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THE **SHEATHED SWORD**: PUBLIC-SECTOR UNION EFFICACY IN NON-BARGAINING STATES

Ann C. Hodges, William Warwick^{a1}

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I. Introduction

The American South has long been hostile territory for both collective bargaining and unionization.¹ Southern states have among the lowest unionization rates in both the public and private sectors, and until recently, the states that expressly prohibited or severely limited collective bargaining for one or more major groups of public employees were located in the South.² Recently, however, other states have moved to eliminate or severely restrict bargaining for public employees.³ In light of these changes, the southern states may provide a model of how labor relations might work in these states with newly enacted restrictions.

Perhaps no states have historically been more hostile to public-sector collective bargaining than Virginia and North Carolina. Both states statutorily forbid collective bargaining among *all* public employees⁴ and have some of the weakest worker protection laws in the *276 nation.⁵ Virginia is one of only two states that dropped in public-sector unionization numbers despite an increase in the number of public-sector employees.⁶ Although public-sector unions in Virginia and North Carolina operate in one of the most hostile legal and political climates in the country, many continue to successfully organize. Indeed, in some cases they thrive, offering hope to unions in states like Wisconsin, Tennessee, Idaho, and Oklahoma, which have recently curtailed bargaining. In the absence of collective bargaining, unions in Virginia and North Carolina have adapted and developed alternative and nontraditional means of advocating on behalf of their members.

Unions have done this in a variety of ways, with certain tactics being utilized in some sectors more than in others, and some strategies being more effective in certain geographical areas than in others. Moreover, while public-sector unions have often used divergent tactics, all rely upon their numbers and expertise to advocate for their members in state legislatures and before local administrative authorities.

Despite the successes, significant and daunting legal restrictions place public-sector unions in these states at a severe disadvantage. While many public-sector unions successfully advocate on behalf of their members, they are far less effective than they would be if the ban on public-sector collective bargaining were removed and other laws were changed. Unions in these states have very little, if any, say over the wages, hours, and working conditions of their members, and they can be ignored with little or no consequence. Moreover, the presence of a hostile political and legal climate discourages membership, which not only hurts members by limiting their ability to expand their base, but also limits the funds unions can raise to advocate on their members' behalf. While the relationship between unionization rates and favorable collective bargaining laws is a “chicken and egg” dilemma,⁷ the reality is that, regardless of the cause, hostile public and political opinion certainly dissuades individuals from joining unions.

Section I of this article briefly reviews the law in Virginia and North Carolina. Section II examines, in detail, many of the strategies and tactics unions have utilized, both successfully and unsuccessfully, in Virginia and North Carolina. Section III discusses the overwhelming challenges that public-sector unions, despite their success, still face under the laws and political climate in hostile states. Finally, *277 section IV offers a brief analysis of how unions in other states that prohibit or severely limit collective bargaining can emulate their successes and learn from their failures.

II. History of Collective Bargaining Laws in Virginia and North Carolina

As far back as 1946, the Virginia General Assembly passed a joint resolution in opposition to public-sector collective bargaining.⁸ The resolution did not have the force of law, however,⁹ and public-sector bargaining continued in Virginia. In fact, by 1970, nearly one out of every three teachers and many firefighters, police officers, and other government employees belonged to a union.¹⁰ Despite a series of commissions appointed to study the rights of public employees,¹¹ and numerous efforts to enact bargaining or “meet and confer” legislation in the 1970s,¹² Virginia remained a state without legal clarity until 1977, when the Virginia Supreme Court stepped in to fill the void.

In *Commonwealth of Virginia v. County Board of Arlington County*,¹³ the Virginia Supreme Court held that the legislature did not expressly or implicitly grant to localities the power to enter into collective bargaining agreements.¹⁴ Its rationale was that the Virginia legislature had never authorized collective bargaining for public employees and the 1946 Senate Joint Resolution declared public-sector collective bargaining to be against the public policy of Virginia.¹⁵

*278 While the case effectively ended collective bargaining in the public sector throughout Virginia, the legislative and political battles raged on, though at a much slower pace. In 1993, the legislature codified the 1977 ban on public-employee bargaining¹⁶ and defeated several bills to overturn a 1992 Comptroller Memo and Attorney General Opinion that allowed for deductions of union dues.¹⁷ Thus, today, public-sector collective bargaining remains illegal in Virginia by statute, but the right of public employees to join unions remains protected by both the 1993 law banning bargaining in the public sector and by the U.S. Constitution.¹⁸ Additionally, some Virginia public employers allow payroll deduction of union dues.¹⁹

North Carolina banned collective bargaining by statute much earlier than Virginia, in 1959.²⁰ As in Virginia, bargaining existed prior to the statute.²¹ This prohibition remains, although employees can join unions, and, as in Virginia, North Carolina unions have achieved some significant goals despite the legal obstacles. North Carolina law authorizes payroll deduction of union dues for public-sector unions with significant membership and allows localities to deduct dues for smaller organizations if they so choose.²²

III. Public-Sector Unions in Virginia and North Carolina Today

Despite the prohibitions on public-sector collective bargaining and the hostile political environments, many unions have adapted and developed a multitude of ways to be strong advocates for their members. While they continue to do this via traditional means, such as lobbying and providing members a voice at the state and local level, they have also relied heavily upon nontraditional means, such as community service programs. Moreover, while unions still face some daunting challenges and disadvantages, their efforts and successes provide *279 inspiration and tactics to unions throughout the country that face an increasingly hostile political climate and a revocation of collective bargaining rights.

