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THE RIGHTS OF A PUBLIC EMPLOYEE IN NEBRASKA

I. INTRODUCTION

It has long been accepted that public employees are to be treated differently from employees in private enterprise. This proposition is primarily based on traditional sovereignty concepts. Another basis of the distinction is the absence of an ordinary business profit motive of the governmental employer. Also, some consider that the governmental employer is in a position to protect or safeguard the best interests of the public as a whole, including the employees, whereas the private entrepreneur is interested only in protecting the interests of his investment or the investment of his stockholders. Although these distinctions have some validity, changing conditions are weakening their effect and application.

The role of the government in American enterprise is constantly increasing; today the government conducts and controls many functions that have traditionally been within the purview of private enterprise. At the present time almost one-sixth of the nonagricultural working population of this country is employed by the government.¹

Most governments at all levels actively encourage and support collective bargaining in private enterprise as an instrumentality to promote industrial peace; however, when considering the status of their own employees, they may tend to take a different view.² Nebraska provides, for example, that "Employees shall have the right of self-organization and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and such employees shall also have the right to refrain from any or all of such activities."³ But this does not apply to employees of the state or political subdivision.⁴

¹ U.S. Bureau of Labor Statistics, Dep't of Labor, 12 Employment and Earnings 13, 20 (1965).

² "Government as employer has failed in many instances to practice what it compels industry to do. Legislatures which deny to government agencies the use of some proper form of 'collective bargaining' procedures so familiar in industry (at least in terms of 'collective negotiation'), which attempt to restrict unduly the right of employees to organize and to petition the government for redress of their grievances, need to review the problem more realistically." ABA LABOR RELATIONS SECTION (1955).

³ NEB. REV. STAT. § 48-904 (Reissue 1960).

⁴ NEB. REV. STAT. § 48-902(3) (Reissue 1960).

In *Local 507, IBEW v. Hastings*,⁵ the Nebraska Supreme Court has followed the majority rule in declaring that governmental employees do not have collective bargaining rights in the same sense that their counterparts in private enterprise have. The legislative aftermath of this decision became one of the most contested issues of the 1967 unicameral session. The specific rights governmental employees and employee organizations possess after the *Hastings* decision and the new legislation, as well as the generally expanding role of government in our society, compel a reexamination of the status of the governmental employee.

II. THE RIGHTS OF PUBLIC EMPLOYEES

It is not questioned that public employees have some rights to associate and present their views and demands to their employer. These rights arise primarily under the first amendment of the United States Constitution and comparable provisions in the Constitution of the State of Nebraska.⁶

However, employment by the government is a privilege, not a right, and those who accept it must do so subject to the conditions involved. This maxim, though, is not to be extended to the point that a person is denied his constitutional right to organize because he chooses to be employed by the government.⁷ The leading case of *Springfield v. Clouse*⁸ recognizes that these employees have a constitutional right to organize, but holds that they do not have collective bargaining rights in the same sense as individuals in private employment. The opinion refuses to distinguish between persons employed by the government in its governmental capacity and those employed by the government acting in a proprietary capacity.⁹ The court says, "all citizens have the right, preserved

⁵ 179 Neb. 455, 138 N.W.2d 822 (1965).

⁶ "The right of the people peaceably to assemble to consult for the common good, and to petition the government, or any department thereof, shall never be abridged." NEB. CONST. art. 1, § 19.

⁷ *But see, Perez v. Board of Police Comm'rs*, 78 Cal. App.2d 638, 178 P.2d 537 (1947), which upheld a board ruling that members of the Los Angeles police department could not associate with any trade association or labor union which admitted to membership persons who are not employees of the City of Los Angeles. The court said: "The action of the Board of Police Commissioners raises no constitutional questions The attempt to raise the issue of free speech and free assembly in the within action is unavailing." *Id.* at 649, 178 P.2d at 544.

⁸ 356 Mo. 1239, 206 S.W.2d 539 (1947).

⁹ Thus far the courts have been unsuccessful in attempts to explicitly define the governmental-proprietary distinction of government activities. Generally a government is said to be acting in a "governmental"

by the First Amendment to the United States Constitution and . . . The 1945 Missouri Constitution . . . to peaceably assemble and organize for any proper purpose, to speak freely and to present their views and desires to any public official or legislative body."¹⁰

Although some right to organize is well established, it is far from an answer to the problems of public employees. Without means of exerting economic or other pressure to back up the group's position, such as the strike, picket or a system of governmental supervision, such as a fact finding procedure, the mere organization of a group of employees provides little benefit for these employees. If the governmental employer is not reasonable in listening to the requests or the grievances of the individual employee, the mere fact that a group of these employees join together to present the grievances will not substantially alter the employer's attitude. Various methods have been used to place effective power behind the right to organize including association with an outside labor union, striking, picketing and various procedures for judicial intervention into disputes. Not all of these, however, are equally available to organizations of public employees.

