

**HAWAII
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CONVENTION STUDIES
1978**

**Article XII:
Organization;
Collective Bargaining**

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Article XII
ORGANIZATION;
COLLECTIVE BARGAINING

PRIVATE EMPLOYEES

Section 1. Persons in private employment shall have the right to organize for the purpose of collective bargaining.

PUBLIC EMPLOYEES

Section 2. Persons in public employment shall have the right to organize for the purpose of collective bargaining as prescribed by law. [Am Const Con 1968 and election Nov 5, 1968]

INTRODUCTION

The purpose of this report is to provide delegates to the 1978 Constitutional Convention with background materials related to employee organization and collective bargaining; special emphasis is placed on developments in the public sector in light of the current attention directed to this area.

The materials have been assembled and presented in a manner so as to facilitate a broad understanding of the issues involved in public sector collective bargaining. It should be noted, however, that the focus of the report is placed on features of the constitutional provision and on aspects of public policy related to public sector collective bargaining rather than on issues concerning the law which may result from the implementation of the constitutional mandate. Great care was therefore taken to avoid intrusion into the discussion concerning changes in the law and to limit as much as possible references to such issues which are more appropriately handled in the legislative forum.

Thus, the report begins with a chapter devoted to the history of the formulation and amendment of the Hawaii article on organization and collective bargaining, which includes presentation of the proposals introduced in both the 1950 and 1968 Constitutional Conventions, summaries of the committee hearings and discussions, and finally summaries of the floor debates in the respective committees of the whole. The chapter also includes attitudes and views of various commentators concerning the Hawaii article on organization and collective bargaining and some of the controversial aspects of the Hawaii law. A discussion on constitutional provisions found in the constitutions of Florida, Missouri, New Jersey, and New York is presented next. A background review of developments at the federal and local government level is presented in another section, which also includes a fairly detailed discussion on the public sector strike issue. A brief review of the Hawaii law is to be found in chapter IV, followed by a glossary of terms used in the language of labor-management relations. An extensive bibliography is also included for those interested in pursuing particular areas of interest.

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It would be a grave omission if the support and assistance of a number of persons were not acknowledged here. The interest and spirit of cooperation extended by all who responded to the request for their views (see Appendix D) were exceptional, and if there should be any value assigned to this review, it will be largely due to the efforts of these individuals and others mentioned below. Acknowledgment should also be made of the support and assistance provided by the Industrial Relations Center staff: student helpers Cynthia Okazaki and Steven Lee in the research of background materials; Mrs. Eva L. Goo, with the assistance of Mrs. Nancy Shiraishi, for the careful typing and preparation of research and interview materials; and Mrs. Helene S. Tanimoto for her invaluable research assistance. Special thanks are due Director Samuel B. K. Chang, Assistant Director for Research Richard F. Kahle, Jr., Research Librarian Hanako Kobayashi, and others on the staff of the Legislative Reference Bureau for their gracious support throughout the project; and to Eugene Chang of the Hawaii State Archives, for his uncommon assistance in obtaining the many documents pertaining to the work of the Committee on Public Health, Education and Welfare; Labor and Industry in the 1968 Constitutional Convention. A special note of gratitude is due Sonia Faust, Executive Officer, Hawaii Public Employment Relations Board, for her insightful comments throughout various stages in the preparation of this report. This note of acknowledgment is not intended to release the author from sole responsibility for any shortcomings found in this report.

Chapter 1

THE FORMULATION AND AMENDMENT OF ARTICLE XII

Background

In its initial form adopted at the 1950 Constitutional Convention, Article XII, Organization, Collective Bargaining, of Hawaii's Constitution provided as follows:

Private Employees

Section 1. Persons in private employment shall have the right to organize for the purpose of collective bargaining.

Public Employees

Section 2. Persons in public employment shall have the right to organize and to present and make known their grievances and proposals to the State, or any political subdivision or any department or agency thereof.

Subsequently, at the 1968 Constitutional Convention, section 1 was retained in its original form and the existing provision in section 2 of the article was deleted and replaced by the present language which reads as follows:

Public Employees

Section 2. Persons in public employment shall have the right to organize for the purpose of collective bargaining as prescribed by law.

The 1968 Constitutional Convention

It is clear that in proposing the above language,¹ members of the Committee on Public Health, Education and Welfare; Labor and Industry perceived differences in the responsibilities of public and private employees;² furthermore, they did not intend for the constitutional provision to be self-executing. Thus, in its majority report (Standing Committee Report No. 42) the committee stated:³

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...By this amendment it is clear that the meaning of the term "collective bargaining" as used in Section 1 of Article XII and in Section 2 as proposed is not identical. In the case of public employees the rights of collective bargaining will be restricted to those areas and in such manner as will be determined by the legislature. Therefore, the right to strike is a matter for legislative determination.

* * *

The proposed amendment to Article XII recognizes the change that has taken place in public employment since the Constitution was drafted in 1950 and does not limit public employees only to making known their grievances and proposals to the State.

In 1950, there were only a few collective bargaining situations in government service in the United States, and the principle of collective bargaining for public employees was not yet generally accepted.

Since that time, collective bargaining has spread in public employment and is now a growing trend throughout the United States.

This amendment does not affect any existing laws on public employment, which will remain in effect until changed by the legislature.

At least 9 proposals related to Article XII were referred to the Committee on Public Health, Education and Welfare; Labor and Industry. These included proposals numbered 36 and 74, relating to collective bargaining for public and private employees; proposals numbered 70, 115, 154, and 172, relating to collective bargaining for public employees; and Proposal No. 321, relating to right to work. Appendix A presents the proposals referred to above. Proposals numbered 268 and 299 were omnibus proposals relating to the entire Constitution which offered no amendments to Article XII.

Proposals numbered 70, 115, 154, and 172 all provided for amending section 2 by giving the right of collective bargaining or collective negotiation to public employees; however, Proposal No. 115 and Proposal No. 172 specifically excluded the right of public employees to strike.

Proposal No. 36 and Proposal No. 74 provided for amendment of section 1 of Article XII by adding the words, "and public employment", so as to extend to

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public employees the same rights as private employees, and deleting the previous section 2 relating to public employees. Those who were opposed to granting public employees the same rights of collective bargaining as those in private employment were concerned with the issue of the definition of the term "collective bargaining". In this respect there were considerable discussion and attention focused on the following issues:⁴

- What are the differences between section 1 and section 2, Article XII, of the 1950 Constitution?
- Does the term "collective bargaining" include the right to strike?
- Will the change render present statutes now prohibiting public employees to strike unconstitutional?
- What areas would be included in collective bargaining?

With respect to the differences between section 1 and section 2 of the 1950 Hawaii Constitution, it was explained at the committee hearing held on August 5, 1968,⁵ by a representative of the Hawaii state attorney general's office that "in Section 1...the right of collective bargaining is made a constitutional right, a basic fundamental right; whereas in Section 2 there is no such constitutional right." Further, the legislation governing collective bargaining in Hawaii has defined collective bargaining to include the right to strike in the case of private employees, but in the case of public employees, the right to strike has been prohibited by statute. Should the Constitution be amended to include the right of public employees to bargain collectively, statutes prohibiting public employee strikes (e.g., chapter 86, Hawaii Revised Statutes) would remain standing as a valid statute unless repealed by the legislature. The New York Constitution was pointed out as one case in which the right of employees to engage in collective bargaining is protected but a strike by public employees is prohibited. It was also explained that the delegates to the 1950 Constitutional Convention expressly stated that they did not intend Section 2 of Article XII to limit the rights of public employees, and that under the existing language of the Constitution, it would not be unconstitutional for the legislature to proceed with implementing legislation in the area of public sector collective bargaining.

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Without exception, those opposed to amending Article XII were concerned that the term "collective bargaining", if applied to public employees, would be defined to include the right to strike. There was also the feeling that the 1950 language protecting the right of public employees to join labor organizations and to make known their grievances was adequate. Mr. Robert R. Grunsky, then president of the Hawaii Employers Council, at a public hearing held on August 7, 1968, pointed out that collective bargaining has worked in the private sector because there are "automatic controls on management and labor which provide a system of checks and balances on the parties to the collective bargaining process. These controls and checks and balances do not exist in labor-management relationships in government", he explained, citing the following differences:

- (1) The profit motive which checks the private employer's willingness to grant wage increases or to increase other costs does not exist in government.
- (2) The threat of going bankrupt or going out of business for all practical purposes does not exist in government. For example, the city government of Honolulu can't close its doors and go out of business. Employers in the private sector are restrained by this fact but also have this right.
- (3) Unions in private industry are restrained from making excessive demands in their own self interest. If costs become too high, the private employer, in addition to the choice of going out of business, can open a plant elsewhere in a lower cost community. In government there is no choice. You can't move the city government of Honolulu to Texas because you are concerned with increasing costs in Honolulu.
- (4) Another factor which makes collective bargaining in the public sector different from the private sector is politics. The union can politically gang up against the employer or agency and could possibly in some instances actually remove their employer from office. In other words, the employees can exert strong political pressure.
- (5) Finally and most important, the private employer has direct control over the source of capital, costs, markets, etc. In the public sector, the employer of the government agency has only limited control over the costs and no control over the source of money. The amount of money available is controlled by the electorate or by the legislature through its powers of taxation.

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With respect to the question of granting public employees the right to strike, Mr. Grunsky pointed to the statements of President Franklin D. Roosevelt and George Meany, president of the AFL-CIO, as best stating the position of the Hawaii Employers Council.⁶ Finally, Mr. Grunsky made the point that the right to strike or lockout is generally recognized as the economic pressure or catalyst that makes collective bargaining work in private industry. However, if government employees are not given the right to bargain collectively, including the right to strike, to insure that they obtain fair treatment and equity in establishing wages, hours, and working conditions, the council recommended that:

- (1) The state constitution set forth a general statement of the basic policy for public employees with respect to wages, hours, and general working conditions which would constitute a "yardstick against which the legislature or other government agencies dealing with government unions could reach factual decisions on wages, hours and working conditions";
- (2) The legislature establish "orderly procedures for guaranteeing government employees and unions rights and procedures" for organization and representation similar to those available to private sector employees and unions under the National Labor Relations Act and Hawaii Employment Relations Act;
- (3) Procedures (arbitration, mediation, or conciliation) be established by the legislature for resolving negotiation disputes as a substitute for the right to strike; and
- (4) The right to engage in "collective representation" or "collective negotiation", rather than "collective bargaining", be granted to state and local government employees.

Those who testified in favor of amending Article XII to grant collective bargaining rights to public employees were divided on the method by which this right might be protected, with one group supporting amendment of section 1 of Article XII to include public as well as private employees, and the other supporting a separate section granting public employees the right to bargain collectively. Both groups agreed, however, that the convention should be concerned with granting rights rather than specifying procedures and that the language in Article XII should not be cluttered or excessively restrictive, with

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the establishment of specific collective bargaining procedures being left to the legislature. Those who supported amendment of section 1 believed that all employees should be treated equally and that public sector employees should have the same constitutional right to organize for the purpose of collective bargaining that private sector employees enjoy. The group favoring amendment of section 2, on the other hand, saw differences between public and private sector employment which called for different policies being required to be established. With respect to the issue of the right to strike, those who favored amendment of section 1 were strongly opposed to the strike prohibition being included in the Constitution. Among the reasons presented were the following:

- (1) The Constitution should set forth broad public policies such as the right to bargain collectively. The strike is only one technique for resolving collective bargaining disputes, and it is an issue more appropriate for legislative determination.
- (2) A strike prohibition is unrealistic and harmful; if employees are frustrated, they will strike, a strike ban notwithstanding. There is a greater possibility of strikes when there is no machinery established for the resolution of disputes or when employees are not permitted to bargain collectively.
- (3) There are laws and regulations already in effect which prohibit public employees from engaging in strikes; making public employee strikes illegal another time will not make such strikes more illegal or help in the enforcement of the strike ban.

Following the public hearings held in August 1968,⁷ the committee decided by a vote of 18 to 3, with 2 excused, to recommend the retention of section 1 without amendment and instead to amend section 2. The committee's proposal to the convention relating to organization, collective bargaining, Committee Proposal No. 5, set forth amendatory language related to section 2 of Article XII as follows:

Section 2. Persons in public employment shall have the right to organize for the purpose of collective bargaining as prescribed by law.

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With respect to Proposal No. 321, the right-to-work amendment, the committee report noted that with one exception, all citizens and delegates testifying on the amendment "strongly urged" that this amendment not be added to the Constitution. The committee agreed that "there was no compelling or persuasive reason to add this provision to the Constitution", and it recommended that "if in the future it should become necessary for such a provision, it can be done by legislative enactment".⁸

The discussion in the Committee of the Whole on September 3, 1968, began with the quick approval of section 1 of Article XII. The major discussion on the floor of the convention related to the definition of the term "collective bargaining" as it was used in section 2.

In response to a request by Hebden Porteus, President of the Constitutional Convention, for (1) the "legal interpretation" of the words "collective bargaining", and (2) whether Committee Proposal No. 5 of the committee would "force" the legislature in the future to provide for bargaining on classification and wages and the right to strike for public employees, Bertram T. Kanbara, Assistant Attorney General, stated that in view of Standing Committee Report No. 42, the extent to which the right will be given, restricted, regulated, or withheld is a matter that the legislature in the exercise of its judgment would decide. He also explained that:⁹

...it is obvious from the foregoing that Committee Proposal No. 5 would not "force" the legislature in the future to provide for bargaining on classification and wages and the right to strike for public employees.

As in enacting any other kind of legislation, the legislature would be expected to weigh the public interest and all other relevant considerations and exercise its discretion in making its determination.

In the committee of the whole deliberations, those who favored amending section 2 of Article XII to extend collective bargaining rights to public employees echoed the expressions presented earlier, including:¹⁰

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- (1) The general lobbying role granted to public employees by section 2 of Article XII is inadequate to handle the presentation of employee concerns to public employers.
- (2) A constitutional amendment granting public employees the right to bargain collectively is necessary in order to reassure the legislature that it can enact laws pertaining to public sector collective bargaining.
- (3) Although the existing language of section 2 could be interpreted to include the right to bargain collectively, specific language is necessary in order to avoid long and costly court appeals.
- (4) The concept that public employees should be permitted to determine the terms and conditions of employment is now widely accepted.
- (5) The power to strike already exists and the legislature should be given the opportunity to determine what rights should be prescribed by law.

Those who opposed amending section 2 voiced the following concerns:¹¹

- (1) Government employment is not a right but a privilege and the public employee has the duty to continue to perform the services for which he or she was hired. Collective bargaining does include the right to strike and if left to legislative action will be legislatively authorized resulting in disruption of essential services.
- (2) Public employees already have access to means to remedy grievances which private sector employees do not have; they can organize to elect or defeat at the polls the representatives at the legislature to determine their pay.
- (3) The present provision of section 2 does not prohibit collective bargaining; the proposed amendment will mandate the legislature to take action on the issue of collective bargaining.
- (4) Government employees have job security, enjoy fringe benefits and already have a voice in the determination of matters affecting conditions of their employment through the rules and regulations governing employment in the civil service system.

The motion to reject the committee proposal by substituting the following language in section 2 was defeated by a vote of 62 against and 13 for, with 7 excused.

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Section 2. Persons in public employment shall have the right to organize and to present and make known their grievances and proposals to the State, or any political subdivision or any department or agency thereof. Persons in public employment shall have the right to engage in collective bargaining procedures as established by laws in the areas therein prescribed.

The motion to delete the existing provision in Article XII, section 2, and insert Committee Proposal No. 5 was carried by a vote of 57 for and 17 against, with 8 excused.

There is no doubt that the discussions and the results of the discussions at both the 1950 Constitutional Convention and the 1968 Constitutional Convention with respect to the issue of the right of employees to organize and bargain collectively reflected to a large extent the development of employee organizations during those periods. Thus, during the 1950 Constitutional Convention the discussion pertained mainly to the rights of private sector employees, although by then the National Labor Relations Act (1935) and the Hawaii Employment Relations Act (1945) which governed private sector collective bargaining had already been enacted and in operation for some time. Interest in the rights of public sector employees to organize and bargain collectively--a topic of central concern in the 1968 Constitutional Convention--was minimal and limited in the final result to an expression that public employees shall have the right to organize and to present and make known their grievances and proposals to the employer.

By 1968, the situation had changed dramatically. In 1962 President Kennedy issued E.O. 10988 which established procedures for recognition of unions and for exclusive bargaining rights with individual agencies of government for those unions which had achieved significant organizational strength. In addition, a number of states had either enacted public employment collective bargaining laws or were considering such legislation. There was also increased effort on the part of unions to organize public employees. Finally, public employees had become more aware of benefits of collective bargaining enjoyed by private sector employees.

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It is also important to note that in both 1950 and 1968, the consensus of the delegates to the Constitutional Conventions was that the right of employees to organize for the purpose of collective bargaining should be recognized as a matter of policy. It was made very clear that it was not intended that a proposal dealing with "statutory matter" be written into the Constitution, nor was it intended to make statutory rights constitutional rights. Finally, it was also recognized that the right of employees to organize for the purpose of collective bargaining, although set forth as a constitutional right, is subject to "reasonable regulation" by the legislature, but it was not intended to mean that the legislature can take that right away or remove the right.

The 1950 Constitutional Convention¹²

One of the basic questions occupying the time and attention of the delegates at the 1950 Constitutional Convention was whether the right to organize and bargain collectively both for private employees and for public employees was appropriate for inclusion in the Constitution. If so, should it be contained in the Bill of Rights or in another section of the Constitution? If the right to organize was so basic and widely accepted, why was it necessary to put it in the Constitution?

General arguments of those opposed to the incorporation of such a section in the Constitution were:

- (1) The right is already protected by statutory enactments;
- (2) The right is already included in various sections of the Bill of Rights;
- (3) The right is not fixed or well-defined; its meaning depends on legislation, administrative rulings and court decisions. It is not a matter to be frozen by constitutional decree;
- (4) The right, if included in the Constitution, would prevent the State from protecting itself from abuse by unions or employers;

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- (5) The right is not found in many constitutions.

Those who favored the inclusion of a constitutional provision dealing with the right to organize and bargain collectively contended:

- (1) The historical development of the right in statutory enactments has developed so far that it is now of fundamental importance and hence should be included and incorporated into the state constitution;
- (2) Although various aspects of the right to organize and bargain collectively may be related to other sections of the Bill of Rights (such as free speech and assembly), the concepts of organization and collective bargaining have developed to the point where they require specific and direct consideration apart from other related rights;
- (3) Granted that the right to organize and bargain collectively is not fixed or permanently defined, like other rights incorporated in the Bill of Rights (such as free speech, religious freedom, right of assembly), decisions of the U.S. Supreme Court have made it quite clear that such fundamental concepts as right of free speech and the right of assembly are not immutable but depend upon their occurrence in time and place;
- (4) Inclusion of such a right in the Constitution would not prohibit reasonable regulation by the state to protect itself from abuse by unions or employers, just as much as none of the basic rights commonly found in the Constitution are not absolute and beyond the scope of reasonable regulation;
- (5) With respect to the argument that the right is not found in many constitutions, those supporting inclusion of the right contended that if a right is desirable the fact that it has not found its place in many constitutions should not be held to prevent its inclusion.

Proposals related to the right to organize and to bargain collectively both for private employees and for public employees were considered by the Committee on the Bill of Rights and the Committee on Industry and Labor. The proposals which dealt with the right to organize and bargain collectively considered by both committees are included in Appendix B. Several joint meetings, as well as separate meetings, of both committees were also held preceding the issuance by the Committee on Industry and Labor of its majority report, Standing Committee Report No. 79.

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Standing Committee Report No. 79 was signed by 9 of the 11 members. The report set out a specific provision dealing with the right to organize and to bargain collectively. A minority report was presented, and a special report (Standing Committee Report No. 81) was presented by one member. One member signed neither the majority nor minority report. Of the 9 who signed the majority report, 4 filed a statement setting out their beliefs that the right to organize should be included in the Constitution, and 5 filed another statement why it should not be placed in the Constitution. However, the 5 agreed to sign the report if the phrase "as prescribed by law" were included in the constitutional provision. The provisional article as proposed by the 9 members (Proposal No. 28) read as follows:

Persons in private employment shall have the right to organize for the purpose of collective bargaining, as prescribed by law. Persons in public employment shall have the right to organize, to present to and make known to the state or any of its political subdivisions or agencies, their grievances and proposals.

The major discussions on the floor of the convention related to the implication of the phrase "as prescribed by law", or related phrases, "in accordance with law" or "subject to reasonable regulation under the law". Basically the discussion indicated a cleavage of opinions as to whether the language as proposed was a "constitutional grant", or whether the right to bargain collectively would exist only when the legislature granted or extended such right. The members of the committee who voted for the inclusion of the proposal in the Constitution indicated that they expected the section as proposed to be considered as a "constitutional right", subject to the same "reasonable regulation" that other rights are subject to. The language of the section was intended to recognize the right to organize for the purpose of collective bargaining as a matter of policy; it was not intended to mean that the legislature can take that right away or remove the right. It was emphasized that the proposal was not intended to deal with statutory matter, but it was written for the purpose of protecting the right to organize for the purpose of collective bargaining as a matter of constitutional right.

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The motion to delete the words "as prescribed by law" was carried by a vote of 47 to 11, with 5 not voting. Subsequently, the article, as amended, was approved by a vote of 51 to 7, with 5 not voting.

There was no floor debate on the language dealing with the rights of public employees, as Roberts explains, because it was viewed in light of the period and development of public employee organizations in the 1940's.

Attitudes and Views Concerning Article XII and Other Issues of Significance

Article XII

An overwhelming majority of the commentators whose views were requested for the purpose of this study do not see need for any change in Article XII, and it is a near unanimous view that changes or modifications which are needed should be limited to the law and are proper matters for deliberation in the legislative forum. In the opinion of a delegate to the 1968 Constitutional Convention who served as Vice-Chairman of the Committee on Public Health, Education and Welfare; Labor and Industry:¹³

[T]here is no need to even discuss this section of the constitution in the constitutional convention. It is there, it is going to stay there, and what you could add to it or subtract from it is questionable in my mind at this point. I certainly would not predict it would ever be repealed, and the responsibility is given squarely to the legislature, and it's up to them to face that responsibility.

* * *

[Back in 1968] the mere fact that they themselves [convention delegates] weren't certain how they wanted this requirement [Article XII] fulfilled is the very reason that they gave the legislature this responsibility. They felt that there was a group of people who are elected, who have the time, who have the opportunity to get research done, and the opportunity to hold hearings, while the constitutional convention's time is limited. And it would have taken almost as long for them to make a determination on what instructions they wish to give the legislature as it did to even consider Article XII itself.