One of the most common tactics utilized by public-sector unions is lobbying at the state level. This approach is multi-faceted and often involves organizing union members as much as it does the legislature. For instance, both the Virginia Education Association (VEA) and the Virginia State Police Association (VSPA) regularly organize “lobby days” where members can speak to their Delegate or Senator, attend a committee or General Assembly session, and talk with state officers of their organization.²³ In February of 2011, the organizations planned a rally day surrounding the debate on the budget bill that would have continued the underfunding of the Virginia Retirement System (VRS). Such rallies not only serve to put political pressure on state legislators, but they also raise awareness among union members.²⁴ Additionally, rallies allow union members from various regions across the state to meet and interact with one another, helping to develop not only camaraderie, but also the bond necessary to act as one voice when trying to effect change at the state level.

The VEA also encourages members to communicate with the legislature when it is not in session. It has developed a listserv for mass email, which includes the contact information for all legislators and state officials who wish to be included, as well as the contact information for all the local and state chapter leaders.²⁵ Members and locals may then use this listserv to communicate with their legislators throughout the year. This method of lobbying is critical to the VEA's strategy because it not only keeps members throughout the state talking and interacting, but also helps the VEA develop a permanent relationship with legislators, which separates them from organizations that communicate with legislators only during the legislative session.²⁶

In many ways and in many government units, local lobbying is even more important than lobbying at the state level. As one leader explained, while the General Assembly may control macro issues like school funding and curriculum, the local school boards and appointed officials determine issues like class size and work rules.²⁷ Thus, if a *280 union is unable to influence the individuals at the local level who are making the actual decisions about wages and conditions of employment, it does little good for the union to influence state leaders. By carefully using resources to lobby and advocate at both levels, unions can influence macro decisions, but they can also do what public-sector unions can do throughout the rest of the country--influence the local leaders who make decisions about wages and conditions of employment.

Along the same lines, public-sector unions work to elect and influence executive officials friendly towards their members' interests. The North Carolina Fraternal Order of Police (FOP) recently did this with Governor Bev Perdue in 2010. After giving Governor Perdue their support, the FOP worked with the Governor to develop an executive order that simultaneously grants public-sector unions more access to the workplace for recruiting and member education while limiting the power of the legislature to deny such access.²⁸

Public-sector unions also do this at the local level. In fact, for education unions, friendly local leaders can be the difference between effective communication and unproductive hostility.²⁹ Nowhere is this a bigger threat than in education, where a rural school district may elect an all-new school board, which then thanks the union for its decades of cooperation and aid, but decides that it does not need to work with the union any longer.³⁰ As one union leader explained, when it comes to dealing with local officials and administrators, there are “no permanent friends, and no permanent enemies.”³¹

An additional way public-sector unions advocate on behalf of their members is by providing critical expertise to state and local legislative and administrative bodies on various issues. When a school board needs to know how student behavior is affected by the student-teacher ratio, or when a police department needs to know the effects on morale of having “ride along” partners on night patrol, the unions that represent these employees are in an advantageous position: they are the most accessible body with such information and often the cheapest organization from which to obtain it.³² For example, the VEA funds continuous studies regarding student test scores, student behavior, and curriculum effectiveness so it can have that information ready and

***281** available for its own lobbying purposes. The VEA also provides this information, often free of charge, to state and local leaders when requested.³³ This helps further develop rapport between unions and state and local officials.³⁴

Another traditional way unions advocate for public-sector workers is through legal and administrative representation. This can also take many forms--from educating employees on their federal and state legal rights, to providing access to attorneys when members are facing lawsuits, to representing or advising employees in administrative hearings. Regardless of the legal arena, public-sector unions become a very conspicuous presence when their members are accused of wrongdoing.³⁵ Some unions are especially prominent in this area: members of the VEA receive free legal assistance and liability insurance when accused of wrongdoing in their employment, in addition to discounted legal representation for accusations arising outside of their employment.³⁶ According to a former VEA president, this is both the most valuable benefit for members and one of the most powerful organizing tools for the union.³⁷ Not only do members receive a free or discounted attorney in exchange for union dues alone, but the union offers a safety net that provides services otherwise virtually unaffordable for the average teacher.

Public-sector unions do not only provide aid when their members face trouble in the courts. They also provide advice and counsel for members attempting to exercise their rights at the administrative level. The National Coalition of Public Safety Officers (NCPSO), which represents correctional officers in Virginia state prisons, provides staff assistance and research for individuals filing grievances through the state's grievance procedure.³⁸ While unions cannot file the grievance or address the issue directly with the employer, they nevertheless work to ensure that the grievance is well-drafted and the member is well-represented.³⁹ The VEA runs a similar program for members filing compensation or disability claims if they have been injured on the job.⁴⁰

***282** An alternative method for advocating through litigation is for unions to bring their own legal actions. The United Electrical, Radio, and Machine Workers of America (UE), with the aid of the North Carolina AFL-CIO, filed a claim against the State of North Carolina alleging that it had violated international law by prohibiting collective bargaining, a right deemed fundamental by the International Labor Organization (ILO).⁴¹ In 2007, the ILO ruled for the unions, holding that North Carolina, and thus the United States, was in violation of international law.⁴² While this has had no material effect on the statutory prohibition in North Carolina, it provides moral superiority for the unions in their fight, and, by gaining positive publicity, could potentially boost unionization rates throughout the state.⁴³