A. THE STRIKE

The strike is the most formidable weapon that employees can utilize to enforce their requests of the employer. The threat of a work stoppage by an organization representing all or a substantial part of the employees of a firm backs up their right to organize and enables them to effectively present their requests to their employer so that he will listen. In private enterprise the strike serves the employees as a means of balancing power between themselves and their employers; but public employees are in a different position. In many areas of public employment a strike is intolerable. The employees cannot enforce their requests by striking without seriously endangering the public welfare. A frequently cited authority for the proposition that governmental employees do not have a right to strike is a famous letter written by President Franklin D. Roosevelt to the President of the National Federation of Federal Employees.¹¹ In this letter, President Roosevelt said:

capacity when it is performing activities that only the government could perform and that it is essential for the government to perform. A government is said to be acting in its "proprietary" capacity when it performs activities traditionally within the purview of private enterprise or that could (or are) being performed by private enterprise. The distinction is used in many areas, primarily tort liability and taxation, but is seldom used in the area of labor relations.

¹⁰ *Springfield v. Clouse*, 356 Mo. 1239, 1244, 206 S.W.2d 539, 542 (1947).

¹¹ Letter from President Franklin D. Roosevelt to Mr. Luther C. Steward,

Since their [federal employees] 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 paralysis of Government by those who have sworn to support it, is unthinkable and intolerable.

This letter was written in reference to employees of the federal government, but it is often used to support the proposition that the employees of any government or governmental subdivision, regardless of their duties or their positions, are not allowed to strike. It is uniformly considered as one of the rights or privileges that a person surrenders when he accepts employment from the government.

In Nebraska, as in most states, all persons are specifically prohibited by statute¹² from hindering governmental service by engaging in a strike. To engage in or encourage a strike against the government is punishable by fine and/or imprisonment. In addition a Nebraska statute¹³ makes any attempt to impose the effects of a strike on a governmental employer by means of a "concerted quit" illegal.

The propriety of prohibiting strikes by governmental employees is not within the purview of this article. The important point is that the strongest sanction of the private enterprise employee is generally not available to the governmental employee. In order for the governmental employee to adequately protect his interests some substitute must be made available to him.

B. THE PICKET

A right to picket for the purpose of publicity, like the right to organize, is a constitutionally protected right of every individual.¹⁴ Under the doctrine stated in *Thornhill v. Alabama*, an individual's right to picket for any "legal purpose" is protected as an expression of free speech. In its normal use picketing is a supplement to a strike. By use of the picket line the employees publicize their discontent to the public in an attempt to gain the public support necessary to exert pressure on the employer to submit to their demands.

In most cases the governmental officials that the employees

August 16, 1937, in C. RHYNE, *LABOR UNIONS AND MUNICIPAL EMPLOYEES* LAW 436 (1946).

¹² NEB. REV. STAT. § 48-821 (Reissue 1960).

¹³ NEB. REV. STAT. § 48-822 (Reissue 1960).

¹⁴ *Thornhill v. Alabama*, 310 U.S. 88 (1940).

are trying to persuade are either elected or subordinate to an elected official. These officials are extremely sensitive to public opinion. If the employees do in fact have a legitimate grievance, the picket could be utilized as a weapon to force the employer to hear their story. If he fails to do so and the grievance is in fact legitimate, the picket may be able to arouse public opinion on the side of the employees to the point where the employer is forced by public pressure to be reasonable in his treatment of the employees. The use of the picket in this manner would not alienate the public from their elected officials. The public officials are in a position to effectively explain their position to the public so that both sides of the controversy can be considered. The primary function of the picket is to bring the dispute to the attention of the public.

The use of the picket as a means to enforce demands is not comparable to the strike. It does not interrupt the efficient working of government, nor can it be interpreted as a challenge to the sovereignty of the government. The picket does, however, exert a political influence on the vote-minded officials comparable to the economic influence the strike exerts on the profit-minded private entrepreneur.

