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LABOR RIGHTS OF PUBLIC EMPLOYEES

THE right of employees in private industry to organize into labor unions and to engage in concerted action to enforce their demands is well recognized. The right is less well recognized in the domain of government employment. In many respects the relationship existing between the government (federal, state or municipal) and its employees is radically different from that existing between private employers and employees. The difference has been recognized repeatedly in labor legislation.¹

A number of reasons combine to place the government worker in a special category. It is commonly thought that he is not in need of the protection which is necessary in private employment.² Representative government is expected to deal fairly with its employees and to be an example to the community in establishing wages, hours and working conditions. The benefits of civil service, of tenure, and of increases in pay at regular intervals are often afforded while private industry lags in these respects. The government does not have the profit-making motive of the private employer, nor does it have to meet competition in holding labor costs to a minimum. The government is not under the economic compulsion of driving a hard bargain with its employees. Accordingly, the necessity for organization and concerted activity by government employees is reduced.

¹ The Wagner Act, the Fair Labor Standards Act of 1938, and the recent Labor Management Relations Act of 1947 exempt government workers from their provisions by expressly excluding the United States, the states, and the political subdivisions thereof from the definition of the term "employer."

² "It is realized that the federal civil service system is an elaborate, carefully constructed system of personnel and labor relations which has accorded to government employees many benefits which organized labor has yet been unable to secure from private industry through strikes and organizational activities over a period of many years. It has, indeed, long been the practice of many union representatives in private industry to base their arguments for requested employment benefits upon comparable benefits secured by government employees. . . ." TELLER, *LABOR DISPUTES AND COLLECTIVE BARGAINING*, 105 (1946 Supplement).

Other factors have affected public opinion concerning organization of government employees. The government worker has been regarded as a docile person who has preferred the security of his job to the larger opportunities and risks of the world of private enterprise. Many people associate government employment with the spoils system, and the employee is looked upon as the recipient of a political plum.³ Finally, organizational activity among public employees has suggested the possibility of strikes against government and impairment of its sovereignty. President Franklin D. Roosevelt, who certainly was a friend of labor, was influenced by this consideration.⁴

During the past few years there has been large scale expansion of government—in many instances into fields once deemed exclusively private. Since the government (federal, state and municipal) is the largest employer in the country, it seems desirable to examine into the legal aspects of its relations with labor organizations.

DO GOVERNMENT EMPLOYEES HAVE THE RIGHT TO JOIN UNIONS?

The Lloyd-LaFollette Act of 1912⁵ was the first law dealing

³ "The general public is inclined to view the civil servant as a surly, uncooperative individual, who has procured a soft job through political pull and has never done an honest day's work in his life. He is regarded as a person with no real ambition or ability, for otherwise he would be 'out in the world' doing something worth while and getting somewhere instead of putting his nose into other people's business. This popular attitude may be explained in part by the long association of government service with the spoils system. . . . And while today some 60 percent of the federal employees are sheltered under the civil service, a government job is still considered, in the public mind, to be a political plum." Agger, *The Government and Its Employees*, 47 *YALE L. J.* 1109, 1110 (1938).

⁴ *Id.* at 1103; Comment, *Government Employees and Unionism*, 54 *HARV. L. REV.* 1360, 1365 (1941). In a letter to Mr. Luther C. Steward, President of the National Federation of Federal Labor, he said in part: "Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of an organization of government employees. Upon employees in the federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of Government activities. This obligation is paramount. Since their own services have to do with the functioning of the Government, a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operations of Government until their demands are satisfied. Such action, looking toward the paralysis of Government by those who have sworn to support it, is unthinkable and intolerable." RHYNE, *LABOR UNIONS AND MUNICIPAL LAW*, 436 (1946).