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So that whenever at any time, I think that they have something that is a subject of this type, with so many approaches to it, that it might not be wise to expect them to do so.

There is very little argument among most observers in Hawaii over the right of public sector employees to organize or to bargain collectively. The feeling expressed repeatedly is "public sector collective bargaining is here to stay".

With respect to the concern expressed over abuses perceived to have resulted from extending collective bargaining rights to public employees, it is contended that to "disenfranchise" public employees through a change in Article XII would be repressive and constitute an inappropriate response to the concerns expressed which imply that public employees and unions have been irresponsible. It is argued that there has been only one major strike in Hawaii's 5-year experience with public sector collective bargaining. Public employee unions have "bit the bullet", it is pointed out, and evidenced concern for the public interest through support of dispute resolution mechanisms other than the strike such as final-offer arbitration. It is felt that public sector collective bargaining problems are a function of other variables such as economic factors, including employer competence and tenacity, and that the public interest would well benefit from more attention being focused on those parts of the equation; if the process is perceived to be failing in producing desired results, the more appropriate response would be to allow a reasonable period of time for the process to work and for parties to adjust to it before the process is abandoned through constitutional or legislative changes.¹⁴

In general, except for a small minority,¹⁵ representatives of labor and management and other participants believe that the collective bargaining process in the public sector has worked out reasonably well. It is pointed out, for example, that although there are improvements that could be made, parties have resolved issues in a responsible way and the public sector has enjoyed relative labor peace during the period that the Hawaii law has been in operation. In the opinion of some observers, among the other available alternatives, the law is the best approach. It may perhaps be helpful to note here that soon after the Hawaii law was enacted, in one of the earliest assessments of the law, the

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Advisory Committee to the 1970 Committee on Executive Management and Fiscal Affairs of the National Governors' Conference commented that the experience developed under the Hawaii law, including the Pennsylvania law, may be useful to other states facing the problem of preventing and resolving strikes; in the opinion of the committee, there was a good probability that the Hawaii and Pennsylvania laws would be called to the attention of other legislatures as efforts were increased to secure statutory authority for recognition and bargaining.¹⁶ Similarly, in a 1974 study conducted by the U.S. General Accounting Office, the Hawaii law was judged to have dealt explicitly with most of the major issues likely to arise in public employee collective bargaining. The report further stated that the law:¹⁷

...has worked reasonably well thus far. Although it has some recognized defects, it should serve as a good starting point for other jurisdictions considering such legislation. At a minimum, it outlines the main issues. Also, except for a perhaps undue stress on management rights, the law is reasonably neutral in tone, and we found that, in practice, both unions and employers considered it impartial.

* * *

The main lesson to be learned from Hawaii's experience, therefore, is the need to carefully consider each of the issues, as Hawaii, for the most part, has done, in developing and legislating a collective bargaining system.

There is some apprehension that collective bargaining has led to the "disenfranchisement" of every voter in the State through the "multiple pressures" which unions and union leaders can bring to bear upon the public (through the strike and strike threats), legislators and other elected officials (through the ballot box), and candidates for political office (through "sheer weight of money and personal help by union members in campaigns").¹⁸ One result of this concern has been to call for a change in the Constitution which would prohibit abrogation of the "legislature's responsibilities" in the bargaining process. Such a change, it is suggested, would require the legislature, rather than the governor's and mayors' representatives, to be present at the negotiating table for the actual conduct of the negotiations so that the public would be privy to the negotiations as they are carried out. If that is unaccept-

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able, it is proposed that the Constitution contain language providing for the establishment of a pay board with the power to set salaries of public employees.¹⁹

In contrast, there is the view that although the process of collective bargaining should not be observed by the general public, the results of it, particularly the costs, should be subject to legislative scrutiny and public hearing. It is feared that permitting media representatives, for example, to be present during labor negotiations would lead to posturing and unreasonable stances for the purpose of publicity and the arguing of positions to the public directly. It may also have the undesirable consequence, it is warned, of reducing the actual number of people participating in the bargaining process with the decisions being made in an adjacent room. Present procedures are believed to be adequate for the purpose of keeping the public informed, although there is some feeling that the legislature needs to be kept informed of developments, particularly with respect to revenues, expenditures, and collective bargaining costs.²⁰ With respect to the notion that a member of the legislature should sit at the negotiating table, it is felt that such an arrangement would place an unreasonable amount of political pressure to bear upon the selected legislator(s); furthermore, it is not at all clear what the role of the legislator would be in the negotiations process.²¹

The notion of a review board superior to the legislature is criticized as likely to be unsuccessful for several reasons. First, it is unlikely that it will be possible to gather a group of persons with "some kind of superior wisdom", eminently fair, and without conflicting interests, who will be able to pass judgment on very difficult questions. Second, there is no reason to believe that decisions of such groups will be any better than those being arrived at by the parties at the bargaining table and subject to review by the legislature. Thus, the present structure which involves elected officials who are accountable to the public for their decisions is viewed as the most appropriate arrangement.²²

According to another observer, the use of review boards is viewed as a means of providing the "form" of collective bargaining, but without the "substance" of collective bargaining. In his view, there is some question if, in

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fact, the experience developed so far under the law indeed represents a situation wherein the "form" of collective bargaining is provided but the "substance" is withheld, and whether the language "as prescribed by law" of section 2 of Article XII has influenced this development.²³

"Open" bargaining in varying degrees is mandated by 6 state jurisdictions at the present time: Florida, Missouri, New Mexico, Texas, Minnesota, and California. In other states, parties at the table are allowed to negotiate on the issue of bargaining in public. In the absence of express statutory provisions covering bargaining in the public sector, courts of some jurisdictions have extended coverage of general "Open Meeting" laws based upon the theory that subordinate bodies (e.g., negotiating teams) are standing in the shoes of the governing body. It is reasoned that subordinate representatives are the deliberative and factfinding alter egos of governing bodies, and that the goal of "sunshine" legislation could be evaded by delegation of authority to nonexposed subordinates.²⁴ In California under the provisions of the recently passed Rodda Act extending collective bargaining rights to K-12 teachers and community college faculty, all initial proposals within the scope of representation are required to be presented at a public meeting of the employer and be made part of the public records. Negotiations must be delayed for a reasonable time until the public has had an opportunity to express its view on the proposals at a meeting of the public school employer, and after the public has expressed its views, the employer is required to adopt its initial proposals at a public meeting. In addition, subjects of negotiations must be made public within 24 hours; if the employer votes on a subject, each member's vote must also be made public within 24 hours.²⁵

The Hawaii "sunshine" law expressly provides that meetings may be closed to the public for one or more of the purposes set forth in the law, including "to deliberate concerning the authority of persons designated by the board [defined as "any agency, board, commission, authority, or committee of the State or its political subdivisions, either legislative or executive, permanent or temporary"] to conduct labor negotiations...."²⁶

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The problem of the role of the respective jurisdictions in public sector collective bargaining and more specifically the decision-making authority among the 5 chief executives representing the separate governmental jurisdictions was also raised in the course of this review. It was explained that at the present time the State has the major voice in decision-making for the employers even for the police officers' unit in which the State has no employees. Although the city and county of Honolulu has the most employees in that unit and will be affected the greatest by decisions made concerning that unit, it has only a minority voice. It is felt that more recognition should be given to the principles of home rule as well as proportional representation in the review of the decision-making process involving the separate governmental jurisdictions.²⁷

From the point of view of unions of professional employees, an issue of central concern is the matter of public policy with respect to providing a mechanism through which employees may make their views known, particularly on the professional issues in which professional workers have expert knowledge and on which they have strong feelings. The point is made that if issues such as determination of curriculum or selection of teaching materials are placed outside the scope of bargaining as management rights, a mechanism should be made available for the input of professional employees who regard themselves as more professionally qualified than the lay members of administrative boards in whom legal authority may be lodged.²⁸

A similar concern was raised by Robert F. Ellis in his speech before the conference on "The Merit Principle and Collective Bargaining in Hawaii", when he stated:²⁹

Look at what's happening to our university as a leader, innovator, seeker of the truth through unions of the faculty. The faculty senate can no longer have its representatives participate in the regents discussions. The reason is the faculty has a collective bargaining contract and can no longer sit on management's side of the table. A whole area of professional expertise is no longer available on a peer basis for the regents in the governance of the university.

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Seidman has explained the complexity of this issue as follows:³⁰

Some of the issues raised by professional groups involve important questions of public policy in which other elements of the community have legitimate interests. Parents, along with teachers and school administrators are concerned with the formulation of educational policy, and citizens as taxpayers have an interest in policy which will have an important effect on tax rates. Such issues as school decentralization and civilian review boards for charges against policemen involve community groups, especially those representing minorities, along with administrators and employees. Thus a three-fold division of topics in which employees are interested is involved: (1) those that are appropriately within the area of collective bargaining; (2) those that are properly within managerial discretion; and (3) those in which community groups are legitimately involved. Unfortunately these issues merge into one another, so that decisions will have to be worked out on a case-by-case basis.

Seidman concludes his observations by pointing out that a wise administrator will consult with employees on any issue with which employees show a concern; the information employees have at their disposal and the views that they hold may help administrators reach sound decisions on matters beyond the scope of bargaining, and morale will be improved if employees believe that their superiors value their contributions to policy formulation. He points to the widespread use of joint study committees on topics which are beyond the scope of bargaining and yet involve subjects in which employees have an interest as well as experience that might guide management to sound decisions.³¹

Changes in Hawaii Law Suggested

Views with respect to suggestions for improvements in the law appear to be shaped by and tend to reflect differences of views concerning the nature of public service. On the one hand, it is pointed out, government is not a profit-making institution; it is paid for by taxpayers. In contrast, private enterprise is a profit-making institution, and if a private enterprise makes a profit, employees have a right to a share of those gains.³² Other differences are pointed out, including with respect to the strike issue, that although taxpayers are denied essential services in a strike, public sector management, unlike its

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private sector counterpart, does not suffer financially but obtains fiscal relief through payroll reductions. Furthermore, unlike private business, the public sector cannot close down or move elsewhere if management is unable to work out acceptable terms of a contract or is experiencing difficulties in the operation of its business. Another aspect of public sector bargaining which is pointed out as unique is that "workers help elect management". It is explained:³³

Therefore, negotiating civil servants can vote out management the next time around if they don't get desired concessions or are forced to strike. Besides being well organized voting blocks, public unions are often heavy campaign contributors.

It is because of these differences that some representatives would prefer to see adopted a process short of the strike; in order that the collective bargaining process not be rendered ineffective and inoperative, it is suggested that meaningful alternatives be examined so that the process works in the best interests of the public.³⁴

From the point of view of employees and labor organizations, the public sector, although different in some ways from the private sector, is similar in many respects. A public utility with its income guaranteed through the control of a public utility commission is not viewed very differently from a governmental agency. Similarly, nonprofit hospitals and other industries and institutions which receive government subsidies are often pointed out as other examples. Finally, negotiators in the public sector for both labor and employer groups are being drawn from the private sector which add to the impression that if there are differences, they tend to be minimal.³⁵

There is a firm belief among labor union representatives--both in the private and public sectors--that public employees should have the same rights (i.e., right to strike) as those in the private sector.³⁶ In view of most of Hawaii's union representatives, the right to strike is viewed as essential in order that there be successful collective bargaining.³⁷ It is pointed out that a union may never resort to a strike and that 98 per cent of all agreements are settled without a strike in the United States.³⁸ It is claimed that denial of the right to strike will have the undesirable effects of stifling meaningful collective

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bargaining and result in dilatory bargaining tactics leading to illegal walkouts and other job actions.³⁹

As expressed by a representative of the Hawaii teachers union, one point often overlooked in discussions concerning the right to strike is that:⁴⁰

Unlike his private sector brethren, the public employee practically subsidizes his own economic benefits by saving government money while he is on strike. How much money is saved obviously is determined by the percentage of employees who are on the lines. In HSTA's case with 93 percent of teachers striking, the savings were substantial.

* * *

The public employee, regardless of which union he belongs to, understands perhaps better than the public that he contributes to his own pay raise. For unlike the private sector unionist who does not have to buy his company's products, the public employee invariably must pay taxes.

To illustrate this with a simple example: If a public employee made \$10,000 a year and received a \$500 pay raise, he would be contributing by an increase in taxes, \$30 of that \$500.

In terms of the actual strike activity in Hawaii, labor representatives point out that Hawaii has a relatively low level, and in the latest year for which data are available, 1975, accounted for only one out of 478 total public sector work stoppages in the United States.⁴¹ Several factors are pointed out as contributing to this condition. Organization of employees is required by law to cover broad statewide units; this forces both employer and union groups to engage in careful and serious consideration of bargaining positions lest unfortunate mistakes occur leading to breakdowns in the negotiating process which have statewide impact affecting taxpaying citizens throughout the State. It is also pointed out that strikes are the result of a number of factors, including the expertise of negotiators representing the parties, membership desires and aspirations, nature of the bargaining relationship, and degree of employer resistance, among others, which cannot be wholly regulated by antistrike legislation, with the result that strikes may and do occur even in the face of prohibitions and penalties. There is also the feeling that granting the right to strike in Hawaii has not led to abuse of that right; hence, controls would be inappropriate.⁴²

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There is also the view that under the present system, public employees, in particular the firefighters, for all practical purposes, are already subject to a strike prohibition. It is contended that the right to strike is not available to those employees involved with the health and safety of the public; such employees are left without any alternative method, other than an illegal strike, to persuade the employer to agree to its demands. It is pointed out that in their effort to obtain an alternative procedure, firefighters are not agreeing to relinquish the right to strike in order to obtain arbitration of negotiation disputes; the firefighters simply have not been granted the right to strike. The right to strike is a necessary part of bargaining, it is explained, but if as in the case of the firefighters, the strike alternative is not available to the employees, arbitration should be made available as the alternative.⁴³

There is some concern that government is taking the lead with respect to the level of wages and benefits provided employees; this is viewed as improper. Most of the attention appears to be focused on the upward pull public sector policies with respect to salary levels, retirement system benefits, paid holiday and vacation benefits have on private sector policies in these areas.⁴⁴

On the other hand, it is contended that if it is desired that persons employed in the government service to provide services to the public should be of the highest quality, government ought to set an example by providing wages and benefits which attract high quality, dedicated employees involved with the teaching of children, providing health services, and rescuing people on the beaches. Public employees pay taxes, too, it is pointed out, and they are entitled to services being provided by qualified people "who are not leftovers from private industry". The reluctance to adequately finance the public sector is viewed as indicative of the traditional feeling that there is something disgraceful about public service.⁴⁵

Concern over the cost of collective bargaining, like other costs of operating government, is viewed from various perspectives depending upon the role of the individual concerned. For the legislator, the cost of collective bargaining is part of the overall budgeting and financing of governmental programs involving the relative powers of the legislature to appropriate and the

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executive to implement. For the individual taxpayer collectively negotiated salary increases are likely to be viewed as absolute increases in tax dollars spent. There is some confusion in the debate over the cost of collective bargaining, and this has been attributed to the lack of a definition of the cost of collective bargaining and to problems associated with the presentation of such information to parties concerned.

One labor representative explains that although wage settlements can be measured as costing x-dollars, it should also be considered how much the actual cost would have amounted to in the absence of collective bargaining, i.e., in annual increments or other increases the legislature would have granted. It is noted that generous increases were granted by the legislature in the period before collective bargaining was established, and it is not at all clear that the differences would be substantial. There is also the problem of determining the cost of so-called noncost items which are of value to the employees. These would include such provisions as shift assignments, days off, and temporary assignments which may not add up very much in additional costs but nevertheless should be computed before meaningful comparisons can be made.⁴⁶

In the opinion of another labor representative, the cost of collective bargaining is influenced, directly or indirectly, by the substance of the collective bargaining process established. It is explained that if unions are not allowed to negotiate over the terms of a health or medical plan, they are left with no choice but to "get all they can" at the negotiating table, and when that is over, to seek from the legislature the improvements desired in the medical or health plans. Unions are being "invited" to take "two bites at the apple" under the system described as providing the "form" but lacking the "substance" of collective bargaining. Costs of collective bargaining are "puffed and inflated" in still another way, it is explained, because by prohibiting collective bargaining negotiations over fringe benefit items, emphasis is placed on wage and salary increases which entail other "hidden" costs such as those related to vacations, sick leaves, overtime, and retirement contributions.⁴⁷

According to Rehmus, the economic results of public employee bargaining are as yet unclear and controversial. Some authorities believe that public

employees have driven their salary and benefit levels far higher than would have been the case in the absence of collective bargaining and higher than can be justified on the basis of economic equity. Those who challenge this assumption state that recent increases in public employee compensation are largely reflective of inflationary pressures and the need for public employees to "catch up" with others whose wages and salaries should be comparable.⁴⁸ Quantitative data that would support either argument are still scanty, and it has been observed that no high quality data exist to study, for example, relative compensation levels in government compared to private employment.⁴⁹ Data on employment, wages, and compensation in various sectors and industries of the economy generated by the U.S. Department of Commerce have served as the basis of crude comparisons between compensation rates for workers in different industrial sectors and in government. The results of one study of pay differences (not including fringe benefits) between federal government and private employees in an area including the District of Columbia, Maryland, Delaware, and Virginia (based on census data) have been interpreted by Orr to indicate that federal employment is more highly paid than employment at other levels of government. It is also pointed out that these differences are in large part unaccountable in terms of qualifying worker attributes.⁵⁰

There is some concern that the political aspects enter too heavily in the bargaining process and that positions are sometimes taken for political considerations rather than for economic or other appropriate reasons. A part of this problem is attributed to the amalgamation of 5 different employers (State and 4 counties) into one single group, a structure which enjoys the advantage of avoiding whipsaw effects, but nevertheless is seen to have other negative effects. One remedy which has been suggested as helpful in minimizing the political aspects is for a set of criteria to be developed which will serve as guidelines not only to the legislature but more importantly to the people sitting at the negotiating table.

It is mentioned that the Hawaii law does not set forth a statement of intent related to wages and salaries which would be useful to negotiators and legislators in their review and approval of cost items negotiated at the bargaining table. Although there is no collective bargaining law at the present time

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which contains such guidelines, it is pointed out that because the profit motive is not evident in public sector bargaining some other gauge becomes necessary. Otherwise, depending upon the state of the economy, the relative strengths of the parties involved in collective bargaining, and the attitude of the particular legislature, there could be settlements resulting which would not only have an adverse impact on the long-run economy of the state (in terms of revenue expenditures), but would also have a real impact on private sector bargaining.⁵¹

Although it is not clear what specific criteria might be included in the statement of intent, it has been mentioned that comparability (federal government and private sector) would be an important feature. Section 77-2, Hawaii Revised Statutes, presently contains a statement of policy with respect to the compensation of public employees which includes a list of 5 factors⁵² which are to be considered in the determination of the amounts of compensation. Although these factors have been used by the employer in presentations before factfinding panels, there is some doubt that the criteria set forth in section 77-2, could apply to the bargaining process.

Criteria, however, are criticized as troublesome because of problems with choice of the formula, framing of the language of the formula, and interpretation of the formula. According to one observer, in reality, the parties have used formulas, which are developed during negotiations. Thus, in a given set of negotiations, cost of living or wage trends in the construction industry may serve as important guidelines, or comparisons with federal blue-collar wages or other units of public sector employees may be used. The point is made that there are guidelines, and responsible unions and employers do develop and use various criteria depending upon various factors, as, for example, tradition--whether or not the unit or company is a leader or one in a catch-up situation. It is explained that in collective bargaining use is made of comparisons which are of a fluid nature, and, therefore, the casting of guidelines in concrete language may lead to parties ignoring it at times and to use the language only when it was convenient or advantageous to the party's interest.⁵³

Another problem mentioned is one characterized as "end-run" or "double-deck" bargaining. It is felt that public sector unions exert a great deal of

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influence on elected officials, and, as a consequence, are able to extract concessions in the legislative forum which either could not be obtained at the negotiating table or were lost at the negotiating table. In this respect, it has been pointed out that annual increments which had been negotiated out of wage settlements in a previous year were restored the following year by legislative action. In addition, it is pointed out that the government employees' retirement system, an item excluded as a subject of negotiation, was significantly altered in terms of the costs and benefits when public sector unions were successful in obtaining legislation which allowed accumulated sick leave credits to be applied toward retirement credits of employees.⁵⁴

There does not seem to be resistance against the right of labor unions to lobby for programs and benefits of value to broad classes of the community; rather, the opposition appears to be directed against lobbying or legislative efforts which results in benefits favoring a particular group obtained not at the bargaining table but from the legislature.

In many jurisdictions, civil service organizations traditionally have formed one of the strongest lobbies in state legislatures, and it would be difficult to argue that these powers should be taken away from these organizations. One observer has framed the problem in the following manner:⁵⁵

But from the municipal government's point of view, freedom to trade cost reductions in one area for contractually bargained new expenditures in another is an essential element of bargaining flexibility and bargaining capability. Where state legislatures mandate wage and fringe bargaining at the municipal level and yet continue to legislate on municipal employee benefits, they place local units of government in a Procrustean bed. Public employee bargaining may be desirable and inevitable, but public employees hardly seem entitled to the benefits both of collective bargaining and of traditional protective state laws.

Anderson, in his comments on this issue, points out:⁵⁶

Public employees, of course, are entitled, as are other citizens to use the legislative process, but there is a difference between acquiring by legislation the means to win substantive benefits and gaining the substantive benefits themselves from legislation.

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Similarly, public bargaining representatives who have agreed with union representatives on the terms of a new labor agreement should not renege on their promise to recommend acceptance of the proposal to the full legislative body nor should they ask the legislative body to take them off the hook.

He continues to explain that the issue is made more complex because many issues affecting public employment and public policy probably should be resolved in the legislature, as, for example, school decentralization, curriculum content, and level of welfare benefits. Such issues concern a larger constituency and involve questions which are the primary responsibility of executive and legislative officials and of concern to the entire public politic. He concludes:⁵⁷

Concerned citizens increasingly want to participate in the policy-making activities of local government agencies, but collective bargaining is a bilateral rather than a multilateral relationship.