The picket has seldom been used as an entity separate and distinct from the strike. When public employees do attempt to picket, their actions are usually interpreted by the courts as an attempt to force their employer into a collective bargaining contract. In most jurisdictions the courts hold that governmental employers do not have the authority to enter into collective bargaining agreements in the absence of specific statutory authority.¹⁵ Thus where the specific statutory authority is not available, the picket is considered to be promoting an "illegal purpose" and therefore is not regarded as a constitutionally protected exercise of freedom of speech. If picketing is utilized not as an attempt to force the employer into a collective bargaining agreement for which the employer has no statutory authority, but rather as merely an attempt to present their grievances to the employer and to legally influence the discretionary decisions of the employer, then the picketing should no longer be considered illegal. It seems reasonable that the use of the picket could profitably be utilized by public employees to persuade the employer to respond more favorably to their requests.

C. AFFILIATION WITH ORGANIZED LABOR

It is one thing to say that the public employees have the right

¹⁵ Local 507, IBEW v. Hastings, 179 Neb. 455, 138 N.W.2d 822 (1965).

to organize, but a more crucial question arises concerning their association with an outside organization, i.e., a labor union. It is often contended on behalf of the governmental employer that it is against public policy and not in the best interests of good government for their employees to associate with a labor organization. For example, in the controversy that gave rise to the *Hastings* case, the Hastings Board of Public Works refused to recognize the IBEW as a spokesman for those employees who had authorized the union to act for them, yet it indicated a willingness to discuss demands of the employees presented individually or through superintendents, supervisors, or foremen.¹⁶

The exertion of outside influence is alleged to be harmful to the government and likely to detract from the smooth operation of government. It has been said that "unionization of the public service diverts the loyalty, allegiance and obligations of the employees from the people and their government which are entitled to them, to the union. . . . Such an intolerable situation is utterly incompatible with sound and orderly government. It constitutes a threat to state sovereignty."¹⁷ Under this view it is assumed that because of the absence of the profit motive in the governmental service, the public employer will always protect the best interests of their employees. This is in fact a valid proposition as far as it goes, but this proposition alone cannot support a contention that public employees should not unionize. This is not a question of striking or forcing collective bargaining activities of a union; it is simply a question of whether the public employees can become associated with outside labor unions.

A group of employees, just like an individual employee, may be inhibited from approaching the employer and effectively presenting a valid grievance and for good reason. When the government is the employer it retains complete discretion over the working conditions of its employees. If the employer refuses to be reasonable there may be no remedy for the employees. It is true that with widespread civil service laws and similar legislation, the employer cannot summarily dismiss an employee or a group of employees for attempting to present a grievance; but civil service laws are not concerned with the day to day operations of government. An employee trying to present a grievance to the supervisor he has to work under every day (or even his supervisor's

¹⁶ Local 507, IBEW v. Hastings, Court of Industrial Relations of the State of Nebraska No. 17 (filed May 5, 1967).

¹⁷ Weisenfeld, *Public Employees-First or Second Class Citizens*, 16 Lab. L.J. 685, 687 (1965) citing a speech by Gov. William M. Tuck to the Virginia Legislature.

superior) is in a precarious position.

Governmental service is not immune from employee grievances and discontent. Generally the cause of this discontent is a failure of communication between management and the employees; and it is this same failure of communication that inhibits a satisfactory solution to the problems. An employee representative could often provide the essential communication between management and its employees as well as valuable experience and expertise in the area of labor relations.

For example a job transfer within a department or agency may be virtually impossible. A supervisor that is satisfied with the status quo may suppress information on job openings that certain of his employees are qualified for and the employee will not freely inquire about a different job. Where this situation exists the employee representative could establish a system where all qualified employees would be notified of job openings or the representative would inquire about openings on behalf of interested employees. Possibly an employee feels he wasn't given sufficient notice for an out of town assignment; or he feels he draws more than his share of undesirable assignments; or he continually has to work with equipment or helpers inferior to that of his co-workers; or more than one superior is giving him inconsistent instructions. The list is infinite, but these are all everyday problems that an employee representative could present to the employer more effectively than could the employee himself. This added link of communication would increase employee morale and likely result in more efficient management. Repeated valid grievances could induce better planning which would mean more notice before an out of town assignment, fairer distribution of assignments and more objective promotions. The presentation of a grievance by an outside representative is entirely unlike one presented by an employee who must go back to work the next day.¹⁸

Just as the right to organize is constitutionally protected, it would seem that the first amendment right of association¹⁹ would

¹⁸ "Grievance machinery should not be designed to deal with disciplinary cases, nor with salary or other problems specially regulated by statute. They should be confined to areas wherein management has authority to exercise its responsibility and discretion to adjust or correct situations which may be the cause of just grievances. Even where a grievance may appear to be fancied rather than real a sympathetic attitude on the part of supervisors and management could go a long way to relieve misapprehension and bolster morale by enhancing confidence in management's desire to treat employees fairly." ABA LABOR RELATIONS SECTION 95 (1955).