Unions do more than just advocate for their members in the political, legislative, and administrative arenas; they also provide tools and resources that help their members become better employees. The VEA, North Carolina Association of Educators, and American Federation of Teachers-affiliated local unions provide periodic seminars and workshops on various skills that are designed not only for new teachers, but also experienced and veteran teachers looking to sharpen or refresh their skills.⁴⁴ The NCPSO provides highly discounted or free classes to members who want to hone their self-defense and conflict resolution skills.⁴⁵ The Virginia State Firefighters Association (VSFA) provides product reviews and recommendations, as well as workplace safety advice, to make sure its members are not only the best employees in the market, but that they are also protecting themselves and those they serve.⁴⁶ The North Carolina State Firemen's Association provides an advanced firefighter certificate based on education and training.⁴⁷ All of these services do more than just encourage membership in the union; they also provide critical services to the state at no cost, saving taxpayer money.

Public-sector unions throughout the state also use their numbers and influence to provide group discounts and benefits that their members can use both professionally and personally. The VEA offers access ***283** to discounted classroom supplies, as well as home loans, credit cards, and retirement villages.⁴⁸ Similarly, the VSFA offers discounted access to fire protection

gear as well as used cars and insurance.⁴⁹ Individuals who take advantage of only one or two of these discounts may save more than they pay in dues.⁵⁰

In addition to the benefits public-sector unions offer to members in the political, legal, and professional realms, the unions remain very active in their communities. Because of the anti-union legal and political climate, unions have to work very hard to counter their generally negative public perception. One of the key methods of accomplishing this has been exceptional community activism.⁵¹ By reinventing their public image, unions not only encourage larger union membership as employees see the benefits of unions, but they also win community support, which is critical to changing the minds and perceptions of state and local leaders.

There are three overlapping tactics that public-sector unions utilize in trying to control and remake their public image. The first is community advertising, such as sponsoring baseball teams, buying ads in local newspapers, or purchasing billboard space along busy roads.⁵² The VEA has utilized billboard advertising very effectively; not only has membership increased as a result, but communities have become much more supportive of VEA members and their concerns.⁵³ Thus, the advertising campaign has helped educate communities about what the VEA stands for, and, more importantly, what it does for its members and the community. This transformation of public perception is invaluable as a recruiting tool, critical in winning support in local negotiations, and important in maintaining positive, healthy relationships with local officials.⁵⁴

The second method for developing public support is through community service initiatives. When the union explains, and then shows, that it is part of and cares wholeheartedly about the welfare of the community, the community is much more willing to support the union. Additionally, an inevitable byproduct of community support is exposure *284 to groups and individuals that otherwise would have no contact with organized labor, let alone organized labor in the public sector. When a local chapter of the NCPSO was considering an organizing drive at a correctional center in Virginia, it “adopted” the highway in front of the prison.⁵⁵ This aided the community, which had often complained of the condition of that stretch of highway, and it also created curiosity among public corrections officers working at the facility.⁵⁶ They were so interested, in fact, that the lead organizer had to call a meeting within the month to address all of the questions that officers were asking about how to form their own union.⁵⁷ The NCPSO has also had great success in community outreach by participating in and helping fund local events that are important to communities, such as parades and career nights in smaller, more rural towns throughout the state.⁵⁸

The third method that public-sector unions employ to gain public support is charitable support to communities, organizations, and individuals. Whether through scholarships, grants, financial donations, or provision of services to charities, public-sector unions provide opportunities to those who may not otherwise receive them, which not only helps that individual in the short term, but also aids the community in the long term. The Norfolk Federation of Teachers (NFT), through its national affiliation, has long utilized scholarships as a way both to motivate young people and to give back to the communities they serve by providing much-needed funds for college-bound students.⁵⁹ Additionally, the Virginia AFL-CIO frequently purchases tables at community events, provides awards for dedicated public servants at both the state and local level, and encourages member unions to donate their labor to localities or organizations.⁶⁰

Thus, while unions are advocating and protecting members legally and politically, they are also working hard to improve their own public image and that of their members. Whether through traditional advertising, community service and outreach, charitable donations and sponsorship, or some eclectic combination thereof, public-sector unions continue to work diligently to help effect positive change for their members. Additionally, they work to undo the damage that decades of an anti-union political and legal climate have done to their reputation. Virtually every public-sector union officer or organizer interviewed stated a

belief that advocating for their members at work or *285 at the state level was enhanced by having a positive relationship with the community their members serve.⁶¹

One of the most common and effective ways unions have been able to advocate in their members' workplace comes from establishing memoranda of understanding with the employer. This particular approach is very common in the education field, and it is the "method of choice" for the Virginia Education Association, the Norfolk Federation of Teachers, and the Fairfax County Federation of Teachers.⁶² Under this approach, the union and the employer, usually after months or years of communication, develop a professional relationship where both feel comfortable meeting and conferring about terms and conditions of employment. Both sides agree to abide by the agreement reached, which can encompass multiple issues or deal with only a single issue.⁶³ While these agreements are not binding on either party, out of mutual cooperation and respect for the relationship, both parties usually abide by them. Moreover, because there is no law dictating what subjects are mandatory or illegal, these agreements can be virtually unlimited in their scope. For example, in one school system, teachers became very frustrated with the administration because students removed from their classrooms for misbehavior would either never go to the office or would come back and tell friends that they were not really punished. This made discipline difficult for teachers because, although the students were often punished with detentions or suspensions, it emboldened other students to misbehave based on the lack of apparent consequences other than leaving the classroom. After meeting with the VEA, the school administration agreed to require a student, upon returning to class, to bring a note from the administrator to the teacher that explained the punishment assigned to the student. Thus, both the employer and the employees obtained an outcome that benefited both parties.⁶⁴

