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THE OHIO PUBLIC SECTOR COLLECTIVE BARGAINING LAW: FIRST ANNIVERSARY COLLOQUIUM

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INTRODUCTION

FROM MEAGER BEGINNINGS and an extended period of stagnation,[1] public sector unionism has accelerated to unprecedented heights in the past three decades. In 1956, there were some five million employees in state and local government.[2] By 1980, the number of state, county, and municipal employees had more than doubled, to over ten million.[3] Almost half of all fulltime state and

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1. The unionization of public sector employees actually began in the 1830's when mechanics, carpenters, and other craftsmen employed by the federal government organized. The craftsmen joined the unions of their private sector counterparts, a tendency that was to become the predominant form of public sector unionism until the late 19th century. Although unions specifically for public employees organized in the 1880's, they did not become a major force in organized labor until the 1960's. *See Project: Collective Bargaining and Politics in Public Employment*, 19 UCLA L. REV. 887, 893-96 (1974). *See generally* M. MOSKOW, COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT (1969); S. D. SPERO, THE GOVERNMENT AS EMPLOYER (1948).

2. The exact number is 5,069,000. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 45 Table B-1 (1984).

3. The exact number is 10,314,398. BUREAU OF THE CENSUS, U.S. DEP'T OF COM-

local government employees were union members in 1980,[4] six times the percentage of state and local employees organized in 1968.[5]

In 1964, approximately 2.35 million employees worked for the federal government.[6] Only 10% were in exclusive bargaining units covered by an agreement.[7] By 1980, the number of federal employees had grown to 2.87 million with, 1.25 million in exclusive units covered by an agreement.[8] These figures contrast with the 20.9% level of organization among civilian employees generally in 1980,[9] down from 31.3% in 1956.[10] Government employees rose from 5.1% of total union membership in the U.S. in 1956 to 30% in 1980.[11]

The trend in Ohio coincides with the national course. Both pub-

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MERCE, SERIES GSS, NO. 102, LABOR-MANAGEMENT IN STATE AND LOCAL GOVERNMENT 1980, 9 Table 2. More recent figures indicate that as of January 1984 there were 12,947,000 state and local employees. BUREAU OF LABOR STATISTICS, *supra* note 2, at 45 Table B-1.

4. The actual percentage of organized fulltime state and local government employees was 48.8%. U.S. BUREAU OF THE CENSUS, *supra* note 3, at 9 Table 2.

5. In 1968, there were 9,109,000 state and local government employees, 8.8% of whom were organized. 93 MONTHLY LAB. REV. 18 Table 3 (1970).

Table I

Function	State and local governments	State governments	Local governments
Total	48.8	40.5	51.9
For selected functions			
Education	55.4	29.6	61.3
Teachers	64.9	36.1	67.9
Other	38.1	26.4	44.4
Highways	45.0	52.9	37.6
Public welfare	41.8	41.2	42.4
Hospitals	40.0	49.8	29.4
Police protection	52.7	51.8	52.8
Local fire protection	70.6	-	70.6
Sanitation other than sewerage	40.2	-	40.2
All other functions	39.4	41.4	38.3

—Represents zero

SOURCE: BUREAU OF THE CENSUS, *supra* note 3 at 2. Table I shows by function the percentage of fulltime state and local governmental employees who were members of an employee organization in October, 1980.

6. The exact number is 2,348,000. BUREAU OF LABOR STATISTICS, *supra* note 2, at 45 Table B-1.

7. U.S. Dep't of Commerce, *Union Recognition in Federal Government*, 1982 STATISTICAL SUMMARY ANN. 30.

8. Exact figures are 2,868,000 and 1,249,999. *Id.*

9. C. GIFFORD, DIRECTORY OF U.S. LABOR ORGANIZATIONS, 1984-85 (1984). Private sector union membership declined to 18.8% in 1984. *See also* 118 LAB. REL. REP. (BNA) 142-43 (Feb. 25, 1985) (citing the most recent Bureau of Labor Statistics data).