⁵ 37 *STAT.* 555 (1912) 5 *U. S. C. A.* § 652 (1934).

with the right of federal employees to organize. It provided that membership in a union should not be cause for demotion, suspension or dismissal. The Act specifically referred to postal employees, but it was generally assumed that its policies protected all government employees.⁶ Nevertheless, there was and is a body of opinion that it is undesirable for such employees to organize. This feeling is exemplified in *Railway Mail Association v. Murphy*,⁷ a New York Supreme Court decision, which declared that any combination of civil service employees of the federal government was incompatible with the spirit of democracy and that collective bargaining had no place in government service.

The *Murphy* case was a suit by the Railway Mail Association for a declaratory judgment that it was not a labor organization within the meaning of a New York statute forbidding discrimination in denying membership because of race, color or creed. The Association had a membership of 22,000 postal clerks of the United States Railway Mail Service. The trial court held that it was an insurance society and was not, and could not lawfully be, a labor organization.

The New York Court of Appeals reversed the decision below and held that the Association was within the terms of the statute prohibiting discrimination.⁸ On further appeal the United States Supreme Court affirmed the judgment below.⁹ Both appellate decisions recognized the right of government employees to organize

⁶ Agger, *supra*, note 3, at 1128.

⁷ 44 N. Y. S. (2d) 601, 607 (N. Y. Sup. Ct. 1945), the court said: "To tolerate or recognize any combination of Civil Service employees of the Government as a labor organization or union is not only incompatible with the spirit of democracy, but inconsistent with every principle upon which our Government is founded. Nothing is more dangerous to public welfare than to admit that hired servants of the state can dictate to the Government the hours, the wages and conditions under which they will carry on the essential services vital to the welfare, safety and security of the citizen. To admit as true that Government employees have power to halt or check the functions of Government, unless their demands are satisfied, is to transfer to them all legislative, executive and judicial power. Nothing would be more ridiculous."

⁸ *Sub nomine*, *Railway Mail Assn. v. Corsi*, 267 App. Div. 417, 44 N. Y. S. (2d) 404 (1944); 293 N. Y. 315; 56 N. E. (2d) 721 (1944).

⁹ 326 U. S. 88 (1944).

into unions. The Supreme Court regarded the Lloyd-LaFollette Act as a Congressional expression permitting government workers to associate in unions.

Generally, it can be said that public employees have the right to form organizations for their mutual benefit and to affiliate with labor unions.¹⁰ However, this right has been prohibited or qualified in three well-defined types of municipal employment.

1. Police officers have been denied the right to join a union by ordinance or regulation on the ground that they must be free from any obligations to a union in order properly to perform their duties. In any controversy between employer and employees the police officer should enter into the discharge of his duties without partiality.¹¹ Furthermore, because of the close relation between the police force and city government, there exists the same necessity of discipline and regulation as in a military force.¹²

2. Fireman have been denied the right to join a union because a labor organization might seek to control the relations of the firemen with the municipality in a manner inconsistent with necessary discipline. Thus, an organization might be detrimental to the general welfare and safety.¹³

¹⁰ *City of Springfield v. Clause*, 206 S. W. (2d) 539 (Mo. Sup. Ct. 1947).

¹¹ For an extensive review of older authorities see *Fraternal Order of Police v. Harris*, 306 Mich. 68, 10 N. W. (2d) 310 (1943), in which the validity of a regulation prohibiting certain members of the police force from joining a union was sustained. The United States Supreme Court denied a petition for writ of certiorari, 321 U. S. 784 (1944). *Accord*: *City of Jackson v. McLeod*, 199 Miss. 505, 24 So. (2d) 319 (1946), *cert. denied*, 328 U. S. 863 (1946); *King v. Priest*, 206 S. W. (2d) 547 (Mo. Sup. Ct. 1947).

¹² The peculiar status of police officers is explained in *Coane v. Geary*, 298 Ill. App. 199, 18 N. E. (2d) 719, 722 (1939): "A police force is peculiar, sui generis, you may say, in its formation and in its relation to the city government. It is practically an organized force resembling in many respects a military force, organized under the laws of the United States and equally as important as to the functions it is required to perform. . . . And there is the same necessity of discipline, of regulation existing in the police department that exists in regard to the military department. Strict discipline must be enforced, and it must be enforced in a manner that is effective and without the supervision or regulation of any other department of the state, and, particularly without any attempt on the part of the judicial department (which is a branch of the government entirely distinct and separate from the executive department), to regulate it in any way, and particularly, to regulate its discipline."