Views concerning political activity in the context of public sector collective bargaining cover a wide range. At one extreme is the view that collective bargaining and political action ought to be "mutually exclusive modes of public sector labor relations". Proponents of this view maintain that the purpose for establishing collective bargaining systems in the public sector is to take labor relations out of the political arena. Union political action is thus seen to distort the collective bargaining process as elected officials are tempted to ignore the public interest by granting unjustified demands of politically powerful unions for the sake of political expedience. At the other extreme is the appraisal which views collective bargaining as a creature of the political environment in which it exists; major decisions concerning public employment are accepted as properly political ones, public employees being one of many interest groups entitled as any other to use normal methods of political persuasion to make demands on elected officials.⁵⁸

Gerhart, in his study of political activities by public employee organizations at the local level, views collective bargaining as an appropriate form of labor relations in the public sector; thus, political activity is assessed from the perspective of its effect on the bargaining process. He describes public sector collective bargaining as consisting of:⁵⁹

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...both a rational decision-making process and a power relationship;...political activity in the context of bargaining is, per se, neither helpful nor harmful but must be evaluated on the basis of whether it "distorts" either or both of the elements of the bargaining process.

He emphasizes that political activity by public employee unions is not necessarily against the public interest; in fact, certain types of lobbying and campaigning may contribute to a more rational process of decision making at the bargaining table. Political activity may serve also to make the collective bargaining process work if it is used to alter the power balance in the bargaining relationship.⁶⁰ He explains:⁶¹

If bargaining is to exist, there is a clear necessity for either side to be able to inflict "costs" on the other. The balance of power is alterable through public policy measures regarding political activity. Policy changes should be aimed at creating the desired balance so that collective bargaining will serve the purposes of the public.

He cautions that as a matter of public policy, any blanket reaction to all political activity would be inappropriate because situational factors will alter its effectiveness. Endorsements of candidates and lobbying in local government councils or boards are pointed out as types of political activity which do not appear to have a generally deleterious effect on the process. Lobbying as well as efforts to bypass the bargaining table through direct appeals to the voters, he explains, may improve the bargaining process:⁶²

...by helping the constituencies of the management negotiator better understand the issues and back the decisions he ultimately makes in the bargaining session; that is,...[they] may have "educational value" for the public and the legislative bodies. In this sense they serve the ends of both the management negotiator and the union.

Chapter 2

CONSTITUTIONAL PROVISIONS ON ORGANIZATION AND COLLECTIVE BARGAINING

As reported by Roberts,¹ only 3 states--New York, Missouri, and New Jersey--had provisions in their state constitutions dealing with the right to organize and bargain collectively, when Hawaii adopted its first constitution in 1950.

The language in the first 3 state constitutions read:

Missouri: Article I, Bill of Rights, section 29:

Organized labor and Collective Bargaining. That employees shall have the right to organize and to bargain collectively through representatives of their own choosing.

New Jersey: Article I, Rights and Privileges, paragraph 19:

Persons in private employment; right to organize; collective bargaining; public employees. Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

New York: Article I, Bill of Rights, section 17:

...Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.

The language of the Florida Constitution at the time of Roberts' writing read as follows:²

Article I, Declaration of Rights, section 6:

Right to Work. The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization; provided that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.

1967 New York State Constitutional Convention

Roberts, in his fairly detailed account of the New York State 1967 Constitutional Convention,³ points out that a number of provisions dealing with matters affecting industry and labor-management relations were reviewed and studied by a preparatory commission, the Temporary State Commission on the Constitutional Convention. Among the provisions reviewed by the commission was Article I, section 17; in its report the commission listed the following arguments for and against retention of the right to organize and bargain collectively in the Constitution:⁴

Arguments cited for retention:

- A right so basic to the majority of the state's citizens is of constitutional dimension and should be a part of it.
- A transient legislative majority might conceivably be moved to abrogate the right. Constitutional expression would avoid that.
- Court opinion has fluctuated in the past and may do so again. Constitutional inclusion will guard against such change.

Arguments cited against retention:

- The policy is fixed and appears immutable. It was fixed and fully supported before constitutional enactment. Hence the clause is not needed to support legislative action.

With respect to the matter of the right to strike, Roberts reports that the New York commission's report set out the arguments for and against the inclusion of an express policy as follows:⁵

Arguments cited for:

- The subject is an important one and its solution has become a matter of the gravest practical concern as increasingly public employees have organized and resorted to strike action. Therefore, the subject is of such magnitude that it should be included in the Constitution.
- This subject is one on which a popular consensus is difficult to reach. A constitutional expression of that policy, requiring and obtaining the approval of the electorate, should assist in obtaining a greater degree of acceptance.

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Arguments cited against:

- The subject is one in which no universally accepted answer has been found. Some experimentation may be required before acceptable solutions emerge. The legislature should be free, therefore, to experiment with varying techniques. This process will be promoted if no constitutional restrictions are imposed.
- These questions can be resolved within the existing constitutional framework; no additional specification is necessary.

Four alternatives were presented by the New York commission with respect to the presentation of materials in the constitution on the issue of the right to organize and prohibition against strikes. The alternatives and arguments for and against were:⁶

- (1) Guarantee public employees the right to organize and bargain collectively.

Arguments cited in favor:

- All other classes of employees are afforded this guarantee in the Constitution; public employees similarly should be guaranteed this right. Also, it would insure that all governments must deal with employee organizations.

Arguments cited against:

- These activities should not be mandated in the Constitution and thus affect governmental agencies' control over their employment policies. Also, a constitutional guarantee might be interpreted as implying the right to strike, which is presently prohibited by statute.

- (2) Prohibit strikes by all employees.

Arguments cited in favor:

- Such strikes represent so great a danger to the public interest that the force of a constitutional prohibition is needed.

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Arguments cited against:

- Absolute prohibition is too harsh and would restrict future legislative action possibly permitting employees involved in "non-essential" jobs to strike. Also, such a prohibition is now embodied in law and has not prevented these strikes; a constitutional prohibition would be no more effective.
- (3) Prohibit strikes by certain classes of employees.

Arguments cited in favor:

- Only certain classes of public employees (e.g., firemen, policemen) present a substantial threat to the public interest if they strike; the Constitution should reflect a balance of protecting the public from dangerous strikes and permitting other classes of "non-essential" employees the right to strike.

Arguments cited against:

- This can be achieved under existing provisions. Attempts to define in a Constitution which employees shall or shall not strike will raise questions of interpretation if too literally worded or be too restrictive if worded specifically and so bind legislative action.
- (4) Provide some form of machinery either specifically or in the form of a general mandate to resolve public disputes.

Arguments cited in favor:

- The only effective means of dealing with public employee disputes is to establish machinery for bargaining rather than prohibiting strikes. Legislative action to date has not been able to establish an effective means of avoiding strikes.

Arguments cited against:

- Constitutional specification is unnecessary as any desired machinery could now be established. Also, it would restrict future legislative action in dealing with these problems.

When the New York Constitution was finally submitted to the people at the November 1967 election (where it was rejected by more than a 3 to one vote), it contained a consolidation of all the provisions related to labor, which were set out in the Bill of Rights, Article I, as sections 10a and 10b:⁷

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It shall be the policy of the state to foster and promote the general welfare and to establish a firm basis of economic security for the people of the state. Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed. The state shall secure the right of employees to organize and to bargain collectively through representatives of their own choosing. No person shall be denied employment or the right to join a labor organization of his choice on the grounds of race, color, creed or national origin.

To implement the state's commitment to the economic security and the dignity of the people, the Legislature may provide a system of workmen's compensation and protection against the hazards of unemployment and disability and against loss or inadequacy of income and employment opportunities.

Court Interpretations

Court interpretations, according to Roberts,⁸ have resulted in different holdings as to the force and effect of constitutional provisions. The Supreme Court of Missouri held that municipal employees are not extended the rights of collective bargaining under Article I, section 29, of the Missouri Constitution. The Court said:⁹

...It is inconceivable that the Constitutional Convention intended to invalidate all of the statutes, enacted through the years under this authority, concerning the operation of municipalities in fixing and regulating compensation, tenure, working conditions and other matters concerning public officers and employees.

...public office or employment never has been and cannot become a matter of bargaining and contract.... This is true because the whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative powers. Except to the extent that all the people have themselves settled any of these matters by writing them into the Constitution, they must be determined by their chosen representatives who constitute the legislative body. It is a familiar principal [sic] of constitutional law that the legislature cannot delegate its legislative powers and any attempted delegation thereof is void.

Similarly, in New York, the Court held that there is no positive duty to bargain collectively imposed upon the university by Article I, section 17, of the New York Constitution. The Court stated:¹⁰

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It is evident that the constitutional provision guaranteeing employees the right to organize and bargain collectively through representatives of their own choosing does not cast upon all employers a correlative obligation. The constitutional provision was shaped as a shield; the union seeks to use it as a sword. The duty of the employer to bargain collectively must be found in the provision of Article 20 of the Labor Law [New York State Labor Relations Act], and does not extend to those who are expressly excepted from the scope of that article.

The constitutional provision was intended to protect employees against legislation or acts which would prevent or interfere with their organization and choice of representatives for the purpose of bargaining collectively.... It is the union which is seeking to compel the university to bargain collectively with it. As no such positive duty has been imposed upon the university by the constitutional provision relied on by the plaintiff union, and as the State Labor Relations Act, which does impose a duty of collective bargaining, is inapplicable to the university, the motion for a temporary injunction must be denied.

In contrast, the New Jersey courts held that Article I, paragraph 19, imposes an affirmative duty upon an employer to bargain collectively with the representative of its employees. In Johnson v. Christ Hospital, decided July 27, 1964, Judge Matthews concluded that to deny that Article I, paragraph 19, of the Constitution imposes no affirmative duty upon the employer to bargain collectively with the representatives of the employees "renders impotent the rights guaranteed to employees under the constitutional provision". He explained:¹¹

...Clearly, this was not the intent of the authors of the provision. Reference to the Proceedings of the N.J. Constitutional Convention of 1947 discloses that the intent of the representatives of organized labor who appeared before the Committee on Rights, Privileges, Amendments and Miscellaneous Provisions, charged, among other things, with the drafting of Article I, was to seek a constitutional provision with respect to the rights of employees that could be enforced in the courts. Labor was not satisfied to permit a constitutional provision which was not self-implementing.

In view of the rather positive pronouncements made at the Constitutional Convention, there seems to be little room for speculation as to what was intended to be the effect of Article I, paragraph 19. In any event, it seems elementary that if one is granted the right to bargain, he must bargain with someone other than himself. If the right to bargain collectively is an enforceable right, as it is intended to be, then the holder of the right or his

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representative must be considered as having access to every available remedy to enforce it.

Further, he added:¹²

In Independent Dairy Workers Union of Hightstown v. Milk Drivers, etc., Local No. 680, 23 N.J. 85, 96 (1956), our Supreme Court held that the rights of employees declared in the constitutional provision herein involved were enforceable when individuals interfered with those rights. No implementing statute to enjoin such interference was deemed necessary for the court to act. In Cooper v. Nutley Sun Printing Co., Inc., 36 N.J. 189, 197 (1961), the court required no legislative implementation to afford an appropriate remedy to redress a violation of those rights. Implicit in these two holdings is a recognition that the rights set forth in the Rights and Privileges Article of our Constitution are actionable. Since this is so, it must be concluded that enforcement of these rights as contained in paragraph 19 must include the power of courts to require an employer to bargain collectively, once his employees have effectively designated their collective bargaining representative.

1968 Amendments to Florida Constitution

The Florida experience is interesting and bears mention because it illustrates the force of constitutional guarantees on legislation and the role of courts in guiding the implementation of collective bargaining rights granted in the Constitution.

In 1968, the Florida Constitution was amended to recognize the right of public employees to bargain collectively; the strike, however, was prohibited under the new provision which read as follows:

Article I, Declaration of Rights, section 6:

Right to Work. The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

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In 1969, the Florida Supreme Court in Dade County Classroom Teachers' Association, Inc. v. Ryan¹³ ruled that rights granted under section 6 apply to both public and private employees, noting that the legislative record of the submission of the joint resolution ratified as the Constitutional Revision of 1968 reflects that the legislature intended both private and public employees to be included in the word "employees" in the second sentence of section 6. The Court stated:¹⁴

It is noted that Section 6 of the Declaration of Rights of the Revised Constitution was submitted by the Legislature in the knowledge and light of the statutory policy enunciated in Section 839.221, F.S. (Ch. 59-223). Subsection (2) of Section 839.221 reads as follows:

"(2) All employees who comply with the provisions of this section are assured the right and freedom of 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. No such employee shall be discharged or discriminated against because of his exercise of such right, nor shall any person or group of persons, directly or indirectly, attempt to compel any such employee to join or refrain from joining a vocational or a labor organization."

It is apparent that Section 6 of the Declaration of Rights of the Revised Constitution is in large part a constitutional restatement of the foregoing quoted statutory provision.

Section 839.221 is the current legislative enactment setting forth standards and guidelines for said Section 6. We conclude it is the government statute spelling out the rights of public school teachers, as well as the authority of the School Board in this area,....

The Court continued:¹⁵

In the sensitive area of labor relations between public employees and public employer, it is requisite that the Legislature enact appropriate legislation setting out standards and guidelines and otherwise regulate the subject within the limits of said Section 6.

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Despite the amendment, government agencies were not permitted to negotiate with representatives of employees,¹⁶ and the prohibition was to be continued until the legislature had approved legislation setting forth collective bargaining guidelines for public employees.¹⁷

Failure on the part of the state legislature through 3 legislative sessions to enact standards or guidelines regulating the right of collective bargaining by public employees, following the decision of the Court in Dade County Classroom Teachers' Assn.,¹⁸ led to an attempt by the Classroom Teachers' Association to compel the legislature to act. The Court denied the petition for a constitutional writ on the grounds that the Court may not control or direct legislation under the doctrine of separation of powers mandated by the state constitution, though the courts have power to invalidate legislative enactments. It observed, however, that one of the exceptions to the separation-of-powers doctrine is in the area of constitutionally guaranteed or protected rights. The Court stated:

Where people in a constitution or charter vote themselves a governmental benefit or privilege, they the people in whom the power or government is finally reposed, have the right to have their constitutional rights enforced.¹⁹

* * *

The Legislature, having thus entered the field, we have confidence that within a reasonable time it will extend its time and study into this field and, therefore, judicial implementation of the rights in question would be premature at this time. If not, this Court will, in an appropriate case, have no choice but to fashion such guidelines by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of the constitution, and comply with our responsibility.²⁰

Two months later, on January 1, 1973, a statute was enacted establishing the right of fire fighters to organize and bargain collectively.²¹

Unsatisfied with the piecemeal approach and lack of progress on the part of the Florida state legislature in enacting a comprehensive statute, the Florida State Supreme Court in an order dated November 28, 1973, appointed an amici curiae commission known as the Supreme Court Employee's Rights Commission to

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gather information and to recommend to the court guidelines for implementation of section 6, Article I, of the Florida state constitution. The commission submitted the guidelines to the Court on March 4, 1974,²² and soon thereafter, the Florida legislature enacted a law covering all public employees to take effect January 1, 1975.²³

Chapter 3

PUBLIC SECTOR COLLECTIVE BARGAINING

Background¹

Public service is the most rapidly growing major sector of employment in the United States, increasing in the last 30 years from 4.2 million to 13.1 million employees. Today, nearly one out of every 5 workers is employed in the public service.

A number of factors are cited as contributing to this dramatic increase, including population growth, requiring increases in publicly provided services; increases in the demand for new services; shifts from private to public provision of certain kinds of service; and advances in technology which have intensified the need for new levels of existing public services. The growth of public service employment, moreover, has not been steady or equal at all levels of government, with the federal government employment showing the least increase in comparison with employment levels of state and local governments. At the present time, federal employment accounts for 23 per cent of total government employment, state government represents 27 per cent, and local government accounts for 50 per cent of all public employment in the United States.

The 1960s proved to be the decade of rapid expansion of unionism and collective bargaining in the public service, and it has been appropriately called by some "the decade of the public employee revolution". Unlike the development of private sector organization in the 1930s, public sector unionization was delayed due to several reasons. Stemming from certain philosophical ideas, traditional concepts of sovereignty asserted that government is and should be supreme, hence immune from forces and pressures such as collective bargaining. It was also believed that the sovereign power could not be delegated and that public decision-making could only be done by elected or appointed public officials. Other practical considerations worked to delay the advent of public employee unionism. These would include the preoccupation of

private sector unions with attempts to organize the private sector, lack of interest of public employees to organize and press for collective bargaining rights, and relative satisfaction of these employees with the greater fringe benefits and job security traditionally associated with public employment.

Conditions had changed, however, by early 1960. There was a new militancy and more groups, including public employees, became accustomed to challenge the established order. Public employees began to feel less secure under the pressure of demands for increased efficiency and lower unit labor costs. Public employee wages and salaries began to lag further behind those in the organized private sector as the inflationary spiral continued. Labor unions also saw the growing employment in the unorganized public sector as a potential field for recruitment to compensate for the steadily diminishing rate of organization in the private sector. Finally, there was increasing public questioning of the logic of the refusal to grant to public sector employees privileges and protection enjoyed by private sector employees.

The gradual erosion in the arguments of sovereignty and illegal delegation of powers began in the city of New York and the State of Wisconsin which extended modified collective bargaining rights to their public employees. Then in 1962 important impetus was added by the issuance by President Kennedy of Presidential Executive Order 10988 which gave federal employees a limited version of the rights that private employees had enjoyed 30 years earlier. Similar kinds of state legislation soon followed and at the present time more than 30 states have granted some form of collective bargaining rights to some or all of their public employees. President Nixon in 2 subsequent executive orders expanded and clarified the bargaining rights of federal employees.

Extent and Nature of Representation

Approximately 55 per cent of civilian federal employees, exclusive of the postal service,² are now represented for collective bargaining purposes. At the state and local government levels it is estimated that as much as 50 per cent of all employees are similarly represented.³

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It has been observed that the extensiveness of public employee organization is closely related to city size and geographic location. Thus, according to Stieber, in cities of 10,000 or more, approximately 60 per cent of all public employees are represented by unions or associations. In some cities (e.g., New York, Philadelphia, Cincinnati, Detroit), representation is close to 100 per cent. The organization of public employees has been greatest in the larger cities of the Middle Atlantic, New England, East North Central, and Pacific states. Municipal employees in the Southern and Mountain states and in cities with less than 50,000 population have the lowest proportion of representation.⁴

The Federal Policy

In 1961, President Kennedy appointed a Task Force to review and advise him on labor-management relations in the public service. The recommendations of the Task Force served as the basis for Presidential Executive Order 10988, which gave federal employees the right to join (or not to join) organizations of their choice and to be recognized by government agencies. Designed to encourage union representation throughout the federal service, the executive order created a system of recognition unique to labor relations experience providing for 3 types of recognition. An employee organization could be granted "informal recognition" which gave an organization, regardless of what status may have been extended to any other group, the right to speak to management on behalf of its members. An organization representing 10 per cent or more of the employees in a unit or activity could be granted "formal recognition" and entitled to consult and be consulted by federal managers on personnel policies broadly affecting its members where no organization had been granted exclusive recognition. "Exclusive recognition" was to be granted an employee organization which was chosen by a majority of the employees in an appropriate unit, the characteristic form of union recognition under prevalent labor relations systems in the United States.

The scope of bargaining under E.O. 10988 was limited to basic working conditions; wages and fringe benefits continued to be set by Congress. In

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addition, the order required every agreement to contain a strong management rights clause recognizing management's right to direct employees; to hire, promote, transfer, assign, suspend, demote, discharge, and discipline them; to relieve them from duty because of lack of work; and to determine the methods, means, and personnel by which operations are to be conducted.

Executive Order 10988 was followed in 1969 by a second labor relations order issued by President Nixon. The new order, E.O. 11491, eliminated the different varieties of recognition and established the characteristic single form of union recognition: exclusive recognition. Executive Order 11491 also established the Federal Labor Relations Council to administer and interpret the order, decide major policy issues, and act as an appellate body on various issues. A Federal Service Impasses Panel was also created within the council to consider negotiation impasses. The order authorized the Assistant Secretary of Labor for Labor-Management Relations to determine appropriate bargaining units, to supervise elections, and to rule on alleged unfair labor practices. Under E.O. 11491, the scope of negotiability was also broadened in several areas, the most important of which was the permission for agencies to negotiate agreements providing for binding arbitration of employee grievances to replace the former system which provided only for advisory opinions. The order continued to prohibit union security arrangements and to maintain the no-strike ban.

Rehmus has commented that the lack of a federal statute regulating relations between local governments and their employees meant in practice the structuring of labor-management relationships and of collective bargaining mechanisms being left to the individual states, "no doubt wisely since the myriad of state and local government fiscal policies, tax structures, and budgetary and personnel practices make federal determination of labor-management policies and enforcement mechanisms for local governments virtually impossible".⁵

State and Local Authorizations

As a matter of general law in the United States, the federal courts have held that an individual's right to form and join a union is a protected right under the First Amendment to the U.S. Constitution. The federal courts have also held, however, that there is no constitutional right to bargain collectively in either the public or the private sector. Hence, so far as the public sector specifically is concerned, the public employer's duty to bargain can be enforced only by statute or executive order. It has been similarly suggested by recent state court decisions that state authorities are under no obligation to bargain in the absence of a statutory requirement, but are free to do so if they choose. Further, as it was noted in an earlier chapter, although the right of public and private employees to organize may be recognized under the state constitution, employers are under no legal obligation to bargain collectively unless this duty is imposed upon them.

According to Rehmus, the reluctance of the minority of states which do not allow collective bargaining in the public sector is largely based on the fear of increased strike action. It is noted, however, that many public employee strikes have taken place in jurisdictions where collective bargaining was regarded as unlawful, and many public employee strikes could have been averted had the statute required the employer to recognize and bargain with the employee organization. Furthermore, the acceptance of collective bargaining in the public sector does not necessarily call for the acceptance of strikes in support of bargaining demands.⁶

Jascourt⁷ has pointed out that the special legal obligations imposed upon government employers have sometimes resulted in limitations upon union activity, stemming from the need to find legal authority to engage in a bilateral relationship with a representative of a group of employees to the exclusion of others. Therefore, the legal propriety of a public employer's engaging in collective bargaining with a union in the absence of statute continues to be a matter of debate, although decreasingly so in the contemporary setting, and there is a general acceptance of such relationships in the public sector, resulting in de facto arrangements where no statutory system exists.