10. L. TROY, TRADE UNION MEMBERSHIP 1897-1962 (1965). *See also Project, supra* note 1, at 896 n.18.

11. 93 MONTHLY LAB. REV. 16 Table 1 (1970).

lic sector employment and union membership have grown dramatically over the past three decades. Ohio's fulltime public sector work force almost doubled, from 259,700 in 1957[12] to 440,772 in 1980.[13] The percentage of Ohio's fulltime state and local government employees belonging to unions increased from approximately 10% in 1957[14] to 45.5% in 1980.[15]

The regulation of public sector collective bargaining is a patchwork of federal, state, and local laws and judicial decisions. The National Labor Relations Act (NLRA) governs private sector employees but specifically excludes federal, state, county, and municipal employees.[16] There is no comparable federal or uniform law regulating governmental labor relations—federal, state, or local—and dictating the kind of national uniformity seen under the NLRA.[17] Instead, the federal government[18] and each state have

12. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, NO. 1, VOL. II, 1957 CENSUS OF GOVERNMENTS: GOVERNMENTAL EMPLOYMENT Table II, at 22 (1958).

13. BUREAU OF THE CENSUS, *supra* note 3, at 18.

14. Interview with Norman Wernet, Political Action Director, American Federation of State County and Municipal employees, Ohio Council 8.

15. BUREAU OF THE CENSUS, *supra* note 3, at 18. In fact, the percentage of unionized public sector employees in Ohio was higher in 1972 (47.5%) and 1974 (49.9%) than in 1980 (45.5%). BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES GSS, NO. 75, LABOR MANAGEMENT RELATIONS IN STATE AND LOCAL GOVERNMENT 1974, Table 3, at 28 (1975).

Another way to appreciate this dramatic growth in Ohio public sector union membership is to consider that Ohio's 199,229 fulltime employee union members (45.5% of fulltime employees) in 1980 would have constituted 76.7% of the state's entire 1957 fulltime workforce.

As the following table illustrates, current employment and organization rates in highly populated states are comparable to those in Ohio.

Table II

State	Total Number of Employees	Percentage Organized
California	1,005,005	61.8%
New York	896,224	81.9%
Texas	654,029	25.9%
Pennsylvania	448,699	65.1%
Illinois	472,778	48.0%

SOURCE: U.S. BUREAU OF THE CENSUS, *supra*, note 3, at 10, 12, 17, 19, 20.

16. 29 U.S.C. § 152(2) (1982).

17. Since the early 1970's, bills seeking to provide comprehensive federal regulation of public sector collective bargaining have been periodically introduced in Congress. None has been enacted. For a summary of the suggested approaches to comprehensive regulation and the principal views regarding the idea, see H. EDWARDS, R. CLARK, and C. CRAVER, LABOR RELATIONS LAW IN THE PUBLIC SECTOR 69-80 (3d ed. 1985). The Supreme Court's decision in National League of Cities v. Usery, 426 U.S. 833 (1976), was thought by some to raise constitutional questions about such a scheme. *See, e.g.*, Channin, *Can A Federal Collective Bargaining Statute for Public Employees Meet the Requirements of* National League of Cities v. Usery?: *A Union Perspective*, 6 J. L. & EDUC. 493 (1977); Shaller, *The Constitutionality of*

independently defined the parameters of public employee collective bargaining in their individual jurisdictions.[19]

Early developments in Ohio's regulation of public sector collective bargaining mirrored the national trend. Public employees enjoyed a right to organize but had no right to bargain collectively or to strike.[20] Notions of sovereignty, loyalty, and the preeminence of the "public interest" cemented judicial resistance to private sector-type collective bargaining and galvanized the state legislature against the right to strike in the public sector.[21]

In 1951, *Norwalk Teachers' Association v. Board of Education*[22] signaled a reversal of the trend against the right to bargain collectively, but affirmed the virtually universal denial of a public sector right to strike. Toward the end of the 1950's, legislative reform of public sector labor relations began.[23]

Currently, twenty-five states and the District of Columbia have comprehensive public sector collective bargaining statutes.[24] Four-

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a Federal Collective Bargaining Statute for State and Local Employees, 29 LAB. L.J. 594 (1978). To the extent that *National League of Cities* might have been an obstacle to comprehensive federal regulation of public sector collective bargaining, Garcia v. San Antonio Metropolitan Transit Authority, 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985), overruling *National League of Cities*, may have cleared the way. *But see id.* at 4143-51 (Powell, J., Burger, C.J., Rehnquist, J., and O'Connor, J., dissenting).