¹³ In *Carter v. Thompson*, 164 Va. 312, 180 S. E. 410 (1935), the court held that a rule of a city manager forbidding firemen to join an A. F. of L. union was within his discretion. The court said at 412: "Police and fire departments are in a class apart. Both

3. School teachers have been denied the right to join a union because of a belief that free and impartial thinking might be abridged by membership in an organization which dictates policies to its members. Since a board of education is responsible for its action only to the people of the municipality, many decisions hold that school authorities may require non-membership in a union as a condition of employment.¹⁴

Other cases have been decided upholding ordinances prohibit-

are at times charged with the preservation of public order, and for manifold reasons they owe to the public their undivided allegiance. The power in the city of complete control is imperatively necessary if discipline is to be maintained."

In *McNatt v. Lawler*, 223 S. W. 503 (Tex. Civ. App. 1920), certain firemen of the City of Dallas became members of a local union affiliated with the A. F. of L. Upon their refusal to withdraw from the union, they were held properly discharged under a charter provision providing that the Board of Commissioners could determine the sufficiency of the cause of removal. In *San Antonio Fire Fighters Local Union No. 84 v. Bell*, 223 S. W. 506 (Tex. Civ. App. 1920), a suit was dismissed in which the union requested the court to restrain the city from discharging employees who were union members. *Hutchinson v. Magee*, 278 Pa. 119, 122 A. 234 (1923), is a case upholding a rule issued by the Director of Public Safety of Philadelphia that all officers of the fire department refrain from belonging to an association which two years before had organized a strike. The court stated: "It is generally conceded that association with an organization which . . . attempts to control the relations of members of either the police or fire departments toward the municipality they undertake to serve, is . . . inconsistent with the discipline which such employment imperatively requires, and therefore must prove subversive of the public service and detrimental to the general welfare; . . . the order herein requested was within the 'discretion of the director,' and that discretion, being 'based upon a reasonable and legal grounds,' is final. If plaintiffs desire to retain their positions in the public service, they should have obeyed the director's order; having elected not to do so . . . they cannot successfully complain of the ensuing results."

¹⁴ In *Fursman v. Chicago*, 278 Ill. 318, 116 N. E. 158 (1917) the court held that a school board had the right to pass and enforce a resolution making participation in a plan to affiliate with union labor equivalent to resignation. In so ruling the court said at 160: "No person has a right to demand that he or she be employed as a teacher. The board has the absolute right to decline to employ or re-employ any applicant for any reason whatever or for no reason at all. The board is responsible for its action only to the people of the city, from whom, through the mayor, the members have received their appointments. It is no infringement upon the constitutional rights of anyone for the board to decline to employ him as a teacher in the schools, and it is immaterial whether the reason for the refusal to employ him is because the applicant is married or unmarried, is of fair complexion or dark, is or is not a member of a trades union, or whether no reason is given for such refusal. The board is not bound to give any reason for its action. It is free to contract with whomsoever it chooses. Neither the Constitution nor the statute places any restriction upon this right of the board to contract, and no one has any grievance which the court will recognize simply because the board of education refuses to contract with him or her. Questions of policy are solely for determination of the board, and when they have once been determined by it the courts will not inquire into their propriety." *Accord*: *Frederick v. Owens*, 35 Ohio Cir. Ct. R. 538 (1915), petition in error dismissed in 95 Ohio St. 407, 116 N. E. 1085 (1916); *Seattle Chapter of the A. F. of L. v. Sharpless*, 159 Wash. 424, 293 P. 994 (1930).

ing various classes of city employees from organizing or joining unions. In *Congress of Industrial Organizations v. City of Dallas*¹⁵ plaintiff union sued to enjoin defendant city from dismissing certain city employees who had organized and joined a local union. An ordinance made it a punishable offense for any city employee "to organize a labor union, organization, or Club of City employees, or to be or become a member thereof . . ." It further provided that any employee who violated the ordinance would be subject to discharge. The district court refused a temporary injunction, and the union appealed on the grounds that the ordinance deprived city employees of the right of petition and assembly and of freedom of speech and press and denied them equal protection of the laws; and that the ordinance was in conflict with the laws of Texas which make it lawful for all employees to organize and become members of labor unions of their own choosing.