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The passage of legislation granting public employees the right to bargain collectively was led by Wisconsin in 1959 with the enactment of the Wisconsin Municipal Employment Relations Act, followed by the issuance of President Kennedy's Executive Order 10988 in January 1962, establishing a system of recognition and collective relationships in the federal service. Comprehensive legislation covering all or different categories of employees now is on the books in about 36 states, with more limited authorizations, both as to content and coverage, in others.⁸

The present body of authorizations--ranging from executive orders, attorney general opinions, court decisions, rules and regulations, to comprehensive ordinances and statutes--varies with regard to the quality of the authorizations, the nature of the provisions, and coverage of employees. Some laws provide nothing more than a minimal statement of rights. Some laws such as the North Dakota statute covering state and local government employees merely provide for mediation of impasse disputes.⁹ Only meet-and-confer rights without an obligation to bargain are provided under the Alabama and Missouri statutes. In some cases, such as Wyoming, there are no administrative bodies to oversee the relationships of the parties.¹⁰

Dissatisfied with the lack of statutory recognition of collective bargaining rights and the diversity that exists where statutory rights have been extended, some unions have pressed for national legislation. These efforts have produced proposals (1) to amend the National Labor Relations Act to extend its full coverage to the public sector; (2) to establish a public sector National Labor Relations Board, allow the right to strike, and permit the national law to supersede local laws, including civil service legislation, except when the state law is substantially equivalent; and (3) to establish minimal standards protected by a public sector NLRB. Although these proposals continue to be resubmitted, according to several observers,¹¹ a slowdown in "Congressional momentum" for the passage of a federal collective bargaining law is indicated.

The Right to Strike in Public Employment

The issue of public employee strikes, one which some authorities feel perhaps receives more attention than it deserves, is usually discussed in the context of whether public employees have or should be given the legal right to strike. It should be noted, of course, that despite the de jure absence of this right in most governmental jurisdictions, in practice, public employees can and do strike, often with impunity.

On a national basis, the public employee strike problem is not an overwhelming one. Although such strikes in the past decade have grown in frequency from approximately one per month to one per day, strike activity in the public sector is still far below that in the private sector. Public employees involved in work stoppages in recent years represent about 1.5 per cent of total employment, compared with nearly 4 per cent in the private sector. In the most recent year for which data are available, 1975,¹² strike idleness represented .06 per cent of man-days worked by government employees; for the economy as a whole this figure was .16 per cent (see Tables 1 and 2). The average duration of public employee strikes was less than 7 days for government employees, as compared to nearly 18 days average duration for the economy as a whole. Among occupational groups, teachers figure more prominently in public sector strike activity than any other occupational group.

Mediation and fact-finding are the most common governmental devices used to help resolve negotiation disputes. Although these mechanisms are effective in the large majority of disputes, in cases where it is determined that no strike can be permitted, as is almost invariably the decision with firefighters and police officers, compulsory arbitration is frequently used. Considerable experimentation with a wide variety of arbitration procedures is now being carried out in nearly 20 states. The newest variant is "final offer selection", in which the arbitrator is given no power to compromise issues in dispute and is limited to selecting one or the other of the parties' final offers. In the 1977 session of the Hawaii state legislature, a bill¹³ providing for final offer selection by whole package covering firefighters only was passed by the legislature; the bill, however, was vetoed by the governor.

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Table 1
Work Stoppages in the United States, 1942-1975¹
(Workers and days idle in thousands)

Year	No. of Stoppages	Workers Involved	Days Idle	
			Number	% of Est. Working Time
1942	2,968	840	4,180	.04
1943	3,752	1,980	13,500	.10
1944	4,956	2,120	8,720	.07
1945	4,750	3,470	38,000	.31
1946	4,985	4,600	116,000	1.04
1947	3,693	2,170	34,600	.30
1948	3,419	1,960	34,100	.28
1949	3,606	3,030	50,500	.44
1950	4,843	2,410	38,800	.33
1951	4,737	2,220	22,900	.18
1952	5,117	3,540	59,100	.48
1953	5,091	2,400	28,300	.22
1954	3,468	1,530	22,600	.18
1955	4,320	2,650	28,200	.22
1956	3,825	1,900	33,100	.24
1957	3,673	1,390	16,500	.12
1958	3,694	2,060	23,900	.18
1959	3,708	1,880	69,000	.50
1960	3,333	1,320	19,100	.14
1961	3,367	1,450	16,300	.11
1962	3,614	1,230	18,600	.13
1963	3,362	941	16,100	.11
1964	3,655	1,640	22,900	.15
1965	3,963	1,550	23,300	.15
1966	4,405	1,960	25,400	.15
1967	4,595	2,870	42,100	.25
1968	5,045	2,649	49,018	.28
1969	5,700	2,481	42,869	.24
1970	5,716	3,305	66,414	.37
1971	5,138	3,280	47,589	.26
1972	5,010	1,714	27,066	.15
1973	5,353	2,251	27,948	.14
1974	6,074	2,778	47,991	.24
1975	5,031	1,746	31,237	.16

¹The number of stoppages and workers relate to those stoppages that began in the year. Days of idleness include all stoppages in effect. Workers are counted more than once if they were involved in more than one stoppage during the year.

Source: U.S. Dept. of Labor, Bureau of Labor Statistics. *Analysis of Work Stoppages, 1975*. (Washington: Government Printing Office, Bulletin 1940, 1977), p. 10.

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Table 2
Work Stoppages by Level of Government, 1942-75
(Workers involved and days idle in thousands)

Year	Total ¹			Federal Government			State Government			Local Government		
	No. of Stoppages	Workers Involved	Days Idle		No. of Stoppages	Workers Involved	Days Idle	No. of Stoppages	Workers Involved	Days Idle	No. of Stoppages	Workers Involved
			No.	% of Est. Working Time								
1942	...	...	...	...	...	...	...	...	...	...	39	6.0
1943	...	...	...	...	...	...	...	...	...	...	51	10.2
1944	...	...	...	...	...	...	...	2	0.4	8.0	34	5.3
1945	...	...	...	...	...	...	...	...	...	...	32	3.4
1946	...	...	...	...	...	...	...	1	...	...	61	9.6
1947	...	...	...	...	...	...	...	...	...	...	14	1.1
1948	...	...	...	...	...	...	...	...	...	...	25	1.4
1949	...	...	...	...	...	...	...	...	...	...	7	2.9
1950	...	...	...	...	...	...	...	...	...	...	28	4.0
1951	...	...	...	...	...	...	...	...	...	...	36	4.9
1952	...	...	...	...	...	...	...	...	...	...	49	8.1
1953	...	...	...	...	...	...	...	...	...	...	30	6.3
1954	...	...	...	...	...	...	...	...	...	...	9	1.8
1955	...	...	...	...	...	...	...	1	.2	.5	16	1.3
1956	...	...	...	...	...	...	...	...	...	...	27	3.5
1957	...	...	...	...	...	...	...	...	...	...	12	.8
1958	15	1.7	7.5	...	...	...	...	...	...	...	14	1.7
1959	25	2.0	10.5	...	...	...	...	1	...	...	21	1.6
1960	36	28.6	58.4	...	...	...	...	4	.4	1.6	33	27.6
1961	28	6.6	15.3	...	...	...	...	3	1.0	1.2	28	6.6
1962	28	31.1	79.1	...	...	...	...	...	...	...	21	25.3
1963	29	4.8	15.4	...	...	...	...	2	.3	2.2	27	4.6
1964	41	22.7	70.8	...	...	...	...	4	.3	3.2	37	22.5
1965	42	11.9	146.0	...	...	...	...	...	...	...	42	11.9
1966	142	105.0	455.0	.01	...	...	...	...	...	...	133	102.0
1967	181	132.0	1,250.0	.02	...	...	...	9	3.1	6.0	169	127.0
1968	254	201.8	2,545.2	.04	...	...	...	12	4.7	16.3	235	190.9
1969	411	160.0	745.7	.08	3	1.7	9.6	16	9.3	42.8	372	139.0
1970	412	333.5	2,023.2	.02	2	.6	1.1	37	20.5	152.4	386	168.9
1971	329	152.6	901.4	.06	3	155.8	648.3	23	8.8	44.6	304	137.1
1972	375	142.1	1,257.3	.03	2	1.0	8.1	23	14.5	81.8	335	114.7
1973	387	196.4	2,303.9	.04	...	...	...	40	27.4	273.7	357	183.7
1974	384	160.7	1,404.2	.07	1	.5	4.6	29	12.3	133.0	348	135.4
1975	478	318.5	2,204.4	.04	2	.5	1.4	34	24.7	86.4	446	252.0
				.06	...	...	...	32	66.6	300.5		1,903.9

¹ The Bureau of Labor Statistics has published data on strikes in government in its annual reports since 1942. Before that year, they had been included in a miscellaneous category—other nonmanufacturing industries. From 1942 through 1957, data refer only to strikes in administrative, protective, and sanitary services of government. Stoppages in establishments owned by governments were classified in their appropriate industry; for example, public schools and libraries were included in education services, not in government. Beginning in 1958, stoppages in such establishments were included under the government classification. Stoppages in publicly owned utilities, transportation, and schools were reclassified back to 1947 but a complete reclassification was not attempted. After 1957, dashes denote zeros.

Source: U.S. Dept. of Labor, Bureau of Labor Statistics, *Work Stoppages in Government, 1975* (Washington: Government Printing Office, Report 483, 1976), p. 5; *Analysis of Work Stoppages, 1975* (Washington: Government Printing Office, Bulletin 1940, 1977), p. 77.

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As it is noted elsewhere, the question as to whether or not the right to strike should be granted to public employees is inextricably tied to the discussion related to the issue of collective bargaining for public employees. In an earlier period collective bargaining for public employees was opposed based on the premise that collective bargaining presupposes the right to strike and that such right should not be available to public employees because of the basic differences between private industry as employer and the government as employer. The 1966 report to Governor Rockefeller by the Taylor Committee set forth these differences as follows:

Collective bargaining, including the right to strike, is recognized as an essential democratic right of employees in the private sector. Private employers have countervailing rights: they may lockout their employees or go out of business entirely.... Although both parties in private collective bargaining possess wide latitude of agreement in private negotiations, they are subject to constraint--the pressure of the market place where the consumer's power of choice is exercised. Jobs can be lost and production can be cut back if goods or services are priced out of the market.... Whether or not market forces provide adequate restraints in the public interest has often been questioned...even in the private sector, doubts have been raised about the compatibility with the public interest of unrestrained use of private economic power in the establishment of wages as well as of prices.

Nor does the right of strike in the private sector prevail without limitation. Under the Taft-Hartley Act special procedures may be invoked in public emergency disputes.¹⁴

* * *

It is the budget, rather than the market place, which constrains collective bargaining in public employment.

..."collective negotiation" in the public service is unlike collective bargaining in the private enterprise sector. The strike cannot be a part of the negotiating process.¹⁵

* * *

...Careful thought about the matter shows conclusively, ...that while the right to strike normally performs a useful function in the private enterprise sector (where relative economic power is the final determinant in the making of private agreements), it is not compatible with the orderly functioning of our democratic form of representative government (in which relative political power is the final determinant).¹⁶

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* * *

It is ultimately the legislature and the political process which has to balance the interests of public employees with the rest of the community, to relate the compensation of public employees to the tax rate, and to appraise the extent and quality of public services and the efficiency of their performance to the aspirations of public employees. The methods of persuasion and political activity, rather than the strike, comport with our institutions and traditions as means to resolve such conflicts of interest. It is these methods, moreover, that have been utilized by the wide variety of employee organizations which are indigenous to public employment.¹⁷

It should be noted that these arguments are mainly raised in the context of legislative deliberations and have been directed toward possible legislation; they are generally not raised in the context of constitutional rights, i.e., whether a constitution should contain a grant or prohibition of the right to bargain collectively and a similar prohibition or grant of the right to strike. As it has already been noted, among the states with constitutional language concerning the right of employees to organize and bargain collectively, language prohibiting public employee strikes is found only in the Florida Constitution.

Although today there is less resistance to authorizing public employees to strike,¹⁸ the issue continues to be debated. The range of views extends from the position of most unionists who argue for the unlimited right of public employees to strike to the position of most government officials and managers who argue against granting the right to strike. Academic observers of the public sector labor scene, who also present diverse views of public employee work stoppages, tend more than others to focus on alternatives to the strike.

George Meany, president of the AFL-CIO, has set forth labor's position as follows:¹⁹

But in seeking the right to collective bargaining, public employees are not pursuing strikes as a goal. Nobody enjoys a strike. Strikes are painful and expensive for all concerned, and sensible unions and sensible managements do everything in their power to avoid them.

Collective bargaining, like the idea of democratic government, is based on consent and acceptance. It assumes that two parties to a

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dispute can reach a reasonable agreement that both parties can live with. It assumes that workable compromises, fair and just to both sides, can be reached by the exercise of reason through give and take at the bargaining table.

* * *

...And strikes and lockouts are a normal and necessary part of the collective bargaining process. They are the last resort.

But it is necessary to preserve the right to that last resort. Unless the real possibility of a strike exists, unless both sides are constantly aware that serious consequences may flow from misjudgments and breaches of faith, bargaining is a charade--an exercise in futility.

It is to be noted that even among labor unions, there are differences of views concerning the strike in public employment. Jerry Wurf, president of AFSCME, recently spoke in favor of mutually acceptable routes for resolving impasses. He stated:²⁰

When collective bargaining reaches an impasse, there need not be a strike or a surrender by either side. What is needed is a mutually acceptable route for resolving the impasse. AFSCME has suggested for some time that we favor the use of voluntary binding arbitration in impasses. But we find public officials resisting this peaceful alternative to strikes.

AFSCME recently endorsed compulsory binding arbitration in emergency public safety services. Our proposal would give firefighters and police officers access to fair mechanisms for reaching reasonable settlements of labor disputes. It would eliminate the danger that communities could suffer from the disruption of vital services.

Arvid Anderson, former commissioner of the Wisconsin Employment Relations Commission and present chairperson of the New York City Office of Collective Bargaining, regards the question of whether public employees should have the right to strike as "academic". He also believes that the strike issue must be taken into account in any consideration of the development of collective bargaining in public employment, but that the growth in public employee unionism and in strikes has caused the question--should public employees have the right to strike--to be transcended by demands for orderly procedures to be developed which will prevent strikes from occurring or which will effectively deal with strikes which do occur.²¹

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Another view is presented in the notion that perhaps the issue on the "right to strike" should not be stated in the framework of "public" vs. "private" employees, but rather within the framework of the essentiality of the services provided. It is argued that there are some occupations--hospitals, public utilities, sanitation, and schools--in public employment which are not crucial to the health and welfare of the citizen and services can be interrupted for a brief period of time but not indefinitely. On the other hand, there are public services which would rank very high on any list of essential services which the public should not be deprived from using. Finally, there are services in which work stoppages can be sustained for extended periods without serious effects on the community. In the first instance, strikes should not be prohibited but should be made subject to injunctive relief through the courts when they begin to threaten the health, safety, or welfare of the community. Strikes by the second group, which would include only police and fire protection and prisons, would not be permitted and compulsory arbitration would be invoked after all other methods have failed. Work stoppages in the other activities would be permitted on the same basis as in private industry.²² This approach, however, is criticized as "fruitless".²³

Policemen and firemen are no more essential than school teachers; it is only that the costs and losses from doing without the police and fire departments are more dramatic and immediate. Every government function is essential in the broadest sense, or the government shouldn't be doing it. In almost every instance, the government is the only supplier of the service involved--and there is serious question about the legitimacy of any strike which deprives the public of something it needs and can't get from somebody else.

More recently, according to the view as articulated by David Lewin, Professor of Business, Columbia Business School, there is doubt being raised with respect to the formulated public sector labor policy that government work stoppages must not be permitted under any circumstances. In Lewin's opinion, policymakers, in legislating against the right of public employees to strike and authorizing arbitrated settlements, are seen to have been exclusively guided by the criterion of labor peace, assuming that the costs of public employee strikes always exceed the costs even of involuntary settlements.²⁴ "It is doubtful", Lewin states, "whether this view remains a useful guide to policy in light of

present financial crisis afflicting many state and local governments and of the resulting problematic future growth of the public sector".²⁵ Several indicators of a change in the traditional attitude are pointed out. Cyclical downturns in the mid-1970s have brought an increasing citizen concern about the costs of government, the levels of public employee wages and benefits, and the role of unions in the fiscal problems of governments. This in turn has led elected officials, including many who traditionally have received strong labor support, to respond to these concerns by reexamining their commitment to public sector collective bargaining, reappraising the costs of labor peace in terms of mandated settlements, and supporting more permissive policies toward public employee strikes. Rather than a policy choice of simply supporting or opposing the right to strike, public officials are being offered the adoption of more selective policies between the traditional polar positions. Lewin also observes that discussions of strikes and strike policies have focused too narrowly on the manifestation of public union power, i.e., the strike, without proper regard for other related aspects of collective bargaining and manpower utilization.²⁶ Personnel policies²⁷ for public supervisors and managers should be reexamined to promote a new sense of management identification in government and lessen managers' identification with their subordinates. Removing organization and bargaining rights for public managers and supervisors, along with modifying personnel policies pertaining to them, helps create a source of nonunion labor which may be substituted to deliver public services during a strike. Among other sources of substitute labor, subcontracting with the private sector not only during strikes but also as an alternative to costly publicly operated services is suggested as a possibility. Cultivation of these sources, along with reform of governmental labor relations and personnel policies, could produce a "potentially effective counterweight against the power of organized public employees, and they can mitigate the consequences of government work stoppages, if not totally eradicate them", Lewin states. He concludes:²⁸

[A]s the economic environment of government becomes more constrained, as the costs of labor peace are reassessed, and as governments revise their management and manpower utilization policies, public sector strikes will be treated less as events always to be prohibited and more as events whose consequences must be weighed against other bargaining outcomes.

PUBLIC SECTOR

Public sector bargaining and strike policies will more closely approximate those of industry not because the latter are necessarily "correct", but because government cannot entirely escape from the discipline of the market.

Chapter 4

THE HAWAII EXPERIENCE WITH PUBLIC EMPLOYMENT COLLECTIVE BARGAINING

The Hawaii Law on Collective Bargaining in Public Employment

Act 171, the Hawaii law on collective bargaining in public employment, was passed by the Hawaii state legislature on May 6, 1970, signed by Governor John A. Burns on June 30, and became effective on July 1, 1970. The law is reproduced in Appendix C.

Enacted to implement the constitutional mandate of Article XII, section 2, which grants public employees the right to organize for the purpose of collective bargaining as prescribed by law, the Hawaii law grants public employees the right to organize and to be represented by organizations of their choice in collective bargaining with their employers. It also protects the right of employees to refrain from union activities, except to the extent of paying reasonable service fees to the exclusive bargaining representative to defray the costs for its services rendered in negotiating and administering an agreement.

The law requires public employers to negotiate with exclusive bargaining representatives and enter into written contracts. It also safeguards those rights it grants by prohibiting certain practices by employees, employers, and employee organizations.

The administration of the law is entrusted to the Hawaii Public Employment Relations Board (HPERB) which is composed of 3 members appointed by the governor, one representing management, another representing labor, and one public representative who serves as chairperson. Principal duties of the board include establishing procedures and resolving disputes over designation of appropriate bargaining units, the scope of negotiations, and prohibited practices; conducting representation elections; assisting in the resolution of impasse disputes, including the setting of requirements to eliminate imminent or present danger to the health and safety of the public caused by an actual or threatened strike; and certifying the reasonableness of service fees required under the law to be paid by all employees in an appropriate bargaining unit.

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Among its other provisions, the law:

--Designates as the "public employer" in the case of bargaining units 5 and 6 and bargaining units 7 and 8, the board of education and the board of regents, respectively, and the governor (State), the mayors (city and county of Honolulu and counties of Hawaii, Maui, and Kauai), in the case of the remaining units.¹

--Sets forth the following 13 appropriate bargaining units, including 5 optional units--(9) through (13)--so designated because of their specialized training and essential nature of work:²

- (1) Nonsupervisory employees in blue-collar positions;
- (2) Supervisory employees in blue-collar positions;
- (3) Nonsupervisory employees in white-collar positions;
- (4) Supervisory employees in white-collar positions;
- (5) Teachers and other personnel of the department of education under the same salary schedule;
- (6) Educational officers and other personnel of the department of education under the same salary schedule;
- (7) Faculty of the University of Hawaii and the community college system;
- (8) Personnel of the University of Hawaii and the community college system, other than faculty;
- (9) Registered professional nurses;
- (10) Nonprofessional hospital and institutional workers;
- (11) Firefighters;
- (12) Police officers; and
- (13) Professional and scientific employees, other than registered professional nurses.

--Requires that negotiated agreements be subject to ratification by the employees concerned and that all cost items negotiated in an agreement be subject to legislative approval.³

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--Excludes certain matters from the scope of negotiations, including classification and reclassification, the Hawaii public employees health fund, retirement benefits, and salary ranges and the number of incremental steps now provided by law (other than the amount of wages to be paid in each range and each step, and the length of service necessary for the incremental and longevity steps).

--Maintains the rights of a public employer to:⁴

- (1) Direct employees;
- (2) Determine qualifications, work standards, nature and content of examinations;
- (3) Hire, promote, transfer, assign, and retain employees in positions, and suspend, demote, discharge, or take other disciplinary action against employees for proper cause;
- (4) Relieve employees from duties because of lack of work or other legitimate reason;
- (5) Maintain efficiency of government operations;
- (6) Determine methods, means, and personnel by which the employer's operations are to be conducted;
- (7) Take such actions as may be necessary to carry out the missions of the employer in case of emergencies.

To assist the governor in discharging the duties set forth in the collective bargaining law, an office of collective bargaining was established⁵ in 1975, to be headed by the chief negotiator, who is responsible for the conduct of negotiations and coordination of the State's resources in all mediation, fact-finding, and interest arbitration cases.

The Hawaii law grants public employees a limited right to strike and, at the same time, seeks to assure continuous government operations by authorizing parties to incorporate into their agreement an impasse procedure, culminating in final and binding arbitration to be invoked in the event of an impasse over the terms of an initial or renewed agreement. In the absence of such a procedure, the law requires HPERB to render assistance to the parties to resolve the

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impasse according to a schedule. The first step in the statutory impasse settlement procedure involves the appointment of a mediator or mediators by the board to assist the parties in arriving at a voluntary settlement. If no resolution is reached through mediation within 15 days of the date of the impasse, a fact-finding board of not more than 3 members is appointed by the board to make findings of fact and any recommendations for the resolution of the dispute to the parties within 10 days after its appointment. Written notification of acceptance or rejection is filed with the board by the parties within 5 days after the receipt of the factfinding board's report and recommendations. If the impasse is not resolved in fact-finding and the parties do not refer the impasse to final and binding arbitration, the fact-finding board's report and recommendations are made public. Thereafter either party is free to take "...whatever lawful action it deems necessary to end the dispute; provided that no action shall involve the disruption or interruption of public services within 60 days after the factfinding board has made public its findings of fact and any recommendations for the resolution of the dispute".⁶

The law prohibits any employee from striking who (1) is not included in an appropriate bargaining unit for which an exclusive representative has been certified by the board, (2) is included in an appropriate bargaining unit for which process for resolution of a dispute is by referral to final and binding arbitration, or (3) is not in the appropriate bargaining unit involved in the impasse. Before employees, who are not prohibited from striking under the above, may lawfully engage in a strike, the following conditions must be met:

- (1) Requirements of dispute settlement procedures in section 89-11 of the law must be complied with in good faith as determined by the board;
- (2) Proceedings for the prevention of any prohibited practices must have been exhausted;
- (3) Sixty days must have elapsed since the fact-finding board has made public its findings and recommendations; and
- (4) The exclusive representative must give a 10-day notice of intent to strike to the board and to the employer.

