. Cir. Ct., Oct. 1, 1976).

98. *Commonwealth v. County Bd.*, Record No. 761421 (Va. Sup. Ct., Jan. 14, 1977) at 14, 18.

99. *Id.* at 18.

100. *Id.* at 16-18.

101. *Id.* at 18.

the power to collectively bargain with labor organizations.¹⁰² Absent express statutory authority, it would have been necessary for the court to infer the existence of this power from general language authorizing the boards to hire employees and enter into contracts or to declare collective bargaining a reasonable exercise of the boards' discretionary powers in carrying out specific duties.¹⁰³

To infer the existence of a particular power from a power expressly granted, said the court, requires a finding of legislative intent.¹⁰⁴ The court found itself unable to make that finding, concluding that:

[T]he recent Virginia history of public employee collective bargaining is persuasive, if not conclusive, that the General Assembly, the source of legislative intent, has never conferred upon local boards, by implication or otherwise, the power to bargain collectively and that express statutory authority, so far withheld, is necessary to confer the power.¹⁰⁵

It is clear from this decision that the court believes that any judicial approval at this time of public employee collective bargaining would "constitute the creation of a power that does not exist or, at least, the expansion of an existing power beyond rational limits."¹⁰⁶ The issue is thus squarely before the legislature. The need for a legislative solution is echoed by the court in its final comment that:

We are faced in this case with overwhelming indications of legislative intent concerning the concept of collective bargaining in the public sector. For this court to declare that the boards have the power to bargain collectively, when even the wisdom of incorporating the concept into the general law of the Commonwealth is the subject of controversial public and political debate, would constitute judicial legislation, with all the adverse connotations that term generates. Conscious of the respective roles of the General Assembly and the judiciary, we decline to intrude upon what the Attorney General succinctly describes as a 'singularly political question.'¹⁰⁷

CONCLUSION

The Virginia Supreme Court has now stated that public employers may not collectively bargain with their employees without express statutory authority. This decision, however, is not the end of the problem, but hopefully the beginning of a legislative solution. The number of public employees will continue to grow and a workable accommodation is obviously required.

102. *Id.*

103. *Id.* at 26.

104. *Id.*

105. *Id.* at 27.

106. *Id.* at 26.

107. *Id.* at 29-30.

Perhaps the greatest bar to rational legislative consideration of the problems involved is one of semantics. Collective bargaining is an ambiguous term which perhaps should be eliminated from the vocabulary of public sector labor relations. Due to inherent differences between the public and private sectors, collective bargaining for public employees does not, indeed cannot, carry the same meaning as collective bargaining for private employees.

What is needed in the public sector is a uniform, comprehensive and sophisticated framework within which public employers and public employees can reach agreements and resolve disputes in an orderly fashion. Such procedures are collective in the sense that the employer meets with a representative instead of individual employees; they are bargaining in the sense that the aim is to reach a mutually satisfying accord subject to such safeguards as no-strike provisions and the preservation of ultimate authority in the governing body.

Furthermore, legislative responsibility in the area of public sector labor relations must be viewed in light of the real effect the Virginia Supreme Court decision will have on localities as they attempt to deal with the practical necessities of their situations. It is increasingly undesirable, if not impossible, for public employees to return to individual bargaining. Legislation must provide a viable alternative if tensions are to be avoided. Such legislation is needed to satisfy the legitimate interests of public employees; it is more urgently needed to preserve and protect governmental institutions and services.

Frederick R. Kozak