Another example involved a school system that provided sick days for teachers but no personal leave days.⁶⁵ The school administration was frustrated with the number of "sick" days teachers were using, and the teachers and union were frustrated that they had to utilize *286 their sick days when they needed a personal day to go to the doctor or travel to see an ill family member.⁶⁶ The union and the school administration reached a memorandum of understanding that created a new set of personal leave days for teachers in exchange for their agreement not to use sick days for any other purpose.⁶⁷ Interestingly, use of leave time dropped significantly as both parties felt respected and satisfied by the mutually beneficial agreement.⁶⁸

Memoranda of understanding have not only helped to harmonize relationships between school administrators and employees, but they have also improved governmental service. There is no better example of this than the success achieved by the Norfolk Federation of Teachers and the Norfolk Public School System. In 2005, the Norfolk Public School System, following the collaborative approach of its then-superintendent Dr. Stephen C. Jones, fostered relationships with community leaders, religious organizations, unions, businesses, and the government to make everyone accountable for the welfare of the schools.⁶⁹ Dr. Jones, the union, and the community were so successful at reinventing and strengthening the Norfolk Public School System that it was awarded the Broad Prize for the top urban school district in the country in 2005.⁷⁰ There is little doubt that without the cooperation between the school administration, the union, and the community, such a great success in such a short amount of time would not have been achievable.⁷¹

Even unions in sectors that have not traditionally utilized memoranda of understanding have been able effectively to advocate inside the workplace by developing and fostering personal relationships with employers. While they do not rely upon any sort of formal memoranda of understanding, the Virginia National Coalition of Public Safety Officers relies upon the mutually beneficial relationship they have developed with wardens and facility administrators.⁷² In fact, the NCP SO had little or no trouble convincing wardens to participate in "meet and *287 confer" sessions and to at least partially address the safety concerns of the union members.⁷³

There is also another traditional method by which public-sector unions advocate for their members in the workplace: economic weapons. Because it is illegal for public employees to strike in Virginia, the lack of “meet and confer” laws and the statutory prohibition on public-sector collective bargaining leave unions and their members with few options if a public employer refuses to cooperate or listen to union members' concerns. One union leader has said that he is much more likely to seriously consider using the strike as a way of forcing an employer to meet with the union if the state does not require employers to “meet and confer.”⁷⁴ However, he also concedes that he would only put his members' jobs at risk if the strike was intended to force a “meet and confer” about a safety issue.⁷⁵ Less dramatic, however, are uses of such economic weapons as “work-to-rule,” where employees refuse to perform any unpaid or volunteer assignments, or remove all personally purchased belongings from the workplace.⁷⁶ While every union official interviewed for this article said that economic weapons are never their first choice, all conceded that they would advise their use as a last resort if employers consistently refused to listen or discuss matters with the union or its members.⁷⁷

IV. Significant Challenges to Public-Sector Unions in States Without Bargaining

Unions in non-bargaining states have done an inspiring job of advocating for their members, despite some of the most hostile, anti-union political and legal climates in the country. With virtually no legal protection and in a culture where a shift of the political wind could mean their virtual extinction, unions still face daunting and dynamic challenges that perpetually threaten to undo decades of progress.

Foremost among the challenges public-sector unions face in Virginia is the total lack of legal protection for any agreements reached *288 with employers.⁷⁸ While employers and union leaders may reach agreements and perhaps even codify them in memoranda of understanding, the agreements largely depend on the goodwill between the organizations and, by extension, between the organizations' leaders. Once a union leader retires or a new manager takes over, the institutional memory of those agreements and their mutual benefit may be forgotten.⁷⁹ The VEA often struggles with this, particularly in more rural, “less progressive” districts where a political shift often brings into office officials who refuse to cooperate with the union based solely on ideology and principle.⁸⁰ Moreover, because it is impossible to tell when the political winds may shift, unions must be diplomatic and very careful never to burn bridges, lest they let emotion and frustration jeopardize any future possibility of a positive relationship.⁸¹

Similarly, the lack of any “meet and confer” requirement allows an employer to refrain from ever speaking to the union. While in some situations this may make employers more willing to talk, as they know they can end discussions at any time and without consequence, the union leaders interviewed unanimously agree that the lack of a “meet and confer” requirement has made it very difficult for them to convince employers to consult with the union.⁸² Moreover, in sectors that have historically not had union representation, employers are the least willing to talk, as they fear being the “idiot” who sets a precedent for the future. This is especially true for the NCPSO; any discussions it has with individual wardens must remain confidential because each warden fears inadvertently setting a de facto precedent for other wardens throughout the state.⁸³ While there are always alternatives to dealing directly with employers, such as working through a parent-teacher association or lobbying the legislature or local school board, there simply is no equally effective substitute for face-to-face discussions.⁸⁴