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If a strike occurring or about to occur is determined (1) to be in violation of the Act, or (2) to present an imminent or present danger to the health or safety of the public, the board is authorized to set forth requirements to be complied with to avoid or remove imminent or present danger to the health or safety of the public, to issue orders directing the employee organization to withdraw the strike declaration or authorization and desist from striking, or to issue cease and desist orders directing the employee or employees from participating in the strike.⁷

Experience under the Hawaii Law

Nearly 40,000 state and county employees are covered by the Hawaii law. Of this total, about 75 per cent are employed by the State with 18.9 per cent employed by the city and county of Honolulu. Bargaining units including these employees range in size from the largest single unit of public employees, unit 5, teachers, including over 9,000 employees, followed by unit 3, including nearly 8,500 employees, to the smallest unit, unit 4, with less than 500 employees. The size of all 13 units and the exclusive representative of the units are presented in Table 3.

During the span of the law's 7 years of experience, there have been several notable developments, including the negotiation of nearly 55 collective bargaining agreements; processing of employee grievances, of which less than 40 have been required to be resolved through final and binding arbitration; and resolution of nearly 30 negotiation impasse disputes, with only one disruption involving withdrawal of employees' services for any extended period of time.⁸ In addition, over 80 decisions have been issued by HPERB out of the more than 200 cases brought before the board.

The Hawaii law has been assessed as one of the most comprehensive public employment relations statutes in terms of its coverage of all state and local government employees and in its treatment of the important issues of public sector collective bargaining. It also includes innovative features, on such topics as union security and the right to strike, which have attracted the

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Table 3
State/County Employees Covered Under Collective Bargaining, December 31, 1976

Bargaining Unit	Exclusive Representative	Total	State	City & County of Honolulu	Hawaii	Maui	Kauai
1 Nonsupervisory employees in blue collar positions	UPW	7628	4491	2306	348	294	189
2 Supervisory employees in blue collar positions	HGEA	768	434	269	35	17	13
3 Nonsupervisory employees in white collar positions	HGEA	8439	6288	1624	297	143	87
4 Supervisory employees in white collar positions	HGEA	421	260	135	10	9	7
5 Teachers and other personnel of the DOE under the same salary schedule	HSTA	9087	9087	--	--	--	--
6 Educational officers and other personnel of the DOE under the same salary schedule	HGEA	564	564	--	--	--	--
7 Faculty of the UH and the community college system	UHPA	2702	2702	--	--	--	--
8 Personnel of the UH and community college system other than faculty	HGEA	799	799	--	--	--	--
9 Registered professional nurses	HNA	728	727	1	--	--	--
10 Nonprofessional hospital and institutional workers	UPW	1572	1441	130	--	--	1
11 Firefighters	HFFA	1325	64	926	140	106	89
12 Police officers	SHOPO	1875	--	1420	208	150	97
13 Professional and scientific employees other than registered nurses	HGEA	3830	2959	698	101	42	30
TOTAL		39738	29816	7509	1139	761	513

Source: State of Hawaii, Hawaii Public Employment Relations Board, Informational Bulletin No. 12, February 18, 1977.

attention of legislators, students, and practitioners in the field. In the opinion of Seidman and other observers and commentators, the law, in its original form, was not without its imperfections.⁹ It was criticized, for example, as not as carefully drawn as may be desired, with resulting inconsistencies and ambiguities. This has been particularly true with respect to definitions of terms covered under section 89-2 of the law, the implementation of the provisions of the law related to the service fee, representation elections, resolution of impasse disputes, and strikes. It should be noted, however, that sections of the law have been subject to board and court interpretations, and some of the uncertainties and ambiguities have been resolved.

In 1974 the Governor's Ad Hoc Commission on Operations, Revenues and Expenditures, in accordance with Executive Order No. 73-1, conducted a broad-ranging review of taxes and revenues, expenditures, and governmental operations in selected areas and made recommendations to improve the "efficiency and effectiveness" of state government. With respect to the area of "Collective Bargaining in the Public Sector", the commission made a number of recommendations, including:¹⁰

- (1) The establishment of an office of employee relations within the governor's office responsible for discharging the governor's duties under the Hawaii public sector collective bargaining law;
- (2) Amendment of the Hawaii law to provide that bargaining units for supervisors shall not be represented by the same union representing their rank-and-file employees; however, separate locals or divisions within a union may serve as agents for supervisors and rank-and-file employees;
- (3) Development of a personnel plan capable of attracting qualified managers and other personnel excluded from bargaining units with a compensation plan related to comparable plans in the private sector;
- (4) Retention of the management rights clause in the Hawaii law for the time being;
- (5) Review of compensation schedules established by statute prior to collective bargaining to determine their relevance to negotiated compensation provisions;

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- (6) Redesign of public employee retirement allowances by the Employees' Retirement System;
- (7) Consideration of the effects of the Hawaii law on the role of the civil service commission by the Reorganization Commission; and
- (8) Preparation of a report on the compatibility of the laws on collective bargaining, civil service, and public employment, in general, including recommendations thereon, particularly in the areas of classification, recruitment and initial hiring (including probationary periods), placement, reassignment and promotion, evaluation of employee performance, compensation schedules, and job security provisions.

The impact of collective bargaining on the merit principle was also another area of recent study and review, and this was carried out by Seidman and Najita in 1975. The study was devoted to an examination of the relationship between the merit principle and collective bargaining in state and local government in Hawaii, to ascertain their compatibility and determine the problem areas, and to make recommendations for clarification or changes in the law that would protect the merit principle in the public service without infringing on the legitimate collective bargaining rights of public employees. Based on their study of data obtained from nearly 120 interviews with labor officials and key officials in the state, county, and city service in Hawaii, from correspondence with heads of civil service commissions and other officers in the other 49 states and 31 major cities or urban areas, and from public employee collective bargaining contracts, grievance files and decisions of the Hawaii Public Employment Relations Board, the authors concluded that although collective bargaining has had some impact on the merit principle in state and local government in Hawaii, it has not destroyed the merit principle, nor is it likely to do so. Collective bargaining limits the merit principle most in the area of filling vacancies, particularly promotions, the researchers found. However, other social goals, such as political influence and equal opportunity, are pointed out as modifying merit much more than collective bargaining has ever done. Union officials are found to be faced with a dilemma in that however sympathetic they may be toward the equal opportunity objective, they have an obligation to represent their members, and they will insist that applicable provisions of the contract, such as seniority, be observed, the report states.

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Although collective bargaining and merit conflict at some points, the conflict is not so great or so irreconcilable that a choice must be made between them, it is pointed out. Collective bargaining is desirable in the public service because it improves morale, prevents arbitrary management action, and gives employees a voice in the determination of working conditions. The merit principle is important to give all applicants opportunity for appointment and to promote efficiency. Thus, the authors pointed out, public policy should seek to preserve some essentials of the merit principle, such as those relating to the examination and appointment process, as desirable goals logically entrusted to management, while permitting unions to negotiate reasonable security of employment that will raise morale while assuring efficiency in government.

Collective bargaining is seen as posing no threat to the concept of equal pay for equal work with regard to the same job title. But where there are multiple bargaining units, as in Hawaii, the authors caution that it would be unrealistic to expect that positions that are located in different bargaining units but that are considered equivalent in education, skill, and responsibility, will pay precisely the same amounts. The pay for these positions should be kept roughly in balance by the self-interest of the employee groups, as well as by management's concern with equity and morale.¹¹

In addition to these studies the Hawaii law has undergone legislative review. In the fall of 1975, joint hearings were conducted by the House Committee on Labor and Public Employment and the Senate Committee on Human Resources to review the law and the experience under it. In its report to the Speaker of the House, the House Committee on Labor and Public Employment set forth its conclusions as follows:¹²

The essence of collective bargaining in the public sector is the joint negotiation between public employers and unions to achieve a set of terms and conditions under which employees of a bargaining unit will work. As such, collective bargaining, since its enactment five years ago, is already operating at all levels of Hawaii's State and county government. What makes it operative is that every bargaining unit under the law has exercised its right to organize, the opportunity to bargain over substantive matters, and the achievement of a written employment contract.

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Although all this has been accomplished and a mechanism for resolving questions of interpretation and application of negotiated contracts exists in the Hawaii Public Employment Relations Board, problems remain which, for the most part, flow from the peculiar nature of collective bargaining in the public sector. It is to these problems your Committee has addressed its interim work and which it will continue to examine during the coming session.

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The language of labor-management relations, although peculiar to and reflective of the practices of employer and labor institutions and their representatives, is not rigid, and many of the terms used have broad, generally accepted meaning. In some cases, as issues and practices have become more complex, the terms have taken on more technical meanings.

The term collective bargaining has popularly been used to denote the process whereby representatives of labor and management are required, usually by law, to meet to work out the set of conditions--normally called wages, hours, and other terms and conditions of employment--to be embodied in an agreement or contract, which is to govern the relations of the parties for a specified *period of time*. A more current definition of the term has developed to include the day-to-day activities involved in effectuating and implementing the terms of the agreement. The term is now generally regarded as covering both the process of negotiation over the terms of the contract and the continuing process of effectuating the agreement. Thus, collective bargaining is not confined to the making of an agreement at specified times of the year, but it is viewed as a continuous process, including utilization of contractual grievance procedures. To the individual employee, the grievance procedure provides a means of enforcing the terms of the contract and a method of appeal against arbitrary decisions affecting the employee's wages or working conditions; it protects the democratic rights of an individual in the work place in the same way that the judicial system protects the individual's democratic rights in civil life.

It should also be noted that the legal obligations of collective bargaining as it is practiced in the private sector under the National Labor Relations Act and the Taft-Hartley Act are more complex than the generally accepted use of the term. In the public sector, the term collective bargaining has not yet developed the same meaning that it has in the private sector. Although an increasing number of jurisdictions have adopted legislation authorizing collective bargaining by public employees, there has not yet developed a consensus as to what features of the collective bargaining process in the private sector are

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applicable to the public sector. There is much interest as to the form of collective bargaining which would be most appropriate for adoption in the public sector, and much discussion may be found in the current literature concerning such issues as impasse resolution mechanisms, the right to strike, and the scope of negotiations in public sector collective bargaining.

Although there has been some effort to use a softer terminology, such as "professional negotiation", "collective dealing", and "collective negotiations", when referring to the give-and-take in working out mutually satisfactory settlements between public employees and public employers, there now appears to be less discomfort with the use of the term collective bargaining. Increasingly, state and local authorizations are resorting to use of the term collective bargaining rather than "professional negotiation" or "collective negotiation". The definition of the term found in the Hawaii public employment collective bargaining law, which follows the pattern of the definition of the term contained in the National Labor Relations Act, is to be found in nearly 30 other state and local authorizations. The Hawaii law provides:¹

"Collective bargaining" means the performance of the mutual obligations of the public employer and exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, and other terms and conditions of employment, except that by any such obligation neither party shall be compelled to agree to a proposal, or be required to make a concession.

There are other words and phrases commonly used in the discussion of issues related to labor-management relations. The definitions of these terms, based in large part on those found in Roberts' Dictionary of Industrial Relations and Labor-Management Relations in the Public Service,² are presented below arranged alphabetically for ease in finding the word or phrase.

Agency Shop (Fair Share Agreement). A union security provision to eliminate "free riders". All employees in the bargaining unit are required to pay dues or service charges to the collective bargaining agent. Nonunion employees, however, are not required to join the union as a condition of employment. Payment of dues is to defray the expenses of the bargaining agent

in negotiations, contract administration, and other activities related to the collective bargaining function. In public employment, these arrangements are required to be authorized by law and, when authorized, are typically made a negotiable subject of bargaining.

Appropriate Bargaining Unit. See Bargaining Unit.

Arbitration. Arbitration is a quasi-judicial proceeding in which a third party determines the issues which cannot be resolved by the parties through collective bargaining or other means. The arbitrator or arbitration panel normally holds a hearing on all relevant facts and disputed issues and then renders a decision or award which is always final and binding on both parties. Arbitration may be "compulsory", that is, the parties may be required by law to submit a dispute to arbitration, or it may be "voluntary", in that it is done by a voluntary submission agreement or by language in the agreement to submit all future disputes, as qualified by the definition of what constitutes an arbitrable grievance, to arbitration.

Arbitration is most frequently applied to the resolution of disputes arising from the interpretation and application of the collective agreement (called "rights arbitration"). It is found in over 90 per cent of collective bargaining agreements as the terminal step in the grievance procedure. Less frequently, the process is applied to the resolution of disputes arising from negotiations over new contract terms (called "interest arbitration").

Bargaining Unit. The group of employees determined to constitute the unit appropriate for bargaining purpose to be represented by an exclusive bargaining representative. In most instances, the appropriate bargaining unit for a particular group of employees is determined by a national, state, or local government board.

Certification. Official recognition by the National Labor Relations Board, or a state labor agency, that the labor organization is the duly designated agency for purposes of collective bargaining. A union so certified remains the exclusive bargaining representative for all of the employees in the appropriate

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bargaining unit, until the union is replaced by another organization, decertified, or dissolves.

Closed Shop. A form of union security wherein the employer agrees to hire and retain only union members in good standing. The closed shop is outlawed under the Taft-Hartley Act.

Collective Bargaining Agreement. A contract or mutual understanding between a union and company or their representatives setting forth the terms and conditions of employment, usually for a specific period of time. Most agreements include sections dealing with the bargaining unit, union security, seniority, wages and hours, and other working conditions, such as vacation pay, grievance procedures, and duration. Public sector agreements are generally bound to have a narrower scope of collective bargaining than private sector agreements.

Conciliation. The process, sometimes called an extension of collective bargaining, whereby the parties seek to reconcile their differences. In the conciliation process, a third party acts as the intermediary in bringing the disputing parties together, but acts as a catalytic agent, by being available, but not actually taking an active part in the settlement process. Conciliation is sometimes distinguished from mediation, where the third party actively seeks to assist the parties in reaching a settlement, by making suggestions, providing background information, and noting avenues open to the parties for settlement. The third party does not actually decide or determine the settlement, but helps the parties find a solution to the problem. In current usage, the terms conciliation and mediation are used interchangeably.

Dispute Settlement. A labor dispute, generally speaking, includes any controversy concerning the terms and conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange the terms or conditions of employment. There are many methods for the settlement of these differences: mediation, conciliation, fact-finding, emergency boards, arbitration, or litigation.

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Employee Organization. A phrase which has the same connotation as "labor organization", except that it does not have the flavor of "unionism". In the public sector, there are many organizations which do not consider themselves "labor" organizations, although they may perform many of the functions of a labor organization, such as representing employees and seeking improvement in wages and working conditions. Some may be professional or technical organizations which want to maintain a clear distinction between the services which they perform for their membership and the general role and function of a labor union. The term is frequently used interchangeably with "public employee organization".

Under Presidential Executive Order 10988, the term was defined as:

...any lawful association, labor organization, federation, council, or brotherhood having as a primary purpose the improvement of working conditions among Federal employees, or any craft, trade or industrial union whose memberships include both Federal employees and employees of private organizations; but such terms shall not include any organization (1) which asserts the right to strike against the Government of the U.S. or any agency thereof, or to assist or participate in any such strike, or (2) which advocates the overthrow of the constitutional form of Government in the United States, or (3) which discriminates with regard to the terms or conditions of membership because of race, color, creed or national origin.

Under Presidential Executive Order 11491, the term "labor organization" is substituted for "employee organization" and redefined to exclude organizations of supervisors and managers and to extend the nondiscrimination requirement to include sex and age.

Under section 89-2(8), Hawaii Revised Statutes, the Hawaii Collective Bargaining in Public Employment law, "employee organization" is defined as "any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, and other terms and conditions of employment of public employees".

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Exclusive Bargaining Representative. When a union is certified as the collective bargaining agent for a particular bargaining unit, it becomes the "exclusive" bargaining representative for all employees in the unit, nonunion as well as union.

Under section 89-2(10), Hawaii Revised Statutes, "exclusive representative" is defined as "the employee organization, which as a result of certification by the board, has the right to be the collective bargaining agent of all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership".

Executive Order 10988. Now superseded by Presidential Executive Order 11491, Presidential Executive Order 10988 was issued by President John F. Kennedy on January 17, 1962, dealing with employee-management cooperation in the federal service. It provided the mechanism for determining bargaining representation and forms of recognition for employees. It also established machinery in the Department of Labor and the U.S. Civil Service Commission to provide technical assistance to government departments in carrying out the provisions of the order.

Fact-Finding. One of the methods of impasse resolution wherein a single third party or special panel, usually 3 or 5 persons, is appointed to review the positions of labor and management, with a view to focusing attention on the major issues in dispute, and resolving differences as to facts. The board may merely report its determination of the facts or make written findings of fact and recommendations to the parties as to terms of settlement. This procedure, usually statutory in nature, is initiated by an appropriate state agency on its own motion or at the request of the parties, usually after mediation efforts have failed.

Under section 89-2(11), Hawaii Revised Statutes, "fact-finding" is defined as "identification of the major issues in a particular impasse, review of the positions of the parties and resolution of factual differences by one or more impartial fact-finders, and the making of recommendations for settlement of the impasse".

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Grievance. Broadly defined, any complaint by an employee or by a union (sometimes by the employer or employer association), concerning any aspect of the employment relationship; the complaint may be real or fancied, arbitrable or nonarbitrable under the contract. Arbitrable grievances are usually those which arise out of the misinterpretation, misapplication, or violation of the terms of the collective bargaining agreement.

Under the New York City Collective Bargaining Law, for example, "grievance" is defined as:³

...(1) a dispute concerning the application or interpretation of the terms of a written collective bargaining agreement or a personnel order of the mayor, or a determination under section two hundred twenty of the labor law affecting terms and conditions of employment; (2) a claimed violation, misinterpretation, or misapplication of the rules or regulations of a municipal agency or other public employer affecting the terms and conditions of employment; (3) a claimed assignment of employees to duties substantially different from those stated in their job classifications; or (4) a claimed improper holding of an opencompetitive rather than a promotional examination. Notwithstanding the provisions of this subsection, the term grievance shall include a dispute defined as a grievance by executive order of the mayor, by a collective bargaining agreement or as may be otherwise expressly agreed to in writing by a public employee organization and the applicable public employer.

Grievance (Rights) Arbitration. Arbitration which involves the violation, misinterpretation, or misapplication of the agreement. The arbitrator in this type of dispute interprets and applies the contract and acts in a quasi-judicial capacity concerning the meaning and intent of the contract when disagreements cannot be settled at the lower levels of the grievance procedure.

Impasse. Deadlock in negotiations between management officials and representatives of an employee organization over the terms and conditions of employment. Many of the public sector collective bargaining laws provide for procedures in case an impasse is reached in negotiations. An impasse may be deemed to exist, as under the New York state law, if the parties fail to achieve agreement at least 60 days prior to the budget submission date of the public employer.

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Under the Hawaii law, "impasse" is defined as "failure of a public employer and an exclusive representative to achieve agreement in the course of negotiations"⁴ which has been interpreted by the Court to mean failure after good faith negotiations.⁵

Labor Organization. A group of workers in a voluntary association combined for the common purpose of protecting or advancing the wages, hours, and working conditions of their members. Although these organizations are concerned occasionally with matters of social and political concern, this is not their primary aim, but a function which is made necessary by the common interest in protecting and advancing the welfare of their members. Political activity frequently is directed toward that end rather than toward the political arena as such.

The National Labor Relations Act defines the term "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work".

Presidential Executive Order 11491 defines the term as:

...a lawful organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with agencies concerning grievances, personnel policies and practices, or other matters, affecting the working conditions of their employees; but does not include organizations which

- (1) consists of management officials or supervisors, except as provided in section 24 of this Order;
- (2) asserts or participates in a strike against the Government of the United States or any agency thereof or imposes a duty or obligation to conduct, assist or participate in such a strike;
- (3) advocates the overthrow of the constitutional form of government in the United States; or

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- (4) discriminates with regard to the terms or conditions of membership because of race, color, creed, sex, age, or national origin;...

The Hawaii law refers to "employee organization" rather than "labor organization".

Lockout. The lockout is the employer's tool of applying economic pressure when the parties are unable to resolve their problems in negotiations or agree on the terms or conditions of employment. The strike is the union's last resort; the lockout is the employer's. The lockout generally implies the temporary withholding of work, by means of shutting down the operation or plant, from a group of workers in order to bring pressure on them to accept the employer's terms. There is great difficulty in classifying a situation as a strike or lockout since it depends upon determination of who, the union or the employer, is the initiator of the work stoppage.

In the strike statistics maintained by the U.S. Department of Labor, the term "work stoppages" brings both strikes and lockouts into the picture. In current disputes, strikes occur more frequently.

Provocation by the employer is also extremely difficult to determine. The union frequently argues the existence of a lockout to place responsibility for the work stoppage on the employer themselves. The public frequently sees only the union doing the picketing and taking the overt action and so places the responsibility for the work stoppage on the union.

Like most of its counterparts, the Hawaii law does not contain a definition of this term.

Maintenance of Membership. A form of union security which provides that, after a 15-day period during which time employees are free to decide whether they want to remain in the union or to withdraw, all union members or those who subsequently become union members shall maintain their union membership in good standing for the duration of the agreement as a condition of continued employment.

GLOSSARY

Majority Rule. The National Labor Relations Act and state labor relations acts provide for holding elections to determine who should represent employees of a particular employer or group of employers for the purpose of collective bargaining. The rules developed under previous statutes, including the Railway Labor Act and various boards under section 7(a) of NLRA, provided that a majority of the employees voting in the appropriate bargaining unit would determine the exclusive bargaining representative for all of the employees in the unit.