The Court of Civil Appeals affirmed the district court and declared that the city employees, by accepting employment with the City of Dallas, impliedly agreed to all existing conditions, one of which was not to organize or affiliate with a labor union. The court stated that even though city employees have a right to insist upon their constitutional rights, they do not have a constitutional right to remain in the service of the City. To the contention that the ordinance was in conflict with Articles 5152 and 5154A¹⁶ of the Texas Civil Statutes the court ruled that they had no application to public employees.

Subsequent to this case the Fiftieth Texas Legislature enacted a statute declaring it to be against the public policy of the state to deny any person public employment because of membership or non-membership in a labor organization.¹⁷ In the face of this

¹⁵ 198 S. W. (2d) 143 (Tex. Civ. App. 1946). *Accord*: *Miami Local No. 654 v. City of Miami*, 157 Fla. 445, 26 So. (2d) 194 (Fla. 1946); *City of Springfield v. Clause*, 206 S. W. (2d) 539 (Mo. Sup. Ct. 1947).

¹⁶ Art. 5152 declares the right of employees to organize into unions. Art. 5154a is the Manford Act, which regulates union activity in Texas. TEX. STAT. (Vernon, Supp. 1947).

¹⁷ "It is declared to be the public policy of the State of Texas that no person shall be

legislation, the *City of Dallas* case, sustaining an ordinance forbidding municipal employees to join unions, is probably no longer good law today. The language of the statute seems to guarantee the right of organization to all public employees.¹⁸ Possibly school teachers, firemen, and police officers will continue as exceptions to the general rule recognizing the right of public workers to organize.

II. DO GOVERNMENT EMPLOYEES HAVE THE RIGHT TO STRIKE?

The Taft-Hartley Act expressly prohibits strikes by government employees, provides for the immediate discharge of striking employees, and makes them ineligible for reemployment for three years.¹⁹ Similarly, Texas statutes declare the public policy to be against strikes by public employees and provide for forfeiture by a striking employee of all civil service rights, reemployment rights and other rights, benefits or privileges which he enjoys as a result of his employment.²⁰

Prior to the passage of the Taft-Hartley Act, there was no federal statute forbidding a strike by government workers.²¹ But statutes existed which could be used against certain kinds of government strikes. For example, a federal criminal statute forbidding interference with the mails was used successfully against postal employees who resigned in protest against intolerable conditions.²²

It has generally been thought that striking against the government is illegal because the terms and conditions of public em-

denied public employment by reason of membership or nonmembership in a labor organization." TEX. REV. CIV. STAT. (Vernon 1925) Art. 5154c, § 4 (1947).

¹⁸ Surveys by the National Institute of Municipal Law Officers in 1941 and in 1946, contained in RHYNE'S LABOR UNIONS AND MUNICIPAL EMPLOYE LAW (1946), disclosed that public employees in many municipalities have become members of labor unions and that most state attorney generals and city attorneys have ruled such membership to be lawful, with certain exceptions. The exceptions were policemen, firemen, and school teachers.

¹⁹ Taft-Hartley Act, 61 STAT. 160 (1947), 29 U. S. C. A. § 188 (1947).

²⁰ TEX. REV. CIV. STAT. (Vernon, 1925) Art. 5154c, § 3 (1947).

²¹ Agger, *supra* note 3, at 1131.