18. 5 U.S.C. §§ 7107-7135 (1982).

19. *See infra* note 24.

20. Cleveland v. Division 268 of the Amalgamated Ass'n of Sheet, Elec., Ry. & Motor Coach Employees, 30 Ohio Op. 395 (C.P. Cuyahoga 1945).

A number of state rules countered this trend. For a review of the case law prior to 1953, see Annot., 31 A.L.R.2d 1142 (1953). *Cleveland v. Division 268* allowed public sector collective bargaining where authorized by legislation. 30 Ohio Op. at 409. This left Ohio, a "home-rule" state, with a patchwork of local governmental collective bargaining practices. *See* Note, *Ohio Public Sector Labor Relations Law: A Time For Reevaluation And Reform*, 42 U. CIN. L. REV. 679 (1973). The Ferguson Act, 1947 Ohio Laws 449, was enacted in 1947 and prohibited public employees from striking (currently codified at OHIO REV. CODE ANN. § 4117.01-.05 (Page Supp. 1984)).

21. *See generally* K. HANSLOWE, THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT 11-12 (1967).

22. 138 Conn. 269, 83 A.2d 482 (1951).

23. Wisconsin enacted a public sector labor relations statute covering municipal employees in 1959 and extended coverage to state employees in 1971. WIS. STAT. ANN. §§ 111.80-.97 (West 1978). For the federal government, public sector labor relations reform began with Exec. Order No. 10,988, 3 C.F.R. 521 (1962) (1959-63 compilation); followed by Exec. Order No. 11,491, 3 C.F.R. 191 (1969). The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111 (codified in scattered sections of 5 U.S.C., currently governs labor-management relations in the federal sector).

24. That is, they "(1) cover all categories of employees (2) provide a method for resolving questions concerning representation, and (3) establish a public employee relations board

teen states have statutes covering certain occupational groupings,[25] and eleven states have no statutes regulating public sector collective bargaining.[26]

The 1983 Ohio Public Employee Collective Bargaining Act benefited from the national body of experience accumulated under the common law and other public sector statutes. As one of the most recently enacted comprehensive statutes,[27] the Ohio proposal underwent over a decade of gestation.[28] During this pre-enactment

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to administer the act." Shaw and Clark, *Determination of Appropriate Bargaining Units In The Public Sector: Legal and Practical Problems*, 51 ORE. L. REV. 152, 157 (1971).

Table III classifies states and the District of Columbia by the degree of statutory coverage of public sector collective bargaining.

Table III

Full Coverage	Partial	No Coverage by State Statute
Alaska	Alabama	Arizona
California	Georgia	Arkansas
Connecticut	Idaho	** Colorado
Delaware	Indiana	Louisiana
District of Columbia	Kentucky	Mississippi
Florida	* Maine	New Mexico
Hawaii	Maryland	North Carolina
Illinois	Nevada	** South Carolina
Iowa	North Dakota	** Utah
Kansas	Oklahoma	** Virginia
Massachusetts	Tennessee	West Virginia
Michigan	Texas	
Minnesota	Washington	
Missouri	Wyoming	
Montana		
Nebraska		
New Hampshire		
New Jersey		
New York		
Ohio		
Oregon		
Pennsylvania		
Rhode Island		
South Dakota		
Vermont		
Wisconsin		

* Maine fails to mention county employees

** Grievance procedure for public employees

See 1 PUB. EMPLOYEE BARGAINING REP. (CCH) 1661-2241 (¶ 600 for each state deals with coverage) (1978).