Management Rights. They encompass those aspects of the employer's operations which do not require discussion with or concurrence by the union, or rights reserved to management which are not subject to collective bargaining. Such prerogatives or rights may include matters of hiring, production, scheduling, price fixing, and the maintenance of order and efficiency, as well as the processes of manufacturing and sales. In the private sector, these rights are often expressly reserved to management in the collective bargaining agreement.

This area is one of substantial conflict between labor and management because the scope of collective bargaining tends to be modified as economic and social conditions change.

Management contends that because of its responsibility for maintaining the operation of a company and the control of the business for the benefit of stockholders, it must of necessity be vested with adequate authority to carry out those functions. The unions on the other hand insist that these management functions are reasonable and proper only when they do not impinge on the specific needs or concerns which affect the relation of the individual to the job. Thus, the field is an open one, and judging from decisions not only of the employers and unions in collective bargaining but also of the National Labor Relations Board, the scope of collective bargaining will continue to be a changing one. What was a management right a few years ago may now be a joint concern of labor and management.

ORGANIZATION; COLLECTIVE BARGAINING

Both federal and state laws reflect the concern over the right of the public agency to perform its mission without interference by organized public employees. The claim in the public sector has been reinforced by the existence of other procedures, through statute and civil service regulations, which provide a degree of protection for the public employee. The point has also been made that many of the decisions which might come within the scope of negotiation or bargaining (and hence shift the extent of management and union rights) are within the discretion of federal and state legislatures.

President Kennedy's Task Force had the following comments on the scope of negotiations between exclusive bargaining agents and public employers:⁶

Any agreement between management officials and an employee organization to grant exclusive recognition should include a statement recognizing that in the administration of any agreement reached between the parties, the officials and employees concerned are governed by the provisions of applicable Federal laws and regulations, including policies set forth in the Federal Personnel Manual, and the agency's regulations, all of which are regarded as paramount, and any such agreement must at all times be applied subject to all such laws, regulations and policies. Subject to existing collective agreements, such agreements should recognize that the responsibility of management officials for a Government activity requires that they retain the right (1) to direct its employees; (2) to hire, promote, demote, transfer, assign, and retain employees in positions within the activity on the basis of merit and efficiency, in accordance with applicable Federal laws and regulations; (3) to suspend or discharge employees for proper cause; (4) to relieve employees from duties because of lack of work or for other legitimate reasons; (5) to maintain the efficiency of the Government operations entrusted to them; and (6) to determine the methods, means, and personnel by which operations are to be carried on.

The Hawaii law similarly incorporates a provision protecting the rights of management. The law provides as follows:⁷

Excluded from the subjects of negotiations are matters of classification and reclassification, the Hawaii public employees health fund, retirement benefits and the salary ranges and the number of incremental and longevity steps now provided by law, provided that the amount of wages to be paid in each range and step and the length of service necessary for the incremental and longevity steps shall be negotiable....

GLOSSARY

* * *

...The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with merit principles or the principle of equal pay for equal work pursuant to sections 76-1, 76-2, 77-31, and 77-33, or which would interfere with the rights of a public employer to (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

Mediation. The most common and widely accepted public sector impasse resolution process whereby an outsider, occasionally a person known to the parties and eminently fair, offers services to both sides in an effort to assist them in finding an acceptable solution to the problem. In present usage, the term conciliation is regarded as the equivalent of mediation.

The conciliator or mediator does not make decisions. Even a highly active conciliator or mediator only suggests possible areas for compromise and contributes additional points of view to the situation, but the resolution of the dispute is left to the parties. Where the parties are unwilling to help find a solution, the role of the conciliator or mediator is of relatively little value.

Under section 89-2(14), Hawaii Revised Statutes, "mediation" is defined as "assistance by an impartial third party to reconcile an impasse between the public employer and the exclusive representative regarding wages, hours, and other terms and conditions of employment through interpretation, suggestion, and advice to resolve the impasse".

Right to Bargain. This phrase has to do with the collective bargaining rights of organizations under the provisions of federal and state laws, particularly when they have been certified as the collective bargaining agents of the employees in the bargaining unit. The right to bargain is retained as long as the unions are properly certified and have a majority in an appropriate unit.

ORGANIZATION; COLLECTIVE BARGAINING

Right to Organize. A protection necessary if employees are to engage in collective bargaining. This right is basic to national labor policy in the United States.

Right-to-Work Law. Provisions in state laws which prohibit or make illegal arrangements between an employer and union (for union shop, closed shop, maintenance of membership, preferential hiring, or other union security provisions) which require membership in a union as a condition of obtaining or retaining employment.

State legislatures have the authority under the provisions of the Taft-Hartley Act to pass legislation more restrictive than the union security provisions of the federal law. The courts have upheld the right not only of the states to pass such legislation but also to enforce it.

Some of the states have also amended their constitutions to prohibit enactment of union security provisions within their respective jurisdictions.

Scope of Bargaining. The actual scope or subject matter which management and unions bring within the area of the collective bargaining contract.

Unfair Labor Practice. Actions of employers or unions that are prohibited as unfair labor practices under the statutes, which if not restrained would undermine the vested rights of employees and employers or tend to frustrate the collective bargaining process. Charges of unfair labor practices are adjudicated by appropriate agencies responsible for administering the collective bargaining law. If violations are found, cease and desist orders are issued, or other relief may be granted, and such orders may be enforced in the courts.

Union Security. Protection of the union against employers, nonunion employees, and/or raid by competing unions, typically through contract provisions establishing the union shop, closed shop, maintenance of membership, or agency shop.

GLOSSARY

Union Shop. A form of union security which permits the employer to hire whomever the employer pleases but requires all new employees to become members of the union within a specified period of time, usually 30 days. It also requires the individual to remain a member or pay union dues for the duration of the collective bargaining agreement.

FOOTNOTES

Chapter 1

1. The amendment was submitted as Committee Proposal No. 5.
2. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, Standing Committee Report No. 42, p. 207.
3. *Ibid.*, p. 206.
4. *Ibid.*
5. Files of the Committee on Public Health, Education and Welfare; Labor and Industry are to be found in the State Archives.
6. President Roosevelt in his message to the Federation of Federal Employees on August 16, 1937, stated: "Since their own services have to do with the functioning of 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."

George Meany also recognizing the difference between private union employees and government employees stated: "We believe that it is essential to devise an impartial and orderly substitute for the right to strike. Otherwise, the right to organize and bargain collectively loses substance and becomes an empty farce."
7. Citizens and representatives of groups and organizations presenting their views before the committee included Mr. Daniel Ainoa, Executive Secretary of the Hawaiian Government Employees Association; Mr. Robert Repas; Mr. Robert Grunsky, President of the Hawaii Employers Council; Mr. Harold Hee, Chamber of Commerce of Hawaii; Mr. Robert Knight, Executive Secretary-Treasurer of the Hawaii State Federation of Labor, AFL-CIO; Mr. Jim Crane, Hawaii Federation of Teachers; Mr. Sam Slom, Business League of Sound Government; Mr. George Pai, Deputy Attorney General, State of Hawaii; Mrs. Edna T. Taufaasau, Director of the Department of Personnel Services, State of Hawaii; Mr. Max Roffman, Oahu Division Director of the United Public Workers; Dr. Daniel Tuttle, Jr., Executive Secretary of the Hawaii Education Association; Mr. Eddie DeMello, Legislative Lobbyist for the ILWU; and Delegate Diana C. Hansen.
8. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. I, p. 207.
9. *Ibid.*, Departmental Communication No. 2, dated September 3, 1968, pp. 104-105.
10. Hawaii, Constitutional Convention, 1968, *Proceedings*, Vol. II, Debates in Committee of the Whole on Organization, Collective Bargaining (Article XII), September 3, 1968, pp. 476-478, 497-498.
11. *Ibid.*, pp. 485, 487, 495-496.
12. Most of this section is based on Harold S. Roberts, *Article XII: Organization, Collective Bargaining*, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, Legislative Reference Bureau, 1968), pp. 13-22.
13. Interview with Dorothy Devereux, former Hawaii State Representative, Delegate and Vice Chairman, Committee on Public Health, Education and Welfare; Labor and Industry, 1968 Constitutional Convention, August 1, 1977.
14. Interview with A. Van Horn Diamond, Executive Secretary-Treasurer, Hawaii State Federation of Labor, AFL-CIO, November 14, 1977. See also Resolution No. 11, adopted at 7th Biennial Convention of the Hawaii State Federation of Labor, AFL-CIO, Sept. 9-11, 1977, relating to the protection of the right of the public employees to bargain collectively.
15. See remarks of Robert F. Ellis, former President of the Chamber of Commerce of Hawaii, in "Collective Bargaining for Public Employees," *The Merit Principle and Collective Bargaining in Hawaii*, Symposium Proceedings, Joyce M. Najita, ed. (Honolulu: Hawaii State Department of Personnel Services, Aug. 1977), pp. 53-57.
16. Committee on Executive Management and Fiscal Affairs, National Governors' Conference, 1970 *Supplement to Report of Task Force on State and Local Government Labor Relations* (Chicago: Public Personnel Association, 1971), p. 52.
17. U.S., General Accounting Office, *Case Study of the Hawaii Public Employment Relations Act*, B-172376, February 1, 1974, p. 15.

It may also be of interest to note that in early 1971 Michigan Labor Department Director Barry C. Brown, in his remarks related to the right to strike in the public sector, was reported to have recommended that the state of Michigan adopt a public employee relations act similar to those enacted in Hawaii, Maine, and Pennsylvania. See BNA, *GERR*, No. 384, January 18, 1971, p. B-15.
18. Ellis, p. 53.
19. This suggestion was made by Robert F. Ellis at a public meeting sponsored by Citizens for Con Con on August 24, 1977.
20. Interview with Representative Kathleen G. Stanley, Chairman, Public Employment and Government Operations, August 1, 1977. A similar view was expressed by James H. Takushi, Chief Negotiator, Office of Collective Bargaining, State of Hawaii, at a public meeting sponsored by Citizens for Con Con on August 24, 1977.
21. Interview with Representative Kathleen G. Stanley.
22. Interview with Henry Epstein, State Director, United Public Workers, Local 646, AFSCME, August 23, 1977.
23. Interview with Francis Kennedy, Jr., Business Manager, Hawaii Fire Fighters Association, October 14, 1977.
24. "ABA Committee Report on State Labor Law," *GERR*, RF 61:210, September 19, 1977.

25. *Calif. Govt. Code*, sec. 3547.
26. *Hawaii Rev. Stat.*, sec. 92-5(a)(2).
27. Letter from Harry Boranian, Director, Department of Civil Service, City and County of Honolulu, to Joyce M. Najita, October 21, 1977.
28. Interview with Joan Husted, Director of Programs, Hawaii State Teachers Association, October 21, 1977.
29. Ellis, p. 56.
30. Joel Seidman, with the assistance of Joyce M. Najita, *The Hawaii Law on Collective Bargaining in Public Employment* (Honolulu: University of Hawaii, Industrial Relations Center, October 1973), pp. 30-31.
31. *Ibid.*, p. 32.
32. Interview with Dorothy Devereux.
33. "Eilerts on Public Sector Strike Alternatives," *Council Forum*, Spring 1977, p. 9.
34. Interview with Bernard T. Eilerts, President, Hawaii Employers Council, August 4, 1977. A similar view was expressed by Mr. Eilerts' predecessor, Robert Grunsky, at the 1968 Constitutional Convention.
35. Interview with Henry Epstein.
36. Letter from Arthur A. Rutledge, President, Joint Council of Teamsters 50, to Joyce M. Najita, November 11, 1977.
37. See, for example, ILWU, Local 142, 13th Biennial Convention, *Statement of Policy on Constitutional Convention*, September 1977.
38. This statement was made by Henry Epstein in a videotape presented at the Citizens for Con Con meeting, August 24, 1977.

A similar experience may also be developing specifically in the public sector. It is reported by Herbert L. Haber, Director of Labor Relations for the City of New York, that from 1966 through 1972, the city reached over 625 settlements with about 220 bargaining units with only 12 work stoppages occurring during this period. Herbert L. Haber, "Factfinding with Binding Recommendations," *Monthly Labor Review*, September 1973, p. 43.
39. This statement was made by John B. Souza, UPW negotiating committee chairman, in a videotape presented by the Citizens for Con Con meeting, August 24, 1977.
40. Letter from Joan Lee Husted, Director, Programs Division, Hawaii State Teachers Association, to author, October 24, 1977.
41. U.S., Department of Labor, Bureau of Labor Statistics, *Work Stoppages in Government, 1975*, Report 483 (Washington: Government Printing Office, 1976), p. 16.
42. Peter C.K. Fong, "The Right to Strike in the Public Sector: Two Case Studies," Senior honors thesis, University of Hawaii, August 1977, pp. 68-87.
43. Interview with Francis Kennedy, Jr.
44. Interview with Robert Robinson, President, Chamber of Commerce of Hawaii, July 27, 1977.
45. Interview with Henry Epstein.
46. Interview with Henry Epstein. A similar point of view was expressed by James H. Takushi at a public meeting sponsored by Citizens for Con Con on August 24, 1977.
47. Interview with Francis Kennedy, Jr.
48. Charles M. Rehmus, "Labour Relations in the Public Sector in the United States," *International Labour Review*, March 1974, p. 215.
49. Daniel Orr, "Public Employee Compensation Levels," *Public Employee Unions, A Study of the Crisis in Public Sector Labor Relations*, ed. by A. Lawrence Chickering (San Francisco: Institute for Contemporary Studies, 1976), p. 139.
50. *Ibid.*, pp. 142-143.
51. Interview with Bernard Eilerts.
52. Section 77-2, *Hawaii Rev. Stat.*, provides as follows:

It is the purpose of this chapter to establish a sound statewide system under which it will be possible to attract and retain competent persons for the government service, to establish and maintain a high level of efficiency of employees and to adequately compensate them for the work they do.

It is also the purpose of this chapter that in so compensating employees in the civil service, due consideration shall be given to a decent standard of living and to the ability of the people to pay for such service. In order to effectively achieve this purpose, it is the declared policy of the State that the compensation for public employees be set and determined after careful consideration of at least the following factors:

 - (1) The general economic condition of the State;
 - (2) Conditions of the labor market;
 - (3) The appropriate cost of living index;
 - (4) The minimum standard of living which is compatible with decency and health;
 - (5) The amount of compensation which is offered by employers competing for labor sought by the government with due consideration being given to compensation offered or paid of a non-monetary character and with proper concern over apparent economic trends.

Each director shall conduct the necessary and appropriate annual studies in order that the purposes and policies expressed in

this section will be effectively achieved and complied with. A director may enter into cooperative arrangements with other public and private agencies in the conduct of such annual studies. The results of the studies shall be submitted annually to the respective chief executive officers and legislative bodies.

53. Interview with Henry Epstein.
54. Ellis, p. 55.
55. Rehmus, p. 213.
56. Arvid Anderson, "The Impact of Public Sector Bargaining," 1973 *Wis. L. Rev.* 1006.
57. *Ibid.*, p. 1007.
58. T.A. Hallem and others, "Collective Bargaining and Politics in Public Employment," 19 *UCLA L. Rev.* 946 (1972).
59. Paul F. Gerhart, *Political Activity by Public Employee Organizations at the Local Level: Threat or Promise*, Public Employee Relations Library 44 (Chicago: International Personnel Management Association, 1974), p. 19.
60. *Ibid.*, p. 17.
61. *Ibid.*, p. 16.
62. *Ibid.*, p. 51.

Chapter 2

1. Harold S. Roberts, *Article XII: Organization, Collective Bargaining*, Hawaii Constitutional Convention Studies (Honolulu: University of Hawaii, Legislative Reference Bureau, 1968), p. 62.
2. The other 19 right-to-work states are Alabama, Arizona, Arkansas, Georgia, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming.
3. Roberts, pp. 46-57.
4. *Ibid.*, p. 54.
5. *Ibid.*, p. 55.
6. *Ibid.*, pp. 55-56.
7. *Ibid.*, p. 57.
8. *Ibid.*, pp. 63-69.
9. *City of Springfield v. Clouse*, 206 S.W. 2d 545 (1947).
10. *Quill v. Eisenhower*, 113 N.Y.S. 2d 887 (1952); 21 LC 81425.
11. *Johnson v. Christ Hospital*, 84 N.J. Super. 541 (Ch. Div. 1964); 45 N.J. 108 (1965); 50 LC 64430-64431.
12. *Ibid.*, 64432.
13. 225 So. 2d 903 (1969); 60 LC 66984.

14. 60 LC 66986-66987.
15. 60 LC 66987.
16. See May 13, 1970, Executive Order issued by Florida Governor Claude R. Kirk, Jr.
17. See April 5, 1971, Executive Order 71-20, issued by Florida Governor Reubin O'D. Askew.
18. *Dade County Classroom Teachers' Association, Inc. v. The Legislature of the State of Florida*, 269 So. 2d 684 (1972); 69 LC 69171.
19. 69 LC 69173.
20. 69 LC 69174.
21. C. Richard Miserendino, "The New Florida Public Employee Relations Statute: Will It Provide for Bargaining or Bouliwarism?", *Industrial and Labor Relations Forum*, Vol. 11, No. 3, Fall 1975, p. 269.
22. *GERR*, No. 551, April 22, 1974, pp. B12-B14, E1-E6.
23. *GERR*, No. 562, July 8, 1974, p. B1.

Chapter 3

1. Most of this section is based on Charles M. Rehmus, "Labour Relations in the Public Sector in the United States," *International Labour Review*, March 1974, pp. 199-203.
2. Since 1970, following the transformation of the Post Office Department into a public corporation, postal service employees have been subject to the rules and regulations that pertain to private sector labor relations. Postal service employees, however, are not permitted to strike and instead compulsory binding arbitration is made available in the event of bargaining impasses.
3. U.S., Bureau of the Census, *Census of Governments, 1972, Vol. 3, Public Employment, No. 3: Management-Labor Relations in State and Local Governments* (Washington: Government Printing Office, 1974), p. 1.
4. Jack Stieber, *Public Employee Unionism: Structure, Growth, Policy* (Washington: The Brookings Institution, 1973), p. 13.
5. Rehmus, p. 206.
6. *Ibid.*, p. 203.
7. Hugh D. Jascourt, *Public Sector Labor Relations, Recent Trends and Developments* (Lexington, Ky.: Council of State Governments, 1975), pp. 5-6.
8. *Ibid.*, p. 11. According to Rehmus, a comprehensive statute is defined as one which: (1) guarantees public employees the right to bargain collectively; (2) establishes procedures for selection of employee representatives; (3) prescribes remedies for unfair labor practices committed by employers or employee organizations; and (4) provides dispute resolution mechanisms. Rehmus, p. 206.

9. Helene S. Tanimoto, *Guide to Statutory Provisions in Public Sector Collective Bargaining: Impasse Resolution Procedures* (Honolulu: University of Hawaii, Industrial Relations Center, April 1977).
10. Joyce M. Najita, *Guide to Statutory Provisions in Public Sector Collective Bargaining: Powers and Duties of Boards* (Honolulu: University of Hawaii, Industrial Relations Center, in process).
11. See, for example, Joan Weitzman, "Current Trends in Public Sector Labor Relations Legislation," *Journal of Collective Negotiations in the Public Sector*, Vol. 5(3), 1976, p. 242.
12. It should be noted that in sharp contrast with the private sector, all major measures of work stoppage activity in the public sector increased markedly from 1974 to 1975. U.S., Department of Labor, Bureau of Labor Statistics, *Work Stoppages in Government, 1975*, Report 483 (Washington: Government Printing Office, 1976).
13. S.B. 237, S.D. 1, H.D. 1, C.D. 1, Ninth Legislature, State of Hawaii, Regular Session (1977).
14. New York (State), Governor's Committee on Public Employee Relations, *Final Report* (Albany: March 31, 1966), pp. 14-15. The members of the Committee included: George W. Taylor, chairman; E. Wight Bakke, David L. Cole, John T. Dunlop, Frederick H. Harbison, members.
15. *Ibid.*, p. 16.
16. *Ibid.*, pp. 18-19.
17. *Ibid.*, p. 39.
18. There are presently 10 laws which permit public employees to strike on a limited basis. Helene S. Tanimoto and Joyce M. Najita, *Guide to Statutory Provisions in Public Sector Collective Bargaining: Strike Rights and Prohibitions* (Honolulu: University of Hawaii, Industrial Relations Center, in process).
19. George Meany, "Union Leaders and Public Sector Unions," *Public Employee Unions, A Study of the Crisis in Public Sector Labor Relations*, A. Lawrence Chickering, ed. (San Francisco: Institute for Contemporary Studies, 1976), pp. 170-171.
20. Jerry Wurf, "Union Leaders and Public Sector Unions," *Public Employee Unions, A Study of the Crisis in Public Sector Labor Relations*, A. Lawrence Chickering, ed. (San Francisco: Institute for Contemporary Studies, 1976), p. 180.
21. Arvid Anderson, "U.S. Experience in Collective Bargaining in Public Employment," *Collective Bargaining in the Public Service*, Kenneth O. Warner, ed. (Chicago: Public Personnel Association, 1967), p. 22.
22. Jack Stieber, "Collective Bargaining in the Public Sector," *Challenges to Collective Bargaining*, Lloyd Ulman, ed. (Englewood Cliffs: Prentice-Hall, 1967), pp. 65-88.
23. Speech by former Secretary of Labor W. Willard Wirtz before the American Federation of State, County and Municipal Employees, AFL-CIO, Washington, D.C., April 27, 1966. See also Harry H. Wellington and Ralph K. Winter, Jr., "The Limits of Collective Bargaining in Public Employment," *Collective Bargaining in Government, Readings and Cases*, J. Joseph Loewenberg and Michael H. Moskow, ed. (Englewood Cliffs: Prentice-Hall, 1972), p. 271.
24. David Lewin, "Collective Bargaining and the Right to Strike," *Public Employee Unions, A Study of the Crisis in Public Sector Labor Relations*, p. 148.
25. Lewin explains why a strike may not be the most costly alternative: "While a public employee strike clearly disrupts--though does not necessarily eliminate--government services, it does not interrupt the flow of revenues to government; citizens continue to be taxed for the services, and they do not have the option of withholding payment for them. Thus, the common assertion that government cannot go out of business cuts both ways in public sector labor relations. Striking public employees may not fear losing their jobs--though they are more fearful now than before--but the government that employs them does not forego 'sales' (and sales revenues) even as it temporarily reduces personnel expenditures." *Ibid.*, pp. 153-154.
26. According to Lewin, technology is not a particularly suitable substitute in labor-intensive public services, but nonunion labor may be. *Ibid.*, p. 159.
27. These would include raising managerial compensation; creating dual salary structures and broader use of merit pay; reducing reliance on promotion from within and expanding use of lateral entry to intermediate and upper-level jobs; creating multiple job classification plans within individual governments; and evaluating managerial personnel for their performance. *Ibid.*, p. 158.
28. *Ibid.*, pp. 162-163.