Similarly, the lack of an official process to designate a union as a bargaining representative places unions at a comparative disadvantage.⁸⁵ As a result, public-sector unions must maintain constant organizing drives in order to keep membership rates

high and demonstrate their strength. While unions would most likely do this anyway, the lack of any “rest” period and the cost of a perpetual organizing drive place a heavy burden on unions' resources.⁸⁶

*289 The absence of a “fair share” law places additional financial constraints on unions, as only members pay dues even though all employees benefit from union activity.⁸⁷ While unions can provide member benefits to members only, when they advocate at the state or local level, or improve working conditions and terms of employment through memoranda of agreement, all employees benefit, including non-members. One union leader called the persistence of these “freeloaders” one of the most frustrating parts of organizing, noting that it often creates friction in the workplace, which is, of course, counterproductive to the union's goals.⁸⁸

Perhaps the most ubiquitous challenge faced by public-sector unions in states like Virginia is the constant political, social, and legal attack not only on what they do, but also on their principles. Rather than being able to pour all of their limited resources and time into political lobbying, legal advocacy, organizing, and collective bargaining, unions have to spend substantial sums of money just to counter the constant negative stereotyping and misinformation spread by their very well-financed opponents.⁸⁹ If they do not, they let their opponents set the terms of the conversation about unionization. Moreover, they risk allowing their foes to scare potential members from even considering joining a union, as well as reinforcing the anti-union culture of the state, and spreading misinformation about the purpose and mission of organized labor.⁹⁰ Ultimately, the challenges of struggling under oppressive laws, developing relationships with reluctant employers, and judiciously spending limited funds are compounded by the fact that unions must do so in the wake of a preceding century of anti-union sentiment.⁹¹

V. Lessons for Public-Sector Unions Elsewhere

While, in this time of fiscal austerity, public-sector unions throughout the nation find their labor rights under attack, they can nevertheless learn from the tactics that Virginia and North Carolina public-sector unions have utilized for decades. In states such as Wisconsin, where many unions have had long and productive relationships with public employers, tactics such as memoranda of agreement are likely to be extremely useful. Moreover, unlike many southern states, where the political culture has historically been oppositional, public-sector unions in states with long bargaining histories can utilize these relationships with employers to maintain a conspicuous union presence in their members' *290 workplace.⁹² Of course, where bargaining has been mandatory, developing positive relationships with employers was not required, and where they do not already exist, they must be established to create the possibility of voluntary negotiations for nonbinding agreements. Even now, some localities in Wisconsin are willingly negotiating extension contracts with public-sector unions.⁹³ Additionally, in some instances, public-sector employers are even voicing opposition to the elimination of public-sector bargaining rights.⁹⁴

In Virginia, membership dropped substantially with the elimination of bargaining,⁹⁵ and unions in states with recent legislative changes restricting or eliminating collective bargaining may see similar reductions.⁹⁶ Unions will need to shift resources to organizing and maintaining membership to demonstrate the benefits that unions provide other than bargaining. The unions' political efforts to resist legislative change have mobilized workers in ways that will help in this effort. Further, unions that are able to retain the legality of deductions will benefit, as they must otherwise devote resources to collecting dues.⁹⁷

Unions will not face elimination in these states, however, no matter how hostile the political culture or legal climate because they will not have to invent all new tactics to adapt to the changing environment.⁹⁸ Public-sector unions in Virginia and North Carolina have created a blueprint for how unions can survive, and potentially thrive, no matter how antagonistic their states' labor laws. While such adaptations will inevitably bring challenges, and while there is no substitute for full collective

bargaining, it is important to realize that unions have, and will continue to develop, methods and tactics that will enable them effectively to advocate for their members and for workers as a whole.

*291 VI. Conclusion

Virginia and North Carolina have storied histories replete with anti-union sentiment and outright hostility. This legacy continues today. Yet, despite the harshness of the law, the hostility of the politics, and the misunderstanding of the culture of public-sector unions, many have acclimated, adapted, and learned to survive as strong worker advocates. Those in states newly deprived of substantial bargaining rights will do so as well.