25. Table III, *supra* note 24.

26. *Id.*

27. The Act became effective April 1, 1984. OHIO REV. CODE ANN. §§ 4117.01-.23 (Page Supp. 1984).

28. The earliest drafts of the current law appeared in 1971. J. O'REILLY, OHIO PUBLIC EMPLOYEE COLLECTIVE BARGAINING 506 (1984). After a 1973 senate defeat and vetoes in 1975 and 1977 by then-Governor James Rhodes, it was signed into law in 1983 by Governor Richard Celeste. *Id.* at 7-9.

period, revisions attempted not only to reconcile conflicting political views but also to solve the variety of policy problems that spring from public sector collective bargaining.

The Act's provisions regulating the right to strike and dispute resolution[29] attempt to balance concerns for public health and safety[30] and the need for peaceful, non-disruptive, dispute resolution[31] with traditional notions of employee economic power.[32] The union security provision[33] solves free-rider, stability, and enforcement problems while limiting the scope of forced association between unions and unwilling employees.[34]

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29. OHIO REV. CODE ANN. § 4117.14-.16 (Page Supp. 1984).

30. *See, e.g., Developments in the Law-Public Employment*, 97 HARV. L. REV. 1611, 1712-13 (1984) (even momentary loss of some public services could cause severe harm).

31. *See* H. EDWARDS, R. CLARK & C. CRAVER, *supra* note 16, at 633-39 (emphasizing need for settlement procedures to avoid strikes); *Developments in the Law-Public Employment*, *supra* note 30, at 1706-12 (arbitration, the primary alternative to public employee strikes, is seriously flawed).

32. *See* H. WELLINGTON & K. WINTER, THE UNIONS AND THE CITIES (1971) (indicating the needs of public employees for industrial peace, democracy and effective political representation).

33. The parties to a public employment collective bargaining pact may agree to include a union security agreement. OHIO REV. CODE ANN. § 4117.09 (Page Supp. 1984).

34. The Act provides in part:

> [T]he employees in the unit who are not members of the employee organization [may be required to] pay to the employee organization a fair share fee . . . Any public employee organization representing public employees pursuant to Chapter 4117 of the Revised Code shall prescribe an internal procedure to determine a rebate, if any, for nonmembers which conforms to federal law . . . . The internal rebate procedure shall provide for a rebate of expenditures in support of partisan politics or ideological causes not germaine [sic] to the work of employee organizations in the realm of collective bargaining.

Id. This language attempts to conform to the Supreme Court's pronouncements in Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977). Ellis v. Brotherhood of Ry., Airline, and Steamship Clerks, 104 S. Ct. 1883 (1984), raised new questions about the adequacy of any rebate approach, since such a scheme "reduces but does not eliminate the statutory violation." *Id.* at 1890.

> By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization. The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only. The harm would be reduced were the union to pay interest on the amount refunded, but respondents did not do so. Even then the union obtains an involuntary loan for purposes to which the employee objects.

Id. The Court suggested as an acceptable alternative "advance reduction of dues and/or interest-bearing escrow accounts." *Id.*

Union stridency, calculated to increase membership or diffuse the effectiveness of rival organizational challenges, is eliminated by the statute's "fair share" provision. OHIO REV. CODE ANN. § 4117.09 (Page Supp. 1984). Employers are simultaneously given the bargaining leverage that emanates from their authority to make "fair share" arrangements. The automatic and unauthorized payroll deduction provision, *id.* § 4117.09(B)(2), eliminates the quagmire of enforcement problems that would arise under a private sector enforcement

The unit determination provisions,[35] drawing from national public sector experience, supplement traditional unit determination criteria with those of efficiency, a concern for the effect of fragmentation, and the special treatment of public protection (safety and health) employees.[36]

The Ohio law specifically addresses other policy concerns discussed repeatedly in the public sector literature. The problem of skewing political decisionmaking through a union's exercise of economic power in the bargaining process is attacked by limiting the discussion of specific non-monetary issues.[37] The need for accommodating the merit and collective bargaining systems has been recognized and specifically satisfied.[38] The law also defines the relationship between agreements governing the parties and external law.[39]

However thoughtful and comprehensive, no law created by human beings is perfect.[40] This colloquium focuses on a few of the problems that have surfaced during the first year of the Act's operation. Discussion will center upon the impasse procedure elaborated in Section 4117.14 of the statute, the voluntary recognition process,[41] and unit determination.[42]

A distinguished panel of experts in public sector labor relations

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model. *See* H. EDWARDS, R. CLARK & C. CRAVER, *supra* note 16, at 471-82 (private sector enforcement options are unavailable in public sector).