¹⁹ "It is beyond debate that freedom to engage in association for the

give the employees the right to choose their own representative to present their grievances, whether it be one of their own ranks or an outside representative. The right of association is a limited right,²⁰ and it is sometimes contended that the limitations should include a prohibition of governmental employees associating with labor unions. Under the view that association with organized labor is antagonistic to the duties entrusted to public employees, it is contended that the overriding public welfare justifies limiting the employee's right of association. Thus the right of public employees to affiliate with an outside organization may be restricted or abrogated in situations in which a conflict of loyalties might affect the performance of the employees' duties.²¹

This limitation of the basic right may be warranted in certain situations, but it is not valid as a blanket prohibition of all affiliation of public employees with outside organizations. A limitation of a right so basic as the right of association should be carried no farther than is absolutely necessary. The American Civil Liberties Union describes the right of government employees to associate with a labor organization as a basic civil liberty.²² In their words, "when a vital civil liberty is concerned, the surrender of the right can be justified only when there is a showing of a positive rather than a remotely speculative danger to the public health and safety."²³

There has been very little litigation on the issue. The leading case, *Norwalk Teachers' Ass'n v. Board of Educ.*,²⁴ held that public employees, in the absence of statute to the contrary, could organize as a labor union. The court said, "in the absence of prohibitory statute or regulation, no good reason appears why public employees should not organize as a labor union."²⁵ In this case the labor union involved was a local, independent organization; thus, the important question of affiliation with an outside organization was not presented. The *Norwalk* case relies on the case of *Springfield v.*

advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

²⁰ Cf. *Uphaus v. Wyman*, 360 U.S. 72 (1959).

²¹ See *Perez v. Board of Police Comm'rs*, 78 Cal. App.2d 638, 178 P.2d 537 (1947).

²² Policy Statement on Civil Rights in Government Employment by the American Civil Liberties Union, April 13, 1959.

²³ *Id.* at 1.

²⁴ 138 Conn. 269, 83 A.2d 482 (1951).

²⁵ *Id.* at 276, 83 A.2d at 485.

*Clouse*²⁶ which simply says, "we start with the proposition that there is nothing improper in the organization of municipal employees into labor unions; and that no new constitutional provisions were necessary to authorize them."²⁷ The *Clouse* case does not say whether the union involved was an independent organization or one connected with an outside organization, but apparently it does not distinguish between them. The real issues in this area have not as yet been presented to the courts.

D. COLLECTIVE BARGAINING LEGISLATION

Employees of governmental agencies and subdivisions have argued intensively that they have a right to bargain collectively with their employer. These demands have been met by the broad, simple answer that the governmental employer does not have the power to bargain with the employees in the absence of specific statutory authority, and by a number of corollary arguments.²⁸

²⁶ 356 Mo. 1239, 206 S.W.2d 539 (1947).

²⁷ *Id.* at 1244, 206 S.W.2d at 542.

²⁸ The government employer argues that any negotiations or contracting with a representative of the employees is an unlawful delegation of authority. The duties of the officers of the government are explicitly defined by law and one of these duties is the control of the employees of the government. To negotiate with an outside representative concerning conditions of employment would be an unlawful delegation of this legally prescribed authority.

The labor unions and employees contend that they are not trying to relieve these officials of their duties, but that they only want to negotiate with the officials in good faith concerning the conditions of their employment; and that negotiations alone do not constitute any delegation of authority. There is no requirement that the employer enter into an agreement with the employees representative but if an agreement is reached, it is not a delegation of authority. The employees cannot force the employer to agree to anything that he does not want to.

The government employer contends that it is against public policy for him to negotiate with the representative of the employees for the employer must have absolute authority over the employees at all times. In the interests of good government the employer must be able to change conditions of employment to meet any unseen contingency. To this argument the employees contend that the public policy is to treat all employees alike. The government requires private industry to recognize all the employees' rights and logically should not be permitted to refuse to recognize them either.