²² *United States v. Debs*, 64 Fed. 24 (C. C. N. D. Ill. 1894).

ployment are fixed by law and not by contract; and because the public welfare and vital public services would be adversely affected.²³ Actually, the danger of strikes by government employees has been slight because the three unions which have represented them have provisions in their charters renouncing the right to strike.²⁴ The few contracts entered into between cities and unions usually contain provisions recognizing the strike weapon to be inappropriate for use by municipal employees. Consequently few strikes by public workers have occurred, and few cases have squarely passed upon the right of such employees to strike.²⁵

A question closely related to government strikes is whether public employees have the right to picket. In *Petrucci v. Hogan*²⁶ a transport workers' union picketed the homes of workers employed by a transit system owned and operated by a city in order to persuade them to reaffiliate with the union. Injunction was granted against the picketing, but mainly on the ground of unlawfulness of the purpose (the establishment of a closed shop). It would seem that if strikes by government employees are illegal, picketing would be equally so. However, the constitutional right of free speech complicates the question.

CAN GOVERNMENT ENTER INTO A COLLECTIVE BARGAINING CONTRACT WITH A UNION?

A collective bargaining agreement is the usual outcome of negotiations between an employer and a union representing his employees. The agreement is a recognition of the union as bargaining agent of the employees and is an enforceable contract dealing with wages, hours, and conditions of employment.

A union representing the majority of employees has no enforceable right to collective bargaining at common law. The right is enforceable only where labor relations laws prevail. The Labor

²³ TELLER, *op. cit. supra* note 2, at 101.

²⁴ Agger, *supra* note 3, at 1131.

²⁵ RHYNE, *op. cit. supra* note 4, at 44.

²⁶ 27 N. Y. S. (2d) 718 (N. Y. Sup. Ct. 1941).

Management Relations Act of 1947 excludes from its benefits government employees, both state and federal.²⁷ The same is generally true of the state labor relations acts. Hence it is clear that federal, state and municipal governments are under no duty to bargain collectively with their union employees.

Even if the government were of a mind to bargain collectively, it is doubtful that it could enter into an enforceable collective contract. Unless the authority to do so is given in express terms it is very questionable that a public official or agency would have power to contract.²⁸ No contract could be made inconsistent with the statute creating the employment. And the government as sovereign could not be sued without enabling legislation. The most a union could hope to do would be to present grievances to the legislature and to cause public officials to act favorably within the confines of their authority.

In this connection it is appropriate to note the remarks of Franklin D. Roosevelt on this subject:

"All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into public service. It has distinct and insurmountable limitations when applied to public personnel management. The very nature and the purposes of Government makes it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations. The employer is the whole people, who speak by means of laws enacted by their representatives in Congress. Accordingly, administrative officials and employees alike are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personnel matters."²⁹

Recent legislation in Texas has declared it unlawful for public officials to enter into collective bargaining contracts with labor organizations respecting wages, hours or conditions of employment.³⁰ Further, public officials are prohibited from recognizing

²⁷ Taft-Hartley Act, 61 STAT. 136 (1947), 29 U. S. C. A. § 152 (2) (1947).

²⁸ TELLER, *op. cit. supra* note 2, at 101.

²⁹ RHYNE, *op. cit. supra* note 4, at 436.

³⁰ TEX. REV. CIV. STAT. (Vernon, 1925) Art. 5154c, § 1 (1947).

a labor organization as a bargaining agent for public employees.

The trend of American decisions has been to declare void any contract between a municipality and a labor union covering terms and conditions of employment as an unlawful delegation of power to the union.³¹ Typical of the cases dealing with the question are the *Mugford* cases.³² In the first of these cases a taxpayer brought suit to enjoin the enforcement of a contract between the Department of Public Works of Baltimore and the Municipal Chauffeurs, Helpers and Garage Employees Union, Local 825, an affiliate of the A. F. of L. The contract, which recognized the union as the "sole and exclusive bargaining representative for all employees of the department," was condemned by the Maryland Circuit court because it granted an unlawful preference to the union over individuals who might not be members of the union. The court noted that the litigants were in agreement that the city had no authority to consent to a closed shop agreement.