Chapter 4

1. *Hawaii Rev. Stat.*, sec. 89-6(b).
2. *Hawaii Rev. Stat.*, sec. 89-6(a).
3. *Hawaii Rev. Stat.*, sec. 89-10(a) and (b).
4. *Hawaii Rev. Stat.*, sec. 89-9(d).
5. *Hawaii Rev. Stat.*, sec. 89A-1.
6. *Hawaii Rev. Stat.*, sec. 89-11.
7. *Hawaii Rev. Stat.*, sec. 89-12.
8. There have been 4 disruptions including a four-day sickout engaged in by the unit of fire fighters in July 1974; a one-day blue flu involving the unit of police officers in June 1976; and a two-week strike carried out by the unit of teachers in April 1973. The teachers were also involved in a one-day walkout in October 1972.
9. See Joel Seidman with the assistance of Joyce M. Najita, *The Hawaii Law on Collective Bargaining in Public Employment* (Honolulu: University of Hawaii, Industrial Relations Center, October 1973); Hawaii, Governor's Ad Hoc Commission on

Operations, Revenues and Expenditures, *CORE Report to the Governor* (Honolulu: November 1974), pp. C49-C92.

10. Hawaii, Governor's Ad Hoc Commission on Operations, Revenues and Expenditures, pp. C84-C90.
11. Joel Seidman and Joyce M. Najita, *The Merit Principle and Collective Bargaining in Hawaii* (Honolulu: Hawaii State Department of Personnel Services, 1976).
12. House Committee on Labor and Public Employment, Special Committee Report No. 10, February 3, 1976, *State of Hawaii*, p. 9.

Glossary

1. *Hawaii Rev. Stat.*, sec. 89-2(5).
2. Harold S. Roberts, *Roberts' Dictionary of Industrial Relations* (rev. ed.; Washington: Bureau of National Affairs, 1971); *Labor-Management Relations in the Public Service* (Honolulu: University of Hawaii Press, 1970).
3. New York City, *Administrative Code*, ch. 54 (1972), sec. 1173.3.0(o).
4. *Hawaii Rev. Stat.*, sec. 89-2(12).
5. *Board of Education v. Hawaii Public Employment Relations Board*, 56 Haw. 85, 528 P.2d 809 (1974).
6. U.S., President's Task Force on Employee-Management Cooperation in the Federal Service, *A Policy for Employee-Management Cooperation in the Federal Service* (Washington: Government Printing Office, 1961), p. 16. The policy statement is reflected in section 7 of Presidential Executive Order 10988.
7. *Hawaii Rev. Stat.*, sec. 89-9(d).

Appendix A

CONSTITUTIONAL CONVENTION OF HAWAII 1968

Proposals Referred to the Committee on Public Health, Education and Welfare;
Labor and Industry*

PROPOSAL NO. 36. RESOLVED, that the following be agreed upon as amending Article XII of the State Constitution:

1. Article XII is amended by amending section 1 to read as follows:

PRIVATE AND PUBLIC EMPLOYEES

Section 1. Persons in private and public employment shall have the right to organize for the purpose of collective bargaining.

2. Article XII is amended by deleting section 2.

PROPOSAL NO. 74. RESOLVED, that the following be agreed upon as amending Article XII of the State Constitution:

1. Article XII is amended by amending section 1 to read as follows:

PRIVATE AND PUBLIC EMPLOYEES

Section 1. Persons in private and public employment shall have the right to organize for the purpose of collective bargaining.

2. Article XII is amended by deleting section 2.

PROPOSAL NO. 70. RESOLVED, that the following be agreed upon as amending Article XII of the State Constitution:

Article XII is amended by amending section 2 to read as follows:

PUBLIC EMPLOYEES

Section 2. Persons in public employment shall have the right to organize for the purpose of collective bargaining.

PROPOSAL NO. 115. RESOLVED, that the following be agreed upon as amending Article XII of the State Constitution:

*The names of the sponsors are on the original proposals. They have not been included here.

Article XII is amended by amending section 2 to read as follows:

PUBLIC EMPLOYEES

Section 2. Persons in public employment shall have the right to organize for the purpose of collective bargaining. The right to collective bargaining shall not include the right to strike. The legislature shall provide orderly, impartial, and reasonable procedures for arbitration, mediation or conciliation to settle unresolved disputes.

PROPOSAL NO. 154. RESOLVED, that the following be agreed upon as amending Article XII of the State Constitution:

Article XII is amended by amending section 2 to read as follows:

PUBLIC EMPLOYEES

Section 2. Persons in public employment shall have the right to organize and to bargain collectively through representatives of their own choosing.

PROPOSAL NO. 172. RESOLVED, that the following be agreed upon as amending Article XII of the State Constitution:

Article XII is amended by amending section 2 to read as follows:

PUBLIC EMPLOYEES

Section 2. Persons in public employment shall have the right to organize for the purpose of collective negotiation. The right to collective negotiation shall not include the right to strike. The legislature shall provide orderly, impartial, and reasonable procedures for arbitration, mediation or conciliation to settle unresolved disputes.

PROPOSAL NO. 321. RESOLVED, that the following be agreed upon as part of the State Constitution:

No person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization, nor shall the state or any subdivision thereof, or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment because of non-membership in a labor organization.

Appendix B

CONSTITUTIONAL CONVENTION OF HAWAII 1950

Proposals Referred to the Committee of Bill of Rights*

Proposal No. 4. Section 4, Right to Organize. Citizens shall have the right to organize, except in military or semi-military organizations not under the supervision of the state, and except for purposes of resisting the duly constituted authority of this state or of the United States. Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.

Proposal No. 25. Section 1, Right to Work. All persons in private employment without discrimination and with equal opportunities, have the right to work, to free choice of employment, to organize and bargain collectively through representatives of their own choosing. All persons in public employment without discrimination and with equal opportunities, have the right to work, to free choice of employment, to organize and bargain collectively through representatives of their own choosing, to present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals.

Proposal No. 88. Section 5, Right to Organize. Citizens shall have the right to organize, except in military or semi-military organizations not under the supervision of the state, and except for purposes of resisting the duly constituted authority of this state or of the United States. Public employees shall have the right, through representatives of their own choosing, to present to and make known to the state, or any of its political subdivisions or agencies, their grievances and proposals. Persons in private employment shall have the right to bargain collectively through representatives of their own choosing.

Proposal No. 97. Section 20. Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

Proposal No. 106. Section 1. Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

All officers and bargaining representatives, as a condition precedent to their office or representative capacity, shall sign and shall file with the appropriate public official the following oath:

*Only the sections dealing with the Right to Organize and Bargain collectively have been included here. The names of the sponsors are on the original proposals. They have not been included here.

I am not a member of the Communist party, or affiliated with such party. I do not believe in, and I am not a member of, nor do I support, any organization that believes in overthrow of the United States government by force or by any illegal or unconstitutional methods.

Proposal No. 182. Section 1. All persons shall have the right to organize, except in military or semi-military organizations not under the supervision of the State, and except for purposes of resisting the duly constituted authority of this State or of the United States. Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, to present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals.

Proposals Submitted to the Committee on Industry and Labor:

Proposal No. 4. Section 4. (From Committee on Bill of Rights, see above.)

Proposal No. 29. Section _____. Every person of this state shall be free to obtain employment wherever possible, and no person, corporation, or agent thereof, shall maliciously interfere or hinder in any way, any person from obtaining or enjoying employment already obtained from any other corporation or person.

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization.

Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.

Proposal No. 37. Section _____. EIGHT HOUR DAY ON PUBLIC WORKS. The time of service of all laborers or workmen or mechanics employed upon any public works of the State of Hawaii or of any county, city, city and county, town, district, or any other political subdivision thereof, whether said work is done by contract or otherwise, shall be limited or restricted to eight hours in any one calendar day, except in cases of extraordinary emergency caused by fire, flood, or danger to life and property, or except to work upon public, military or naval works or defenses in time of war, and the Legislature shall provide by law that a stipulation to this effect shall be incorporated in all contracts for public works and prescribe proper penalties for the speedy and efficient enforcement of said law.

Proposal No. 38. Section _____. MINIMUM WAGE LAWS. The Legislature may by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees. No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon

any commission now or hereafter created, such power and authority as the Legislature may deem requisite to carry out the provisions of this section.

Proposal No. 97. Section 20. (From Committee on Bill of Rights, see above.)

Proposal No. 182. (From Committee on Bill of Rights, see above.)

Proposal No. 191. Section _____. The government of this state hereby declares its responsibility to seek full employment of its people. When the volume of unemployment indicates that private industry is not providing sufficient employment opportunities to attain this end, the state shall undertake such programs as will restore a condition of full employment.

Appendix C

[CHAPTER 89] COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT

SECTION	
[89-1]	STATEMENT OF FINDINGS AND POLICY
[89-2]	DEFINITIONS
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[89-4]	PAYROLL DEDUCTIONS
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[89-11]	RESOLUTION OF DISPUTES, GRIEVANCES, IMPASSES
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[89-13]	PROHIBITED PRACTICES; EVIDENCE OF BAD FAITH
[89-14]	PREVENTION OF PROHIBITED PRACTICES
[89-15]	FINANCIAL REPORTS TO EMPLOYEES
[89-16]	PUBLIC RECORDS AND PROCEEDINGS
[89-17]	LIST OF EMPLOYEE ORGANIZATIONS AND EXCLUSIVE REPRESENTATIVES
[89-18]	PENALTY
[89-19]	CHAPTER TAKES PRECEDENCE, WHEN
[89-20]	CHAPTER INOPERATIVE, WHEN

[§89-1] **Statement of findings and policy.** The legislature finds that joint-decision making is the modern way of administering government. Where public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method for dealing with disputes and work stoppages, and to maintain a favorable political and social environment.

The legislature declares that it is the public policy of the State to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are best effectuated by (1) recognizing the right of public employees to organize for the purpose of collective bargaining, (2) requiring the public employers to negotiate with and enter into written agreements with exclusive representatives on matters of wages, hours, and other terms and conditions of employment, while, at the same time, (3) maintaining merit principles and the principle of equal pay for equal work among state and county employees pursuant to sections 76-1, 76-2, 77-31, and 77-33, and (4) creating a public employment relations board to administer the provisions of this chapter. [L 1970, c 171, pt of §2]

[§89-2] **Definitions.** As used in this chapter:

- (1) "Arbitration" means the procedure whereby parties involved in an impasse mutually agree to submit their differences to a third party for a final and binding decision.
- (2) "Appropriate bargaining unit" means the unit designated to be appropriate for the purpose of collective bargaining pursuant to section 89-6.
- (3) "Board" means the Hawaii public employment relations board created pursuant to section 89-5.
- (4) "Certification" means official recognition by the Hawaii public employment relations board that the employee organization is, and shall remain, the exclusive representative for all of the employees in an appropriate bargaining unit for the purpose of collective bargaining, until it is replaced by another employee organization, decertified, or dissolves.
- (5) "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to wages, hours, and other terms and conditions of employment, except that by any such obligation neither party shall be compelled to agree to a proposal, or be required to make a concession.
- (6) "Cost items" includes wages, hours, and other terms and conditions of employment, the implementation of which requires an appropriation by a legislative body.
- (7) "Employee" or "public employee" means any person employed by a public employer except elected and appointed officials and such other employees as may be excluded from coverage in section 89-6(c).

- (8) "Employee organization" means any organization of any kind in which public employees participate and which exists for the primary purpose of dealing with public employers concerning grievances, labor disputes, wages, hours, and other terms and conditions of employment of public employees.
- (9) "Employer" or "public employer" means the governor in the case of the State, the respective mayors in the case of the city and county of Honolulu and the counties of Hawaii, Maui, and Kauai, the board of education in the case of the department of education, and the board of regents in the case of the University of Hawaii, and any individual who represents one of these employers or acts in their interest in dealing with public employees. In the case of the judiciary, the governor shall be the employer for the purposes of this chapter.
- (10) "Exclusive representative" means the employee organization, which as a result of certification by the board, has the right to be the collective bargaining agent of all employees in an appropriate bargaining unit without discrimination and without regard to employee organization membership.
- (11) "Fact-finding" means identification of the major issues in a particular impasse, review of the positions of the parties and resolution of factual differences by one or more impartial fact-finders, and the making of recommendations for settlement of the impasse.
- (12) "Impasse" means failure of a public employer and an exclusive representative to achieve agreement in the course of negotiations.
- (13) "Legislative body" means the legislature in the case of the State, the city council in the case of the city and county of Honolulu, and the respective county councils in the case of the counties of Hawaii, Maui, and Kauai.
- (14) "Mediation" means assistance by an impartial third party to reconcile an impasse between the public employer and the exclusive representative regarding wages, hours, and other terms and conditions of employment through interpretation, suggestion, and advice to resolve the impasse.
- (15) "Professional employee" includes (A) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work, (ii) involving the consistent exercise of discretion and judgment in its performance, (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time, (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (B) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (A) (iv), and (ii) is performing related work under the supervision of a professional employee as defined in (A).
- (16) "Service fee" means an assessment of all employees in an appropriate bargaining unit to defray the cost for services rendered by the exclusive representative in negotiations and contract administration.
- (17) "Strike" means a public employee's refusal, in concerted action with others, to report for duty, or his wilful absence from his position, or his stoppage of work, or his abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in the conditions, compensation, rights, privileges, or obligations of public employment; provided, that nothing herein shall limit or impair the right of any public employee to express or communicate a complaint or opinion on any matter related to the conditions of employment.
- (18) "Supervisory employee" means any individual having authority in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. [L 1970, c 171, pt of §2]

[§89-3] Rights of employees. Employees shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion. An employee shall have the right to refrain from any or all of such activities, except to the extent of making such payment of service fees to an exclusive representative as provided in section 89-4. [L 1970, c 171, pt of §2]

[§89-4] Payroll deductions. (a) The employer shall, upon receiving from an exclusive representative a written statement which specifies an amount of reasonable service fees necessary to defray the costs for its services rendered in negotiating and administering an agreement and computed on a pro rata basis among all employees within its appropriate bargaining unit, deduct from the payroll of every employee in the appropriate bargaining unit the amount of service fees and remit the amount to the exclusive representative. A deduction permitted by this section, as determined by the board to be reasonable, shall extend to any employee organization chosen as the exclusive representative of an appropriate bargaining unit. If an employee organization is no longer the exclusive representative of the appropriate bargaining unit, the deduction shall terminate.

(b) In addition to any deduction made to the exclusive representative under subsection (a), the employer shall, upon written authorization by an employee, deduct from the payroll of the employee the amount of membership dues, initiation fees, group insurance premiums, and other association benefits and shall remit the amount to the employee organization designated by the employee.

(c) The employer shall continue all payroll assignments authorized by an employee prior to the effective date of this chapter and all assignments authorized under subsection (b) until notification is submitted by an employee to discontinue his assignments. [L 1970, c 171, pt of §2]

§89-5 Hawaii public employment relations board. (a) There is created a Hawaii public employment relations board composed of three members of which (1) one member shall be representative of management, (2) one member shall be representative of labor, and (3) the third member, the chairman, shall be representative of the public. All members shall be appointed by the governor for terms of six years each, except that the terms of members first appointed shall be for four, five, and six years respectively as designated by the governor at the time of appointments. Public employers and employee organizations representing public employees may submit to the governor for consideration names of persons representing their interests to serve as members of the board and the governor shall first consider these persons in selecting the members of the board to represent management and labor. Each member shall hold office until his successor is appointed and qualified. Because cumulative experience and continuity in office are essential to the proper administration of this chapter, it is declared to be in the public interest to continue board members in office as long as efficiency is demonstrated, notwithstanding the provision of section 26-34, which limits the appointment of a member of a board or commission to two terms.

The members shall devote full time to their duties as members of the board. The salary of the chairman of the board shall be the same as the salary of a circuit court judge. Each of the other members shall be paid a salary at a rate of ninety-five per cent of the chairman's salary. No member shall hold any other public office or be in the employment of the State or a county, or any department or agency thereof, or any employee organization during his term.

Any action taken by the board shall be by a simple majority of the members of the board. All decisions of the board shall be reduced to writing and shall state separately its finding of fact and conclusions. Three members of the board, consisting of the chairman, at least one member representative of management, and at least one member representative of labor, shall constitute a quorum. Any vacancy in the board, shall not impair the authority of the remaining members to exercise all the powers of the board. The governor may appoint an acting member of the board during the temporary absence from the State or the illness of any regular member. An acting member, during his term of service, shall have the same powers and duties as the regular member.

The chairman of the board shall be responsible for the administrative functions of the board. The board may appoint an executive officer, mediators, members of fact-finding boards, arbitrators, and hearing officers, and employ other assistants as it may deem necessary in the performance of its functions, prescribe their duties, and fix their compensation and provide for reimbursement of actual and necessary expenses incurred by them in the performance of their duties within the amounts made available by appropriations therefor. The provisions of section 103-3 notwithstanding, an attorney employed by the board as a full-time staff member may represent the board in litigation, draft legal documents for the board, and provide other necessary legal services to the board and shall not be deemed to be a deputy attorney general.

The board shall be within the department of labor and industrial relations for budgetary and administrative purposes only. The members of the board and employees other than clerical and stenographic employees shall be exempt from chapters 76 and 77. Clerical and stenographic employees shall be appointed in accordance with chapters 76 and 77.

At the close of each fiscal year, the board shall make a written report to the governor of such facts as it may deem essential to describe its activities, including the cases and their dispositions, and the names, duties, and salaries of its officers and employees. Copies of the report shall be transmitted to the legislative bodies and to the public management committee.

(b) In addition to the powers and functions provided in other sections of this chapter, the board shall:

- (1) Establish procedures for, investigate, and resolve, any dispute concerning the designation of an appropriate bargaining unit and the application of section 89-6 to specific employees and positions;
- (2) Resolve any dispute concerning cost items;
- (3) Establish procedures for, resolve disputes with respect to, and supervise the conduct of, elections for the determination of employee representation;
- (4) Conduct proceedings on complaints of prohibited practices by employers, employees, and employee organizations and take such actions with respect thereto as it deems necessary and proper;
- (5) Hold such hearings and make such inquiries, as it deems necessary, to carry out properly its functions and powers, and for the purpose of such hearings and inquiries, administer oaths and affirmations, examine witnesses and documents, take testimony and receive evidence, compel attendance of witnesses and the production of documents by the issuance of subpoenas, and delegate such powers to any member of the board or any person appointed by the board for the performance of its functions;
- (6) Establish, after reviewing nominations submitted by the public employers and employee organizations, lists of qualified persons, broadly representative of the public, to be available to serve as mediators, members of fact-finding boards, or arbitrators;
- (7) Establish daily or hourly rates at which mediators, members of fact-finding boards, and arbitrators are to be compensated and apportion the costs of arbitration to the parties involved;
- (8) Conduct studies on problems pertaining to public employee-management relations, and make recommendations with respect thereto to the legislative bodies; request information and data from state and county departments and agencies and employee organizations necessary to carry out its functions and responsibilities; make available to the public management committee, employee organizations, as may exist, mediators, members of fact-finding boards, arbitrators, and other concerned parties statistical data relating to wages, benefits, and employment practices in public and private employment to assist them in resolving issues in negotiations;
- (9) Promulgate rules and regulations relative to the exercise of its powers and authority and to govern the proceedings before it in accordance with chapter 91. [L 1970, c 171, pt of §2; am L 1971, c 49, §1; am L 1974, c 17, §1 and c 116, §2; am L 1975, c 58, §11; am L 1976, c 41, §1]

§89-6 Appropriate bargaining units. (a) All employees throughout the State within any of the following categories shall constitute an appropriate bargaining unit:

- (1) Nonsupervisory employees in blue collar positions;
- (2) Supervisory employees in blue collar positions;
- (3) Nonsupervisory employees in white collar positions;
- (4) Supervisory employees in white collar positions;
- (5) Teachers and other personnel of the department of education under the same salary schedule;
- (6) Educational officers and other personnel of the department of education under the same salary schedule;
- (7) Faculty of the University of Hawaii and the community college system;
- (8) Personnel of the University of Hawaii and the community college system, other than faculty;
- (9) Registered professional nurses;
- (10) Nonprofessional hospital and institutional workers;
- (11) Firefighters;
- (12) Police officers; and
- (13) Professional and scientific employees, other than registered professional nurses.

Because of the nature of work involved and the essentiality of certain occupations which require specialized training, units (9) through (13) are designated as optional appropriate bargaining units. Employees in any of these optional units may either vote for separate units or for inclusion in their respective units (1) through (4). If a majority of the employees in any optional unit desire to constitute a separate appropriate bargaining unit, supervisory employees may be included

in the unit by mutual agreement among supervisory and nonsupervisory employees within the unit; if supervisory employees are excluded, the appropriate bargaining unit for such supervisory employees shall be (2) or (4), as the case may be.

The compensation plans for blue collar positions pursuant to section 77-5 and for white collar positions pursuant to section 77-13, the salary schedules for teachers pursuant to section 297-33 and for educational officers pursuant to section 297-33.1, and the appointment and classification of faculty pursuant to sections 304-11 and 304-13, existing on July 1, 1970, shall be the bases for differentiating blue collar from white collar employees, professional from non-professional employees, supervisory from nonsupervisory employees, teachers from educational officers, and faculty from nonfaculty. In differentiating supervisory from nonsupervisory employees, class titles alone shall not be the basis for determination, but, in addition, the nature of the work, including whether or not a major portion of the working time of a supervisory employee is spent as part of a crew or team with nonsupervisory employees, shall also be considered.

(b) For the purpose of negotiations, the public employer of an appropriate bargaining unit shall mean the governor or his designated representatives of not less than three together with not more than two members of the board of education in the case of units (5) and (6), the governor or his designated representatives of not less than three together with not more than two members of the board of regents of the university of Hawaii in the case of units (7) and (8), and the governor or his designated representatives together with the mayors of all the counties or their designated representatives in the case of the remaining units. The designated employer representatives for units 5, 6, 7, and 8 shall each have one vote and in the case of the remaining units, the governor shall be entitled to four votes and the mayor of each county shall each have one vote, which may be assigned to their designated representatives. Any decision to be reached by the applicable employer group shall be on the basis of simple majority.