Governmental employers argue that they only have the powers expressly given them by the state legislatures, and that in the absence of express statutory authority they do not have the power to bargain collectively with the employees. The employees counter that governmental agencies have, in addition to the express powers given by the legislature, the implied power to implement these responsibilities in the

With few exceptions²⁹ the courts have held that in the absence of this specific statutory authority the governmental agencies and subdivisions do not have the power to enter into collective bargaining with their employees in the same sense as employees in private enterprise.³⁰ These cases are generally based on the proposition that the governmental employers derive all their power and authority from the state legislature and do not have an inherent or implied power to enter into a collective bargaining agreement with their employees. With few exceptions³¹ these cases leave undecided what power the employer has to negotiate with the employees without actually entering into a binding agreement. In many in-

best manner available. The power to bargain collectively should be implied from the right to employ personnel and the power to contract. They argue that the employees have an inherent right to be recognized as a collective unit for purposes of bargaining with their employer, and the employer has an implied power to bargain with them.

The employer contends that the difference in purposes and goals between a public and a private employer means that the employees should be treated differently. The absence of the profit motive in government means that the employer will look out for the best interests of the employees as well as the best interests of the public. The employees answer that the growing intervention of government into activities traditionally private has weakened this distinction. The government is often now in direct competition with private enterprise and there is no reason why the employees of the two should be treated any differently.

The government also contends that collective bargaining in theory and in practice conflicts with existing civil service laws. The employees contend that collective bargaining and civil service laws can be used co-extensively; collective bargaining is intended to supplement civil service laws, not replace them.

Government employers argue that collective bargaining in its very essence contemplates the strike as a weapon to enforce the demands of the employees, that the strike is inconsistent with the position of public employees, and the whole process of collective bargaining is meaningless without the strike. The employees answer that a strike is not essential to collective bargaining. The public employee can use political pressure through picketing and lobbying as a substitute to striking. Usually public employees do not advocate that they should have a right to strike, but that collective bargaining can serve a useful purpose even without a strike.

²⁹ See *Local 266, IBEW v. Salt River Project Agr. Imp. & P. Dist.*, 78 Ariz. 30, 275 P.2d 393 (1954); *Local 611, IBEW v. Farmington*, 75 N.M. 393, 405 P.2d 233 (1965).

³⁰ *Nutter v. Santa Monica*, 74 Cal.2d 292, 168 P.2d 741 (1946); *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951); *Mugford v. Baltimore*, 185 Md. 266, 44 A.2d 745 (1945); *Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539 (1947); *Local 507, IBEW v. Hastings*, 179 Neb. 455, 138 N.W.2d 822 (1965).

³¹ See *Norwalk Teachers' Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951).

stances the holdings are interpreted as denying the employer any authority even to discuss or negotiate with a representative of the employees.

These holdings, coupled with increased pressures by employees and labor unions to obtain collective bargaining rights, have induced legislative action in many states. In recent years, many states³² have enacted legislation giving governmental agencies and subdivisions specific statutory authority to bargain collectively with their employees. These statutes give employees the right to organize, the right to affiliate with labor organizations of their own choosing, and the right to bargain collectively with their employer.

Under the typical statute, the governmental employer is not only empowered to enter into a collective bargaining agreement with his employees, he is commanded by law to enter into such negotiations and to bargain in good faith. When an agreement is reached, if there is one, the employer is given the statutory authority to enter into a binding collective bargaining agreement with the employees. There is no statutory proclamation that the parties must reach an agreement.

In governmental service the balance of power that is so inherent in the collective bargaining process is missing. The public employees are almost universally denied the right to strike and it is obvious that the governmental employer could not impose a lock-out. The statutes provide for intervention of a governmental agency, upon the petition of either party, to insure that both parties will comply with the statutory command to bargain in good faith.

Fact finding is currently the procedure most commonly utilized by the statutes pertaining to solution of disputes involving public employment. Fact finding has been described as "a device for securing proposed terms of settlement which will secure wide public backing and require the parties to give careful, serious attention to them."³³ A typical example is the Massachusetts statute.³⁴ This statute provides that neither party may refuse to bargain in good faith. When it is alleged that one party is refusing to bargain in good faith, the state labor commission is directed to order fact

³² See CONN. GEN. STAT. ANN. § 7-467 to 7-477 (Supp. 1965); MASS. GEN. LAWS ANN. ch. 149, § 178 (Supp. 1965); MICH. STAT. ANN. § 17.455(9) (Supp. 1965); MINN. STAT. ANN. § 179.52 (1966); N.H. REV. STAT. ANN. § 31:3 (Supp. 1965); ORE. REV. STAT. § 243.710 to 243.760 (1965); R.I. GEN. LAWS ANN. § 36-11-1 (Supp. 1965); WIS. STAT. ANN. § 111.70 (Supp. 1965).