A second contract was entered into providing that any individual might bargain in his own behalf but that the department would not recognize or deal with any union or organization other than Local 825. Again suit was brought to enjoin performance of the contract, and the circuit court held that it constituted an unlawful preference of one group over another. The court went on to rule that the contract provision for deduction of union dues by the city at the request of the employee, revocable by him at any time, was valid. However, the court found that the valid and invalid provisions were inseparable and declared the whole contract void.

The theory of American government is that it is organized and administered for the welfare of the whole people and not for the benefit of any one group or class. Hence a contract providing

³¹ *City of Springfield v. Clause*, 206 S. W. (2d) 539 (Mo. Sup. Ct. 1947).

³² The *Mugford* cases were a series of three decisions by Circuit Court No. 2 of Baltimore City: Opinion of April 14, 1944, 8 C. C. H. LAB. CAS. ¶ 62,137; Opinion of July 5, 1944, reprinted in RHYNE, *LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW*, 164 (1946); and Opinion of November 16, 1944. These decisions were followed by a partial review in the Maryland Court of Appeals, 185 Md. 266, 44 A. (2d) 745 (1945).

for a closed shop or for the maintenance of union membership as a condition of employment or for the recognition of a union as the exclusive bargaining agent, entered into with a governmental agency, violates what many persons regard as a first principle of sound government.³³

Occasionally a court sustains the validity of a collective bargaining contract between a public agency and a union of public employees on the ground that the municipality is acting in a proprietary capacity and not as a political agency exercising governmental powers.³⁴ In *Nutter v. Santa Monica*³⁵ it was held by the trial court that the City of Santa Monica was operating a bus line in a proprietary capacity and therefore could not resist a request on the part of the employees to bargain collectively. The judgment was reversed on appeal on the ground that labor laws applicable to private industry could not be construed to apply to public employment.

CAN GOVERNMENT AGENCIES COLLECT UNION DUES BY CHECK-OFF?

Another of the implements of effective union organization is the check-off, which is the deduction by the employer from an employee's wages at prescribed intervals of the amounts due to the union for initiation fees, dues, fines and assessments. The compulsory check-off system was considered in the *Mugford* cases and at first was held to be illegal as a device for the accomplishment of a closed shop.

The second contract entered into put deduction of dues on a voluntary basis, revocable by the employee at any time. Any expense incurred by the City in collecting the dues and assessments was to be paid by the union. The circuit court found that this

³³ *Chaplin v. Board of Education of Peoria* (Ill. Cir. Ct. 1939), text reprinted in Appendix of RHYNE, *LABOR UNIONS AND MUNICIPAL LAW*, 157 (1946).

³⁴ This distinction is often applied in determining questions of municipal liability for tort or for taxes.

³⁵ 8 C. C. H. LAB. CAS. ¶ 62,323 (Calif. Superior Ct. 1944); 74 Cal. App. (2d) 292, 168 P. (2d) 741 (Calif. Dist. Ct. of App. 1946).

arrangement constituted the City the agent of the employee for the purpose of paying his union dues and that the arrangement was valid as long as the employee permitted his written order to remain in effect. The Maryland Court of Appeals agreed with the trial court on this point and ruled that the City could extend to individuals the privilege of having dues deducted and paid to the union if they so requested.

CONCLUSION

It is difficult to state unequivocal rules prevailing in labor relations between government and its employees. The reason is that disputes between the government and its employees have been comparatively few and have very infrequently ended up in the courts. Certainly it can be said that government employees are more circumscribed in their joint activities than are private employees. This is largely because government workers are considered to be less in need of the protection afforded by aggressive, concerted action and because their uninterrupted services are important to the community.

In general, government employees may organize and join unions. Their representatives may counsel with the legislature and with high-ranking officials who do the hiring. There is considerable doubt that collective bargaining contracts can be entered into or enforced, in the absence of specific legislative authorization. Contracts for exclusive bargaining privileges or for closed shop are probably invalid. The right to strike and to picket governmental agencies has had little or no recognition.

One hesitates to predict that the union movement among government employees will go much further than recognition of the right to organize and join employee associations. So long as the government is a "model" employer there will be little occasion for the agitation and disruption found in some areas of private industry.

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