(c) No elected or appointed official, member of any board or commission, representative of a public employer, including the administrative officer, director, or chief of a state or county department or agency, or any major division thereof as well as his first deputy, first assistant, and any other top-level managerial and administrative personnel, individual concerned with confidential matters affecting employee-employer relations, part time employee working less than twenty hours per week, temporary employee of three months duration or less, employee of the executive office of the governor, household employee at Washington Place, employee of the executive office of the mayor, staff of the legislative branch of the State, employee of the executive office of the lieutenant governor, inmate, kokua, patient, ward or student of a state institution, student help, any commissioned and enlisted personnel of the Hawaii national guard, or staff of the legislative branch of the city and county of Honolulu and counties of Hawaii, Maui and Kauai except employees of the clerks' offices of said city and county and counties, shall be included in any appropriate bargaining unit or entitled to coverage under this chapter.

(d) Where any controversy arises under this section, the board shall, pursuant to chapter 91, make an investigation and, after a hearing upon due notice, make a final determination on the applicability of this section to specific positions and employees. [L 1970, c 171, pt of §2; am L 1973, c 36, §1; am L 1975, c 162, §1; am L 1976, c 13, §1]

[§89-7] Elections. Whenever, in accordance with regulations as may be prescribed by the board pursuant to chapter 91, a petition is filed by an employee organization after January 1, 1971, showing written proof of at least thirty per cent representation of the public employees in an appropriate bargaining unit, the board shall hold an election by secret ballot to determine whether and by which employee organization the employees desire to be represented for the purpose of collective bargaining. The ballot shall contain, in addition, both the name of any candidate showing written proof of at least ten per cent representation of the public employees within the unit, and a provision for marking "no representation".

In any election in which none of the choices on the ballot receives a majority of the votes cast, a runoff election shall be conducted, the ballot providing for a selection between the two choices receiving the largest number of valid votes cast in the election. The board shall certify the results of the election, and where an employee organization receives a majority of the votes cast, the board shall certify the employee organization as the exclusive representative of all employees in the appropriate bargaining unit for the purpose of collective bargaining.

No election shall be directed by the board in any appropriate bargaining unit within which (1) a valid election has been held in the preceding twelve months; or (2) a valid collective bargaining agreement is in force and effect, except upon a petition as provided herein not more than ninety days, but not less than sixty days, prior to the expiration of the agreement.

The board shall adopt rules and regulations governing the conduct of elections to determine representation, including the time, place, manner of notification, and reporting the results of elections, and the manner for filing any petition for an election or any petition concerning the results of an election. No mail ballots shall be permitted by the board except when for reasonable cause a specific individual would otherwise be unable to cast a ballot. The board shall have the final determination on any controversy concerning the eligibility of an employee to vote. [L 1970, c 171, pt of §2]

§89-8 Recognition and representation; employee participation. (a) The employee organization which has been certified by the board as representing the majority of employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership. Any other provision herein to the contrary notwithstanding, whenever two or more employee organizations which have been duly certified by the board as the exclusive representatives of employees in bargaining units merge, combine, or amalgamate or enter into an agreement for common administration or operation of their affairs, all rights and duties of such employee organizations as exclusive representatives of employees in such units shall inure to and shall be discharged by the organization resulting from such merger, combination, amalgamation, or agreement, either alone or with such employee organizations. Election by the employees in the unit involved, and certification by the board of such resulting employee organization shall not be required.

(b) An individual employee may present a grievance at any time to his employer and have the grievance heard without intervention of an employee organization; provided that the exclusive representative is afforded the opportunity to be present at such conferences and that any adjustment made shall not be inconsistent with the terms of an agreement then in effect between the employer and the exclusive representative.

(c) Employee participation in the collective bargaining process conducted by the exclusive representative of the appropriate bargaining unit shall be permitted during regular working hours without loss of regular salary or wages. The number of participants from each bargaining unit with over 2,500 members shall be limited to one member for each five hundred members of the bargaining unit. For bargaining units with less than 2,500 members, there shall be at least five participants, one of whom shall reside in each county; provided that there need not be a participant residing in each county for the bargaining unit established by section 89-6(a)(8). The bargaining unit shall select the participants from representative departments, divisions or sections to minimize interference with the normal operations and service of the departments, divisions or sections. [L 1970, c 171, pt of §2; am L 1971, c 212, §2]

§89-9 Scope of negotiations. (a) The employer and the exclusive representative shall meet at reasonable times, including meetings in advance of the employer's budget-making process, and shall negotiate in good faith with respect to wages, hours, and other terms and conditions of employment which are subject to negotiations under this chapter and which are to be embodied in a written agreement, or any question arising thereunder, but such obligation does not compel either party to agree to a proposal or make a concession.

(b) The employer or the exclusive representative desiring to initiate negotiations shall notify the other in writing, setting forth the time and place of the meeting desired and generally the nature of the business to be discussed, and shall mail the notice by certified mail to the last known address of the other party sufficiently in advance of the meeting.

(c) Except as otherwise provided herein, all matters affecting employee relations, including those that are, or may be, the subject of a regulation promulgated by the employer or any personnel director, are subject to consultation with the exclusive representatives of the employees concerned. The employer shall make every reasonable effort to consult with the exclusive representatives prior to effecting changes in any major policy affecting employee relations.

(d) Excluded from the subjects of negotiations are matters of classification and reclassification, the Hawaii public employees health fund, retirement benefits and the salary ranges and the number of incremental and longevity steps now provided by law, provided that the amount of wages to be paid in each range and step and the length of service necessary for the incremental and longevity steps shall be negotiable. Notwithstanding any law to the contrary, a bargaining unit employee shall be entitled to his normal annual increment or longevity increase, as the case may be, during the period July 1, 1975 through June 30, 1976 subject to the following applicable conditions:

- (1) A nonsupervisory or supervisory blue collar employee covered by chapter 77 and who is at step 1, 2, 3, or 4 shall be entitled to an incremental increase on his service anniversary date provided his appointing authority certifies that he has rendered a year's satisfactory service. Any employee not being compensated at step 1, 2, 3, 4, or 5 and who has served satisfactorily for one year shall be moved to the next higher increment step on his service anniversary date provided there is such a step.
- (2) An employee in bargaining unit 3, 4, 9, 10, 11, 12, or 13 who is covered by chapter 77 and who is at step B, C, D, E, or F shall be entitled to an incremental increase on his service anniversary date provided his appointing authority certifies that he has rendered a year's satisfactory service. Any employee not being compensated at step B, C, D, E, F, or G and who has served satisfactorily for one year shall be moved to the next higher increment step on his service anniversary date provided there is such a step.

- (3) An employee in bargaining unit 3, 4, 9, 10, 11, 12, or 13 who is covered by chapter 77 and who has served satisfactorily for three years at step G, L-1, L-2, or L-3 shall be entitled to a longevity step increase on his service anniversary date. Any employee whose pay rate is above step G but is not at step L-1, L-2, L-3, or L-4 and who has served satisfactorily for three years shall be moved to the next higher longevity step on his service anniversary date provided there is such a step.
- (4) An employee in bargaining unit 8 who is at step 1, 2, 3, 4, 5, 6, or 7, as established by the rules and regulations of the board of regents, shall be entitled to an incremental increase on his service anniversary date provided his appointing authority certifies that he has rendered a year's satisfactory service. Any employee not being compensated at step 1, 2, 3, 4, 5, 6, 7 or 8 and who has served satisfactorily for one year shall be moved to the next higher increment step on his service anniversary date provided there is such a step.
- (5) An employee in bargaining unit 8 who has served satisfactorily for two years at step 8 or special step A, as established by the rules and regulations of the board of regents, shall be entitled to a longevity step increase on his service anniversary date. Any employee whose pay rate is above step 8 but is not at special step A or special step B and who has served satisfactorily for two years shall be moved to the next higher longevity step on his service anniversary date provided there is such a step.
- (6) Employees in bargaining unit 7 shall be treated in the same or similar manner as those employees covered by chapter 77 and as prescribed by paragraphs (1), (2), (3), (4), and (5) above, as applicable.
- (7) Services prior to June 30, 1975 in which salary increases were granted in lieu of increment or longevity increases under a collective bargaining agreement shall not count as service creditable for increment or longevity purposes when applying paragraphs (1), (2), (3), and (4) above. Effective July 1, 1976, an employee shall not be entitled to his normal annual increment or longevity increase, as the case may be, in any fiscal year that an increase in the applicable salary or wage board schedule is effected, whether by statute or agreement, and no part of such a fiscal year shall be counted as service creditable for any future increment or longevity pay increase; provided that any collective bargaining agreement, the expiration date of which is beyond June 30, 1976, which provides for a general wage adjustment together with incremental and longevity increases shall be observed in accordance with the terms of the agreement in effect on June 30, 1975 for an employee covered by such agreement. The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with merit principles or the principle of equal pay for equal work pursuant to sections 76-1, 76-2, 77-31, and 77-33, or which would interfere with the rights of a public employer to (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies. [L 1970, c 171, pt of §2; am L 1975, c 31, §1 and c 164, §1]

§89-10 Written agreements; appropriations for implementation; enforcement.

(a) Any collective bargaining agreement reached between the employer and the exclusive representative shall be subject to ratification by the employees concerned. The agreement shall be reduced to writing and executed by both parties. The agreement may contain a grievance procedure and an impasse procedure culminating in final and binding arbitration, and shall be valid and enforceable when entered into in accordance with provisions of this chapter.

(b) All cost items shall be subject to appropriations by the appropriate legislative bodies. The employer shall submit within ten days of the date on which the agreement is ratified by the employees concerned all cost items contained therein to the appropriate legislative bodies, except that if any cost items require appropriation by the State legislature and it is not in session at the time, the cost items shall be submitted for inclusion in the governor's next operating budget within ten days after the date on which the agreement is ratified. The State legislature or the legislative bodies of the counties acting in concert, as the case may be, may approve or reject the cost items submitted to them, as a whole. If the State legislature or the legislative body of any county rejects any of the cost items submitted to them, all cost items submitted shall be returned to the parties for further bargaining.

(c) Because effective and orderly operations of government are essential to the public, it is declared to be in the public interest that in the course of collective bargaining, the public employer and the exclusive representative shall make every reasonable effort to conclude negotiations, and include provisions for

an effective date, a reopening date, and an expiration date, at a time to coincide, as nearly as possible, with the period during which the appropriate legislative bodies may act on the operating budget of the employers.

The parties may include provisions for the reopening date during the term of a collective bargaining agreement, provided that such provisions shall not allow for the reopening of cost items as defined in section 89-2.

(d) All existing rules and regulations adopted by the employer, including civil service or other personnel regulations, which are not contrary to this chapter, shall remain applicable. If there is a conflict between the collective bargaining agreement and any of the rules and regulations, the terms of the agreement shall prevail; provided that the terms are not inconsistent with section 89-9(d). [L 1970, c 171, pt of §2; am L 1975, c 162, §2]

[§89-11 Resolution of disputes; grievances; impasses. (a) A public employer shall have the power to enter into written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in a final and binding decision, to be invoked in the event of any dispute concerning the interpretation or application of a written agreement. In the absence of such a procedure, either party may submit the dispute to the board for a final and binding decision. A dispute over the terms of an initial or renewed agreement does not constitute a grievance.

(b) A public employer shall have the power to enter into written agreement with the exclusive representative of an appropriate bargaining unit setting forth an impasse procedure culminating in a final and binding decision, to be invoked in the event of an impasse over the terms of an initial or renewed agreement. In the absence of such a procedure, either party may request the assistance of the board by submitting to the board and to the other party to the dispute a clear, concise statement of each issue on which an impasse has been reached together with a certificate as to the good faith of the statement and the contents therein. The board, on its own motion, may determine that an impasse exists on any matter in a dispute. If the board determines on its own motion that an impasse exists, it may render assistance by notifying both parties to the dispute of its intent.

The board shall render assistance to resolve the impasse according to the following schedule:

- (1) Mediation. Assist the parties in a voluntary resolution of the impasse by appointing a mediator or mediators, representative of the public, from a list of qualified persons maintained by the board, within three days after the date of the impasse, which shall be deemed to be the day on which notification is received or a determination is made that an impasse exists.
- (2) Fact-finding. If the dispute continues fifteen days after the date of the impasse, the board shall appoint, within three days, a fact-finding board of not more than three members, representative of the public, from a list of qualified persons maintained by the board. The fact-finding board, shall, in addition to powers delegated to it by the public employment relations board, have the power to make recommendations for the resolution of the dispute. The fact-finding board, acting by a majority of its members, shall transmit its findings of fact and any recommendations for the resolution of the dispute to both parties within ten days after its appointment. If the dispute remains unresolved five days after the transmittal of the findings of fact and any recommendations, the board shall publish the findings of fact and any recommendations for public information if the dispute is not referred to final and binding arbitration.
- (3) Arbitration. If the dispute continues thirty days after the date of the impasse, the parties may mutually agree to submit the remaining differences to arbitration, which shall result in a final and binding decision. The arbitration panel shall consist of three arbitrators, one selected by each party, and the third and impartial arbitrator selected by the other two arbitrators. If either party fails to select an arbitrator or for any reason there is a delay in the naming of an arbitrator, or if the arbitrators fail to select a neutral arbitrator within the time prescribed by the board, the board shall appoint the arbitrator or arbitrators necessary to complete the panel, which shall act with the same force and effect as if the panel had been selected by the parties as described above. The arbitration panel shall take whatever actions necessary, including but not limited to inquiries, investigations, hearings, issuance of subpoenas, and administering oaths, in accordance with procedures prescribed by the board to resolve the impasse. If the dispute remains unresolved within fifty days after the date of the impasse, the arbitration panel shall transmit its findings and its final and binding decision on the dispute to both parties. The parties shall enter into an agreement or take whatever action is necessary to carry out and effectuate the decision. All items requiring any monies for implementation shall be subject to appropriations by the appropriate legislative bodies, and the employer shall submit all such items agreed to in the course of negotiations within ten days to the appropriate legislative bodies.

- (4) The costs for mediation and fact-finding shall be borne by the board. All other costs, including that of a neutral arbitrator, shall be borne equally by the parties involved in the dispute.

(c) If the parties have not mutually agreed to submit the dispute to final and binding arbitration, either party shall be free to take whatever lawful action it deems necessary to end the dispute; provided that no action shall involve the disruption or interruption of public services within sixty days after the fact-finding board has made public its findings of fact and any recommendations for the resolution of the dispute. The employer shall submit to the appropriate legislative bodies his recommendations for the settlement of the dispute on all cost items together with the findings of fact and any recommendations made by the fact-finding board. The exclusive representative may submit to the appropriate legislative body its recommendations for the settlement of the dispute on all cost items. [L 1970, c 171, pt of §2]

[§89-12] Strikes, rights and prohibitions. (a) Participation in a strike shall be unlawful for any employee who (1) is not included in an appropriate bargaining unit for which an exclusive representative has been certified by the board, or (2) is included in an appropriate bargaining unit for which process for resolution of a dispute is by referral to final and binding arbitration.

(b) It shall be lawful for an employee, who is not prohibited from striking under paragraph (a) and who is in the appropriate bargaining unit involved in an impasse, to participate in a strike after (1) the requirements of section 89-11 relating to the resolution of disputes have been complied with in good faith, (2) the proceedings for the prevention of any prohibited practices have been exhausted, (3) sixty days have elapsed since the fact-finding board has made public its findings and any recommendation, (4) the exclusive representative has given a ten-day notice of intent to strike to the board and to the employer.

(c) Where the strike occurring, or is about to occur, endangers the public health or safety, the public employer concerned may petition the board to make an investigation. If the board finds that there is imminent or present danger to the health and safety of the public, the board shall set requirements that must be complied with to avoid or remove any such imminent or present danger.

(d) No employee organization shall declare or authorize a strike of employees, which is or would be in violation of this section. Where it is alleged by the employer that an employee organization has declared or authorized a strike of employees which is or would be in violation of this section, the employer may apply to the board for a declaration that the strike is or would be unlawful and the board, after affording an opportunity to the employee organization to be heard on the application, may make such a declaration.

(e) If any employee organization or any employee is found to be violating or failing to comply with the requirements of this section or if there is reasonable cause to believe that an employee organization or an employee is violating or failing to comply with such requirements, the board shall institute appropriate proceedings in the circuit in which the violation occurs to enjoin the performance of any acts or practices forbidden by this section, or to require the employee organization or employees to comply with the requirements of this section. Jurisdiction to hear and dispose of all actions under this section is conferred upon each circuit court, and each court may issue, in compliance with chapter 380, such orders and decrees, by way of injunction, mandatory injunction, or otherwise, as may be appropriate to enforce this section. [L 1970, c 171, pt of §2]

[§89-13] Prohibited practices; evidence of bad faith. (a) It shall be a prohibited practice for a public employer or its designated representative wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
- (2) Dominate, interfere, or assist in the formation, existence, or administration of any employee organization;
- (3) Discriminate in regard to hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization;
- (4) Discharge or otherwise discriminate against an employee because he has signed or filed an affidavit, petition, or complaint or given any information or testimony under this chapter, or because he has informed, joined, or chosen to be represented by any employee organization;
- (5) Refuse to bargain collectively in good faith with the exclusive representative as required in section 89-9;
- (6) Refuse to participate in good faith in the mediation, fact-finding, and arbitration procedures set forth in section 89-11;
- (7) Refuse or fail to comply with any provision of this chapter; or
- (8) Violate the terms of a collective bargaining agreement.

(b) It shall be a prohibited practice for a public employee or for an employee organization or its designated agent wilfully to:

- (1) Interfere, restrain, or coerce any employee in the exercise of any right guaranteed under this chapter;
- (2) Refuse to bargain collectively in good faith with the public employer, if it is an exclusive representative, as required in section 89-9;
- (3) Refuse to participate in good faith in the mediation, fact-finding and arbitration procedures set forth in section 89-11;
- (4) Refuse or fail to comply with any provision of this chapter; or
- (5) Violate the terms of a collective bargaining agreement. [L 1970, c 171, pt of §2]

[§89-14] Prevention of prohibited practices. Any controversy concerning prohibited practices may be submitted to the board in the same manner and with the same effect as provided in section 377-9. All references in section 377-9 to "board" shall include the Hawaii public employment relations board and "labor organization" shall include employee organization. [L 1970, c 171, pt of §2]

[§89-15] Financial reports to employees. Every employee organization shall keep an adequate record of his financial transactions and shall make available annually, to the employees who are members of the organization, within sixty days after the end of its fiscal year, a detailed written financial report thereof in the form of a balance sheet and an operating statement, certified as to accuracy by a certified public accountant. In the event of failure of compliance with this section, any employee within the organization may petition the public employment relations board for an order compelling such compliance. An order of the board on such petition shall be enforceable in the same manner as other orders of the board under this chapter. [L 1970, c 171, pt of §2]

[§89-16] Public records and proceedings. The complaints, orders, and testimony relating to a proceeding instituted by the public employment relations board under section 377-9 shall be public records and be available for inspection or copying. All proceedings pursuant to section 377-9 shall be open to the public. [L 1970, c 171, pt of §2]

[§89-17] List of employee organizations and exclusive representatives. The public employment relations board shall maintain a list of employee organizations. To be recognized as such and to be included in the list, an organization shall file with the board a statement of its name, the name and address of its secretary or other officer to whom notices may be sent, the date of its organization, and its affiliations, if any, with other organizations. No other qualifications for inclusion shall be required, but every employee organization shall notify the board promptly of any change of name or of the name and address of its secretary or other officer to whom notices may be sent, or of its affiliations.

The board shall indicate on the list which employee organizations are exclusive representatives of appropriate bargaining units, the effective dates of their certification, and the effective date and expiration date of any agreement reached between the public employer and the exclusive representative. Copies of the list shall be made available to interested parties upon request. [L 1970, c 171, pt of §2]

[§89-18] Penalty. Any person who wilfully assaults, resists, prevents, impedes, or interferes with a mediator, member of the fact-finding board, or arbitrator, or any member of the public employment relations board or any of the agents or employees of the board in the performance of duties pursuant to this chapter shall be fined not more than \$500 or imprisoned not more than one year, or both. [L 1970, c 171, pt of §2]

[§89-19] Chapter takes precedence, when. This chapter shall take precedence over all conflicting statutes concerning this subject matter and shall preempt all contrary local ordinances, executive orders, legislation, rules, or regulations adopted by the State, a county, or any department or agency thereof, including the departments of personnel services or the civil service commission. [L 1970, c 171, pt of §2]

[§89-20] Chapter inoperative, when. If any provision of this chapter jeopardizes the receipt by the State or any county of any federal grant-in-aid or other federal allotment of money, the provision shall, insofar as the fund is jeopardized, be deemed to be inoperative. [L 1970, c 171, pt of §2]

Appendix D

COMMENTATORS

The following individuals were requested to respond to the author's request for their views on Article XII with written or oral statements:

Charles T. Akama, Legislative Officer, Hawaii Government Employees Association
Harry Boranian, Director, Department of Civil Service, City and County of Honolulu
Donald Botelho, Director, State Department of Personnel Services
Stanley Burden, Executive Director, State of Hawaii Organization of Police Officers
Dorothy Devereux, former Hawaii State Representative, and Delegate and Vice Chairman, Committee on Public Health, Education and Welfare; Labor and Industry, 1968 Constitutional Convention
A. Van Horn Diamond, Executive Secretary-Treasurer, Hawaii State Federation of Labor, AFL-CIO
Bernard T. Eilerts, President, Hawaii Employers Council
Henry B. Epstein, State Director, United Public Workers
Sonia Faust, Executive Officer, Hawaii Public Employment Relations Board
Joan Husted, Director of Programs, Hawaii State Teachers Association
Francis Kennedy, Jr., Business Manager, Hawaii Fire Fighters Association
Helen M. Kronlein, Executive Secretary, University of Hawaii Professional Assembly
Norman Meller, Professor of Political Science, University of Hawaii
Shoji Okazaki, Legislative Lobbyist, International Longshoremen's and Warehousemen's Union
Robert B. Robinson, President, Chamber of Commerce of Hawaii
Arthur A. Rutledge, President, Joint Council of Teamsters 50
Kathleen G. Stanley, Chairman, Committee on Public Employment/Government Operations, House of Representatives
Sylvia W. Sumida, Director of Economic and General Welfare Department, Hawaii Nurses Association
Robert S. Taira, Hawaii State Senator
James H. Takushi, former Chief Negotiator, Office of Collective Bargaining
Wayne J. Yamasaki, Deputy Director, State Department of Personnel Services
Nadao Yoshinaga, Chairman, Labor and Industrial Relations Appeals Board, Department of Labor and Industrial Relations

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