³³ A. CHAMBERLAIN & J. KUHN, *COLLECTIVE BARGAINING* 415 (1965).

³⁴ MASS. GEN. LAWS ANN. ch. 149, § 178L (Supp. 1965).

finding. If it is determined that a prohibited practice has been committed, the commission is empowered to issue an order to the guilty party to cease and desist from the prohibited acts, and the commission "shall take further affirmative action as will comply with the provisions of this section."³⁵

The fact finder also attempts to resolve the dispute. Due to the inequality of the parties' power, the performance of this function is more crucial in public employment than in private industry. If the efforts of the fact finder are not successful in resolving the dispute and the parties are still deadlocked the employees are still without a remedy. Despite this shortcoming the fact finding process can be a valuable instrument in public employment collective bargaining. It insures that both parties will bargain in good faith and it can resolve many actual disputes.

III. THE NEBRASKA SITUATION

In the 1943 session of the Nebraska Legislature, a bill was introduced to give all governmental employers in Nebraska express statutory authority and power to bargain collectively with an exclusive bargaining representative chosen by a majority of the employees to represent them.³⁶ The bill was introduced to give public employees collective bargaining rights similar to those now extended to employees by the National Labor Relations Act,³⁷ and would give the governmental employer the express statutory authority often thought to be needed for it to enter into a collective bargaining contract. The bill was favorably reported out of the Labor and Public Welfare Committee but it died on the general file at the close of the session by virtue of a motion to postpone indefinitely all bills remaining on the general file.³⁸ In the words of the chairman of the committee:

The purpose of the bill is to empower officials of Public Power Districts, cities and political subdivisions to bargain collectively with representatives of their employees and more especially where such governmental subdivisions operate electric power and light plants. This bill has no connection with strikes, closed shop or exclusive bargaining rights. It was the opinion of the majority of the committee that this bill only confirms the rights that the employees now have. That is also the opinion of the Attorney General. *This bill is to clarify existing rights.*³⁹

³⁵ *Id.*

³⁶ L.B. 207 56th Neb. Leg. Sess. (1943).

³⁷ 29 U.S.C. §§ 141-187 (1964).

³⁸ Files of Committee on Labor and Public Welfare, 56th Neb. Leg. Sess. (1943).

³⁹ *Id.* (Statement of Senator George Craven, Committee Chairman.) (Emphasis added).

It is obvious from this statement that the majority of the committee felt that the governmental employers in Nebraska did not need express statutory authority to enter into collective bargaining agreements with their employees. They apparently also believed that under the law, as it then existed, the employees had a right to be represented in these collective bargaining sessions by a representative of their own choosing. This is what the bill purported to do and the committee looked upon the bill as merely a clarification of existing rights.

The attorney general of Nebraska concurred. In a reply to a request from Senator Craven for an opinion on the bill, Mr. Walter R. Johnson, Nebraska Attorney General said, "In our judgment the bill [L.B. 207] as thus amended would be an expression of the law as it now exists and would apply to controversies which may arise between municipalities or public corporations and their employees and *would be in effect a legislative declaration of existing law.*"⁴⁰

In the 1947 session of the Nebraska Legislature a bill similar to the 1943 bill and purporting to accomplish the same purpose was introduced before the legislature.⁴¹ This bill was indefinitely postponed by the Committee on Labor and Public Welfare because "it was not needed and would serve no useful purpose."⁴² In light of the report on the bill four years earlier, this statement could easily be interpreted to mean that this committee also felt that this bill too was but a declaration of the existing law and therefore unnecessary. Since 1947 there has been no attempt in the Nebraska Legislature to give *all* governmental employers the express statutory authority to bargain collectively with their employees.⁴³ The fact that the earlier bills failed because they were considered a "legislative declaration of existing rights" must be considered as having a deterring effect on any subsequent bills.

⁴⁰ Nebraska Attorney General's Opinion, March 22, 1943, in C. RHYNE, *LABOR UNIONS AND MUNICIPAL EMPLOYE LAW* 279 (1946) (Emphasis added).

⁴¹ L.B. 468 60th Neb. Leg. Sess. (1947).

⁴² Files of Committee on Labor and Public Welfare, 60th Neb. Leg. Sess. (1947).