Footnotes

- a1 Ann Hodges, Professor of Law at the University of Richmond, would like to acknowledge the financial support of the Hunton & Williams Summer Research Endowment Fund. William Warwick is a member of the Class of 2012 at the University of Richmond School of Law.
- 1 See RICHARD C. KEARNEY WITH DAVID G. CARNEVALE, LABOR RELATIONS IN THE PUBLIC SECTOR 32-33 (3d ed. 2001); Patrick W. Carlton & Richard T. Johnson, *Teacher-Board Relations in Virginia: A Case of Perceptual Discontinuity*, 10 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR. 267, 276-77 (1981); Lon S. Felker et al., *Public Sector Unionization in the South: An Agenda for Research*, 13 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 1, 8-9 (1984).
- 2 See *Teacher Rules, Roles, and Rights*, NAT'L COUNCIL ON TEACHER QUALITY, <http://www.nctq.org/tr3/scope> (last visited Dec. 12, 2011).
- 3 See Joseph E. Slater, *The Assault on Public Sector Collective Bargaining: Real Harms and Imaginary Benefits*, ISSUE BRIEF (Am. Constitution Soc'y, D.C.), June 2011, at 10-14, http://www.acslaw.org/sites/default/files/Slater_Collective_Bargaining.pdf (detailing changes in laws relating to collective bargaining); Martin H. Malin, *The Legislative Upheaval in Public-Sector Labor Law: A Search for Common Elements*, 27 A.B.A. J. LAB. EMP. L. 149 (2012). The Ohio legislation which severely restricted bargaining and eliminated bargaining rights for certain groups of employees was overturned by referendum on November 8, 2011. See Paul E. Kostyu, *Issue 2 Rejected, Overturning SB 5*, CINCINNATI.COM (Nov. 9, 2011, 12:45 AM), <http://news.cincinnati.com/article/20111108/NEWS0108/111090341/Issue-2-rejected-overturning-SB-5?odyssey=tab|topnews|text|FRONTPAGE>.
- 4 See VA. CODE ANN. § 40.1-57.2 (2011); N.C. GEN. STAT. § 95-98 (2011).
- 5 Ann C. Hodges, *Lessons from the Laboratory: The Polar Opposites on the Public Sector Labor Law Spectrum*, 18 CORNELL J.L. & PUB. POL'Y 735, 758-59 (2009).
- 6 *Id.* at 757 (citing Felker et al., *supra* note 1, at 8). The other state is Texas, which also severely limits bargaining. *Id.* For other evidence of Virginia's hostility to unions and bargaining, see *id.* at 759-61.
- 7 KEARNEY, *supra* note 1, at 29.
- 8 S.J. Res. 12, 1946 Gen. Assemb., Reg. Sess. (Va. 1946).
- 9 *Newport News Fire Fighters Ass'n, Local 794 v. City of Newport News, Va.*, 307 F. Supp. 1113, 1114-16 (E.D. Va. 1969).
- 10 Jeffrey F. Webb, *A Decade After Commonwealth v. County Board of Arlington: Public Employee Bargaining in Virginia Reconsidered*, 18 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 59, 61, 67 (1989); see also Robert R. Richards & Patrick W. Carlton, *Relative Deprivation and Teacher Militancy in Virginia: A Model and Its Application*, 12 J. COLLECTIVE NEGOTIATIONS PUB. SECTOR 355, 359 (1983) (noting that more than 30,000 public employees were covered by collective bargaining agreements in 1977).

- 11 Hodges, *supra* note 5, at 746-47. As a result of these commissions, the legislature passed a grievance procedure for public employees but failed to pass any legislation requiring bargaining, requiring employers to meet and confer, or making collective bargaining agreements enforceable. See VA. CODE ANN. § 2.2-3000 (2011); COMMONWEALTH OF VA., REPORT OF THE COMMISSION TO STUDY THE RIGHTS OF PUBLIC EMPLOYEES, H.D.-12, Reg. Sess., at 3 (1973); Hodges, *supra* note 5, at 746.
- 12 Dane M. Partridge, *Virginia's New Ban on Public Employee Bargaining: A Case Study of Unions, Business, and Political Competition*, 10 EMP. RESPS. & RTS. J. 127-29 (1997).
- 13 232 S.E.2d 30 (Va. 1977).
- 14 *Id.* at 41-42. In doing so, the court applied the “Dillon Rule,” derived from Iowa Supreme Court Chief Justice John Forrest Dillon's opinion in *Clinton v. Cedar Rapids & Missouri River Railway*, 24 Iowa 455 (1868). In the words of the *Arlington County* court, the “Dillon[] Rule [holds] that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable.” 232 S.E.2d. at 40 (citing *City of Richmond v. Cnty. Bd.*, 101 S. E.2d 641, 644-45 (1958)).
- 15 *Arlington Cnty.*, 232 S.E.2d. at 43.
- 16 VA. CODE ANN. § 40.1-57.2 (2011).
- 17 1992 Va. Op. Att'y Gen. 126, 1992 WL 533106.
- 18 VA. CODE ANN. § 40.1-57.2 (2011); *Thomas v. Collins*, 323 U.S. 516, 532 (1945).
- 19 Telephone Interview with Rob Jones, Dir. of Gov't Relations, Former President, Va. Educ. Ass'n (Mar. 15, 2011).
- 20 See N.C. GEN. STAT. § 95-98 (2011).
- 21 See *Atkins v. City of Charlotte*, 296 F. Supp. 1068, 1072 (W.D.N.C. 1969); Jason Burton & David A. Zonderman, *Where Did This Law Come From: A History of General Statute 95-98*, N.C. HOPE COALITION (Oct. 27, 2011), <http://nchope.org/adobe/GS9598history.pdf>.
- 22 N.C. GEN. STAT. § 143B-426.40A(g) (2011). This statute was amended by the North Carolina legislature in January 2012 to remove the authority of local boards of education to deduct union dues, but a temporary restraining order prevented the amendment from taking effect, as the court concluded that it was likely unconstitutional. Andrew Ballard, *North Carolina Court Temporarily Blocks Ban on Teachers' Association Dues Deduction*, Daily Lab. Rep. (BNA) No. 06, at A-9 (Jan. 10, 2012).
- 23 Interview with Rob Jones, *supra* note 19. In North Carolina, several public-sector unions employ lobbyists, and the unions have established a coalition to work for repeal of the collective bargaining ban. *Resolution in Support of Organized Labor*, N.C. COUNCIL OF CHURCHES (Mar. 2, 2004, 1:51 PM), <http://www.nccouncilofchurches.org/2004/03/resolution-in-support-of-organized-labor-in-north-carolina/> (last visited June 13, 2011).
- 24 Interview with Brian Dawe, Executive Dir., Am. Corr. Officer Intelligence Network, in Richmond, Va. (Mar. 16, 2011).
- 25 Interview with Rob Jones, *supra* note 19.
- 26 *Id.*
- 27 *Id.*
- 28 Randy Hagler, *Executive Order Gives Labor Groups Access*, FRATERNAL ORDER OF POLICE BLUENOTE (Mar./Apr. 2010), <http://www.ncfop.org/ht/a/GetDocumentAction/i/1613>. The Virginia AFL-CIO worked with former Virginia Governor Tim Kaine to issue a similar executive order, but intense political pushback and the election of a Republican successor doomed the effort. Telephone Interview with Doris Crouse-Mays, President, Va. AFL-CIO (Mar. 18, 2011).