35. OHIO REV. CODE ANN. § 4117.06 (Page Supp. 1984).

36. The categories of insulated employees under § 4117.06(D)(2) and (3) coincide with categories of employees who are not given the right to strike under the statute. *See id.* § 4117.14(D)(1). *See generally*, Sharpe, *Unit Determination under the Public Employee Collective Bargaining Law*, IN BRIEF, 2, Sept. 1984.

37. *Id.* § 4117.08(C). *See* H. WELLINGTON & K. WINTER, *supra* note 32, at 15-32; D. BOK & J. DUNLOP, LABOR AND THE AMERICAN COMMUNITY 327 (1970); Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L. J. 1156, 1192-97 (1974).

38. OHIO REV. CODE ANN. § 4117.08(B) and .10 (Page Supp. 1984). *See* Note, *supra* note 19, at 687-89. Rather than excluding from the scope of bargaining all matters regulated by the merit or civil service systems, the Ohio law *selectively* excludes merit related items. Section 4117.08(B) provides:

> The conduct and grading of civil service examinations, the rating of candidates, the establishment of eligible lists from the examinations, and the original appointments from the eligible lists are not appropriate subjects for collective bargaining.

OHIO REV. CODE ANN. § 4117.08(B) (Page Supp. 1984). *See* Helburn and Bennett, *Public Employee Bargaining and the Merit Principle*, 23 LAB. L.J. 618, 623-24 (1972). Also, it removes jurisdiction from the state personnel board or civil service commissions over matters that are the subject of final and binding arbitration under a collective bargaining agreement. OHIO REV. CODE ANN. § 4117.10 (Page Supp. 1984).

39. *Id.* § 4117.10.

40. *See, e.g., Exodus* 20:1-17 (The "Ten Commandments").

41. *Id.* § 4117.05(A)(2).

42. *Id.* § 4117.06.

will present papers and entertain a broad range of questions from the audience. Judge Jack G. Day, Chairman of the Ohio State Employment Relations Board (SERB), in a "Report From Serbia," addresses the issues of impasse resolution and voluntary recognition under the statute. Mr. Arvid Anderson, Chairman of the New York City Office of Collective Bargaining, puts the dispute resolution issue into comparative perspective in his paper, "The Ohio Bargaining Impasse Procedures: An Outsider's View." Judge Day and Mr. Anderson will then field a number of questions from the audience on dispute resolution theory and practice under the Ohio statute.

The second segment of the colloquium features two presentations on "unit determination," an enormously important issue in the formation of long term collective bargaining relationships. In "Anatomy of a Public Sector Bargaining Unit," Professor Andria S. Knapp, of the University of Pittsburgh School of Law, discusses the import of unit determination in theory and problems particular to the Ohio statute.

Finally, in a presentation entitled "A Separate Peace: Recommendations Upon Review of the Board's First Year," Mr. James O'Reilly discusses the specific concerns about unit determination under the statute as expressed by management and union representatives in his personally conducted opinion survey.[43] Professor Knapp and Mr. O'Reilly will also address questions from the audience in a second general discussion session. In the final segment of the colloquium, all four panelists consider in an "open forum," questions from the audience and from each other on a wide range of public sector topics.

The expertise and well-prepared presentations of the panelists conjoin with a well-informed audience of SERB representatives, neutrals (arbitrators, mediators, and factfinders), union and management representatives, and academics, to make uniquely successful this first anniversary colloquium. The ideas generated during this colloquy are certain to influence important changes in the statute and its administration. Equally important will be their contribution to the growing body of national public sector knowledge.

43. The O'Reilly Article also discusses problems in the administration of the statute by SERB, as well as elections and unfair labor practices under the statute.