⁴³ All the bills referred to by the court in the *Hastings* case were concerned solely with disputes involving a public utility operated by the government in its proprietary capacity. The 1967 legislature passed LB 298 which was substantively the same as the previous unsuccessful bills. LB 298 gives the Court of Industrial Relations the power to order bargaining between the parties in the event of an industrial dispute, a power which the *Hastings* case held that they did not have. Since 1947, there have been no attempts in the Nebraska Legislature to give all governmental employees comprehensive collective bargaining rights similar to the two earlier bills.

However, in 1965 the Nebraska Supreme Court declared the law in Nebraska to be exactly the opposite of what the legislators and the attorney general thought the law was in 1943 and 1947. In *Local 507, IBEW v. Hastings*⁴⁴ the court said, "The generally accepted rule established in other jurisdictions on the issue, which we adopt, is that a public agency or governmental employer has no legal authority to bargain with a labor union in the absence of express statutory authority."⁴⁵ The resulting conflict is that the legislature, at least the legislature in 1943, apparently believed that governmental employers had the power and authority to bargain collectively with a representative chosen by their employees, while the supreme court in 1965 believed that there was no such power or authority unless the legislature expressly granted it.

The *Hastings* case does not specify what authority the governmental employer in Nebraska has short of actually signing a collective bargaining contract, nor does it specify what rights the governmental employee has in Nebraska. The court bases its statement of the rule on a Florida Case, *Dade County v. Amalgamated Ass'n of Street Electric Ry. & M.C. Emp.*,⁴⁶ and an Alabama case, *Local 321, Int'l Union of Operating Eng. v. Water Works Bd.*⁴⁷

In the *Dade County* case the county transit authority purchased the local bus transportation system from its private owner. The national union had been representing the bus drivers for a number of years and a collective bargaining contract with the bus company was in effect. The union requested the county to recognize the union as exclusive bargaining agent, and assume the existing collective bargaining agreement. The county brought the suit to determine their status in relation to the union. A Florida court of appeals held: "Unless clearly authorized to do so by the enactment of legislation, the plaintiffs [the county] would not be authorized and are not now authorized to enter into collective bargaining agreements, within the labor relations meaning of the term, with the defendants [the union]."⁴⁸ A Florida statute in force at the time of the *Dade County* case prohibits a strict interpretation of this rule. Under this statute⁴⁹ all governmental employees in the state are

⁴⁴ 179 Neb. 455, 138 N.W.2d 822 (1965).

⁴⁵ *Id.* at 457, 138 N.W.2d at 824.

⁴⁶ 157 So. 2d 176 (Fla. Ct. App. 1963).

⁴⁷ 276 Ala. 462, 163 So. 2d 619 (1964).

⁴⁸ *Dade County v. Amalgamated Ass'n of Street Electric Ty. & M.C. Emp.*, 157 So. 2d 176, 181 (Fla. Ct. App. 1963).

⁴⁹ FLA. STAT. § 839.221 (1965). "(2) All employees who comply with the provisions of this section are assured the right and freedom of

assured the right and freedom of association, self-organization and the right to join any employee or labor organization. This is not a comprehensive statute as discussed above but it clearly gives the employees the right to join an outside organization and choose a representative to present their proposals for them. Interpreted in light of this statute (which the court cited) the *Dade County* case holds only that the governmental agency does not have the authority to enter into an actual collective bargaining contract with its employees.

In the *Water Works Board* case an international union had been representing the employees for some thirty years, during which time a series of twelve collective bargaining contracts were executed between the parties. The union sought a declaratory ruling that the contract then in force was valid and enforceable. The Alabama court held that "matters of wages, hours, and conditions of employment never have been, and cannot become, a matter of collective bargaining and contract in the absence of constitutional or statutory authority . . ."⁵⁰

In reaching this result the court quoted the rule from the *Dade County* case and relied heavily on several attorney generals' opinions in Alabama. The opinions were based on the proposition that there was no specific authority granted to the governmental employer to enter into such a contract and, therefore, they did not have the authority to do so. This case, like *Hastings*, makes no mention of the authority of the employer to negotiate with the representative of the employees without actually signing a contract. It is interesting to note that in this case the employees were organized; they were represented by an international union and the water works board had been bargaining collectively with the union for some 30 years. The court makes no mention of the propriety of the employees being represented by an international union.

These cases indicate that under the "generally accepted rule" the public employees are not denied a right to organize and to associate with outside labor unions. A similar interpretation of the *Hastings* rule is also warranted by the language of the court. The court says, "Up to the present time, public employees are generally not entitled to collective bargaining in the sense that pri-

association, self-organization, and the right to join or to continue as members of any employee or labor organization which complies with this section, and shall have the right to present proposals relative to salaries and other conditions of employment through representatives of their own choosing."