- 29 Interview with Rob Jones, *supra* note 19.
- 30 *Id.*
- 31 *Id.*
- 32 *Id.*; Interview with Doris Crouse-Mays, *supra* note 28.
- 33 Interview with Rob Jones, *supra* note 19.
- 34 *Id.*
- 35 Interview with Chris Lane, President, Nat'l Coal. of Pub. Safety Officers--Va. Chapter, in Richmond, Va. (Mar. 16, 2011).
- 36 Interview with Rob Jones, *supra* note 19; *Join VEA*, VA. EDUC. ASS'N, <http://www.veanea.org/home/join-vea.htm> (last visited June 25, 2011).
- 37 Interview with Rob Jones, *supra* note 19.
- 38 Interview with Chris Lane, *supra* note 19.
- 39 *Id.*
- 40 *VEA Legal Services: Your Safety Net*, VA. EDUC. ASS'N, <http://www.veanea.org/home/legal-services.htm> (last visited Dec. 13, 2011); Interview with Rob Jones, *supra* note 19.
- 41 *Union Files Complaint with ILO Alleging State Violates International Labor Law*, Daily Lab. Rep. (BNA) No. 238, at A-3 (Dec. 13, 2005).
- 42 *ILO Recommendation Seen Aiding Push to Allow N.C. Public Employees Bargaining*, Daily Lab. Rep. (BNA) No. 64, at A-1 (Apr. 4, 2007).
- 43 Interview with Doris Crouse-Mays, *supra* note 28.
- 44 *Training and Workshops*, VA. EDUC. ASS'N, <http://www.veanea.org/home/training-and-workshops.htm> (last visited Apr. 24, 2011); *Professional Growth and Development*, N.C. ASS'N OF EDUCATORS, <http://www.ncae.org/cms/Professional+Growth+and+Development/46.html> (last visited July 29, 2011); Hodges, *supra* note 5, at 750.
- 45 Interview with Brian Dawe, *supra* note 24.
- 46 *See Read About VFSA*, VA. ST. FIREFIGHTERS ASS'N, <http://www.vfsa.org/about-the-vfsa> (follow "Read About VFSA" hyperlink) (last visited Dec. 13, 2011).
- 47 *Advanced FF Certificate*, N.C. ST. FIREMEN'S ASS'N, <http://www.ncsfa.com/index.php/about-ncsfa/advanced-certificate> (last visited Dec. 13, 2011).
- 48 *Member Savings*, VA. EDUC. ASS'N, <http://www.veanea.org/home/member-savings.htm> (last visited Apr. 24, 2011).
- 49 *See Member Resources*, VA. ST. FIREFIGHTERS ASS'N, <http://www.vfsa.org/about-the-vfsa/member-resources/> (last visited Dec. 13, 2011); *Objectives and Accomplishments*, VA. ST. FIREFIGHTERS ASS'N, <http://www.vfsa.org/about-the-vfsa/> (follow "Objectives and Accomplishments" hyperlink) (last visited Dec. 13, 2011). The North Carolina State Firemen's Association provides similar discounted benefits such as insurance, eye care, travel, and telecommunications products and services. *Benefits*, N.C. ST. FIREMAN'S ASS'N, <http://www.ncsfa.com/index.php/about-ncsfa/benefits-2> (last visited Dec. 13, 2011).
- 50 Interview with Rob Jones, *supra* note 19.

- 51 Interview with Brian Dawe, *supra* note 19.
- 52 Interview with Rob Jones, *supra* note 19.
- 53 *Id.*
- 54 *Id.*
- 55 *NCPSO Gives Back!*, NAT'L COAL. OF PUB. SAFETY OFFICERS, [http:// www.cwa2201.org/index.cfm?zone=/unionactive/view_article.cfm&HomeID=169120](http://www.cwa2201.org/index.cfm?zone=/unionactive/view_article.cfm&HomeID=169120) (last visited Apr. 24, 2011).
- 56 Interview with Chris Lane, *supra* note 35.
- 57 *Id.*
- 58 *Id.*
- 59 *Scholarships*, AM. FED'N OF TEACHERS, [http:// aft.org/benefits/scholarships.cfm](http://aft.org/benefits/scholarships.cfm) (last visited Dec. 13, 2011).
- 60 Interview with Doris Crouse-Mays, *supra* note 28.
- 61 Interview with Brian Dawe, *supra* note 24; Interview with Rob Jones, *supra* note 19; Interview with Doris Crouse-Mays, *supra* note 28.
- 62 Interview with Rob Jones, *supra* note 19.
- 63 *Id.* Unions in North Carolina have also negotiated such agreements in addition to participating in informal discussions with employers. See Michael G. Okun, *Public Employee Bargaining in North Carolina: From Paternalism to Confusion*, 59 N.C. L. REV. 214, 228 (1980); Willow Jacobson, *Teaching Presentation: What Public-Sector Unions Are Now Active in North Carolina? Where Are They? What Are They Doing?*, School of Government, University of North Carolina (Apr. 7, 2010) (on file with authors) (demonstrating based on survey of local government managers that some North Carolina employers meet with unions and discuss workplace issues).
- 64 Interview with Rob Jones, *supra* note 19.
- 65 *Id.*
- 66 *Id.*
- 67 *Id.*
- 68 *Id.*
- 69 See Press Release, The Broad Prize for Urban Educ., \$1 Million Broad Prize for Urban Educ. Awarded to Norfolk Pub. Schs., Four Finalist Distrs. (Sept. 20, 2005), <http://www.broadprize.org/news/320.html>; *National Center for Educational Accountability Fact Sheet*, NORFOLK PUB. SCH. (2005), [http:// www.broadprize.org/asset/2005_Norfolk.pdf](http://www.broadprize.org/asset/2005_Norfolk.pdf).
- 70 *Id.*
- 71 *Id.* For a description of the collaborative relationship of the Norfolk Public Schools and the Norfolk Federation of Teachers, see SAUL A. RUBINSTEIN & JOHN E. MCCARTHY, *COLLABORATING ON SCHOOL REFORM: CREATING UNION-MANAGEMENT PARTNERSHIPS TO IMPROVE PUBLIC SCHOOL SYSTEMS* 18-20 (2010), [http:// smlr.rutgers.edu/content/collaborating-school-reform](http://smlr.rutgers.edu/content/collaborating-school-reform).
- 72 Interview with Chris Lane, *supra* note 35.
- 73 *Id.*

- 74 Interview with Brian Dawe, *supra* note 24; *see also* David Lewin et al., *Getting It Right: Empirical Evidence and Policy Implications from Research on Public-Sector Unionism and Collective Bargaining*, EMP'T POLICY RESEARCH NETWORK 13-14 (Mar. 16, 2011), <http://www.employmentpolicy.org/sites/www.employmentpolicy.org/files/EPRN%20PS%20draft%203%2016%2011%20PM%F#INALtk-ml4%20edits.pdf> (describing research indicating that strikes are more common in states without collective bargaining legislation).
- 75 Interview with Brian Dawe, *supra* note 24.
- 76 Hodges, *supra* note 5, at 750; Juan Antonio Lizama, *Chesterfield Teachers to End Work-to-Contract Action*, RICH. TIMES DISPATCH, Apr. 1, 2010, *available at* 2010 WLNR 6846823.
- 77 Interview with Brian Dawe, *supra* note 24; Interview with Rob Jones, *supra* note 19.
- 78 [VA. CODE ANN. § 40.1-57.2 \(2011\)](#).
- 79 Hodges, *supra* note 5, at 754.
- 80 Interview with Rob Jones, *supra* note 19.
- 81 *Id.*
- 82 Interview with Doris Crouse-Mays, *supra* note 28; Interview with Brian Dawe, *supra* note 24; Interview with Rob Jones, *supra* note 19.
- 83 Interview with Chris Lane, *supra* note 35.
- 84 Interview with Rob Jones, *supra* note 19.
- 85 Hodges, *supra* note 5, at 751.
- 86 Interview with Brian Dawe, *supra* note 24.
- 87 Of course, this same problem exists in states with collective bargaining laws but no fair share provisions.
- 88 Interview with Rob Jones, *supra* note 19.
- 89 Interview with Doris Crouse-Mays, *supra* note 28.
- 90 *Id.*
- 91 Partridge, *supra* note 12, at 132.
- 92 The recent political attacks on these unions by Republican administrations intent on limiting collective bargaining, however, may have created some similar public relations issues that must be addressed by the unions.
- 93 *See* Jeff Bollier, *Council, City Manager to Discuss Contract Extensions for City Unions in Special Meeting*, OSHKOSH NW., Mar. 25, 2011, *available at* 2011 WLNR 5853262.
- 94 Letter from John H. Ashley, Exec. Dir., Wis. Ass'n of Sch. Bds., to Alberta Darling, Co-Chair, Joint Comm. on Fin., and Robin Vos, Co-Chair, Joint Comm. on Fin. (Feb. 15, 2011), http://www.wasb.org/websites/advoc_gov_relations/File/budget_repair_bill/budget_repair_bill.pdf.
- 95 Felker et al., *supra* note 1, at 4, 9.
- 96 *But see* Mark Niquette, *Wisconsin's Professors Unionize in Defiance of Walker's Law*, BLOOMBERG NEWS, Mar. 31, 2011, <http://www.bloomberg.com/news/2011-03-31/wisconsin-professors-unionize-defy-walker-s-law-on-collective->

bargaining.html (noting that faculty at four University of Wisconsin campuses voted in favor of unionization after a law passed that eliminated bargaining for faculty).

97 *See supra* notes 17 and 21 and accompanying text discussing Virginia and North Carolina laws allowing dues deduction.

98 Adam Rodewald & Jeff Bollier, *Unions Vow the Fight for Rights Will Continue*, OSHKOSH NW., Apr. 24, 2011, available at 2011 WLNR 7975975.