⁵⁰ Local 321, Int'l Union of Operating Eng. v. Water Works Bd., 276 Ala. 462, 465, 163 So. 2d 619, 622 (1964).

vate industrial employees are."⁵¹ The collective bargaining rights of private employees are protected by the National Labor Relations Act⁵² and are broad and comprehensive. It is clear that governmental employees are not included within this act⁵³ and that they do not have the same rights, but the question of what specific rights governmental employees in Nebraska do have is still unanswered.

Legislation recently passed in the 1967 session of the Nebraska Legislature has extended the power of the Court of Industrial Relations to order bargaining between labor organizations representing certain governmental employees and their employers when they are involved in an industrial dispute. LB 298, a bill substantively the same as the unsuccessful bills referred to in the *Hastings* case, allows the Court of Industrial Relations to order bargaining between the employers and employees of a public utility operated by the government in its proprietary capacity. LB 875 gives them substantially the same authority when an industrial dispute arises between any labor organization or the employees of a paid fire department and a city having a population of more than 5,000 or which is under a civil service system.

The 1967 legislature also passed LB 583 which appears to be a codification of existing law. This act declares that a refusal to discuss terms or conditions of employment shall constitute an industrial dispute and that no governmental subdivision can be *compelled* to enter into a contract with any labor organization. Thus certain governmental employees in Nebraska can now turn to the Court of Industrial Relations when their employer refuses to bargain in good faith and the court has the authority to order the employer to bargain with the labor organization authorized by the employees. This is precisely the kind of order that was set aside by the supreme court in the *Hastings* case.

Collective bargaining has long served private industry as an instrumentality promoting industrial peace, as well as acquiring benefits for the employees. The public employees have as a result of being denied these rights been left behind and it has been said that the "public employees patiently await the grant of first class citizenship."⁵⁴ However, it has recently become painfully obvious

⁵¹ *Local 507, IBEW v. Hastings*, 179 Neb. 455, 457, 138 N.W.2d 822, 824 (1965) (Emphasis added).

⁵² 29 U.S.C. §§ 141-187 (1964).

⁵³ 29 U.S.C. § 152 (1964).

⁵⁴ Weisenfeld, *Public Employees—First or Second Class Citizens*, 16 Lab. L.J. 685, 704 (1965).

that these employees do not always so "patiently await." Disastrous strikes by vital public employees such as firemen and nurses have frequently demonstrated this in the past year.

IV. CONCLUSION

It is well established that public employees do not share the same collective bargaining rights as their counterparts in private industry. The demands of the governmental employees to be recognized as a bargaining unit are, however, rapidly increasing.⁵⁵ Where these efforts are denied or completely ignored these employees have demonstrated that they will take action,⁵⁶ generally to the detriment of the public as a whole. Although public employees will likely never share the full rights of private industry employees, they are entitled to a stronger voice in the determination of their wages, working conditions and presentation of their grievances.

The problems presented by disgruntled public employees have been met or anticipated in many states by legislation giving them express authority to organize, associate with a labor union and bargain collectively with their employers. This legislation clarifies the rights of public employees and removes the uncertainty left by court decisions such as the *Hastings* case. The 1967 legislature has taken the first step in granting all public employees their "first class citizenship" but it is not enough. Such piecemeal legislation can only result in greater uncertainty and stronger demands by those groups not included.

It is submitted that broad, comprehensive legislation giving all governmental employees in Nebraska the right to organize, to join outside labor organizations, to bargain collectively with their em-

⁵⁵ For example the American Federation of State, County and Municipal Employees. As of May 1966, the union claimed 305,000 members, an increase from 250,000 in May 1964. "Coming: Unionized Government," 61 *U.S. News & World Report*, Sept. 26, 1966, 96, 97.

⁵⁶ Jerry Wurf, President of the American Federation of State, County and Municipal Employees said, "I remember a strike I was involved in about a year and a half ago where the employer, at every meeting, kept handing us a copy of a State statute telling us we had practically no rights and, therefore, he wouldn't settle the grievance. Our people went out on strike in sheer indignation at the fact that the employer wouldn't responsibly deal with his conditions of employment." *Id.* at 97.

Other examples in 1966 alone include the firemen strikes in Kansas City and Atlanta where the National Guard had to be called out to man the fire stations; the two nurses' "strikes" in San Francisco; and numerous school teacher strikes across the country.

ployers, and enter into collective bargaining agreements with them would be desirable, beneficial and timely.

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