

Summer 1968

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Recommended Citation

Daniel P. Sullivan, *Subjects of Collective Bargaining in the Public Service: Not Really Collective Bargaining*, 33 MO. L. REV. (1968)

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SUBJECTS OF COLLECTIVE BARGAINING IN THE PUBLIC SERVICE: NOT REALLY COLLECTIVE BARGAINING

DANIEL P. SULLIVAN*

I. INTRODUCTION

The collective bargaining statutes¹ covering public employees require the public employer to bargain² with a representative of his employees about wages, hours, and other terms and conditions of employment. These subjects of collective bargaining have received considerable attention in the private sector,³ but their definition remains vague and ambiguous.⁴ Since the public employee collective bargaining relationship is relatively new,⁵ it is not surprising that the uncertainty which exists in the private sector also pervades the public sector.⁶ However, unlike the private sector, in the public sector the meaning of the words "wages" and "hours" is not even clear.⁷ It is the purpose of this article to resolve this ambiguity in the public sector, and to propose a more workable definition of them. This will be done by analyzing the specific statutory and judicial requirements regulating public officials and employees, the public employee collective bargaining statutes, and the case law.

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1. *E.g.*, CONN., Pub. A. No. 159 (1965); MICH. COMP. LAWS, Pub. A. 379 (1965).

2. *E.g.*, CONN., Pub. A. No. 159 (1965), § 3:

The municipal employer and such employee organization as has been designated as exclusive representative of employees in an appropriate unit, through appropriate officials or their representatives, shall have the duty to bargain collectively. . . .

3. B.N.A., *Scope of L.M.R.A. Duty to Bargain*, L.R.R. Rpt., L.R.X. 58a-64b (1967).

4. For example, until recently it was uncertain whether subcontracting was a mandatory subject of collective bargaining, *Fiberboard Paper Products v. N.L.R.B.*, 57 L.R.R.M. 2609 (U.S. S.Ct. 1964).

5. The first significant step was taken in 1954 with the issuance of an interim executive order by the Mayor of New York City. It provided for collective bargaining in public employment. Interim Executive Order 49 of the Mayor of New York City (1954).

6. In the private sector a considerable amount of experience has been accumulated from which the public sector can derive some direction.

7. This point will be more fully developed later in this article.

II. SUBJECTS OF BARGAINING

A. Wages

In the private sector of collective bargaining, the employer and the employees' representative bargain over wages.⁸ The employer may or may not choose to grant a wage increase. If he does not, the union may strike to force him to increase wages.⁹ If a strike occurs and is successful he may choose to go out of business¹⁰ rather than grant a wage increase.

In the public sector, the public employer also engages in collective bargaining about wages with his employees' representative.¹¹ But the similarity ends here. If the public employer wants to grant an increase, he must first ascertain whether funds have been appropriated¹² for such an increase. That is, he must look to a higher authority, while in the private sector the employer is the final authority. If the public employer does not grant an increase, the public employees may not strike.¹³ Also the public employer may not decide to go out of business before granting a wage increase to public employees who have unlawfully struck.

Truly, the dissimilarities between the public and private sector collective bargaining relationships regarding wages are significant. In fact the requirement that the public employers must bargain about wages is almost meaningless in view of the above mentioned circumstances.

However, in practice, public employees do make wage demands backed up by strikes. The public employer makes concessions because of this pressure, finding the money to meet the demands, and continues to function.¹⁴

8. *E.g.*, CONN., Pub. A. No. 159 (1965), § 4-c.

9. "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike. . . ." National Labor Relations Act, 49 Stat. 457 (1935); 29 U.S.C. § 163 (1964), as amended.

10. *N.L.R.B. v. Royal Plating & Polishing Co., Inc.*, 60 L.R.R.M. 2033 (3rd Cir. 1965), held that the decision to close involved a management decision to recommit and reinvest funds in the business. Therefore bargaining is not required since such management decisions lie at the core of entrepreneurial control.

11. Sullivan, *Binding Arbitration in Public Employment Labor Disputes*, 36 CINN. L. REV. 666 (1967). See also, for a full discussion of collective bargaining in the public service about wages and the wage increase criteria that has evolved in Wisconsin, STERN, KRINCKY, & TENET, *FACTFINDING UNDER WISCONSIN LAW*, Univ. of Wisc., Madison, Wisc. (1966), pp. 15-17, 20-24.

12. U.S. CONST., art. 1 § 9: "No money shall be drawn from the treasury, but in consequence of appropriations made by law."

13. Sullivan, *How Can The Problem Of The Public Employees Strike Be Resolved?*, 19 OKLA. L. REV. 365, 380 (1966), n. 76; *cf.*, Bureau of Lab. Statistics, *Analyses of Work Stoppages, 1960, 1961, 1962, 1963, 1964*, BULL. Nos. 1302, 1339, 1420, 1460 U.S. DEPT. OF LAB. (1966).

14. The most striking example of this occurred in January of 1966. Agreement could not be reached as to the amount of a wage increase to be given the New

While the power over appropriations remains with the legislature, its power is diluted if action is forced by a strike. We must conclude that although at first glance the public employee collective bargaining statutes convey the opposite impression,¹⁵ wages are generally a legislative matter rather than a matter subject to collective bargaining.

B. Hours

The public employer is required to bargain collectively about the hours that his employees work.¹⁶ In the private sector, the number of hours that an employee must work may vary with the will of the parties at the bargaining table.¹⁷ There is less freedom in the public sector.¹⁸ While most of the States' wage and hour laws exclude public employees,¹⁹ only recently the Fair Labor Standards Act was amended to include certain public employees.²⁰ This creates a conflict between the express words of this act and the States' public employee collective bargaining statutes.²¹ This apparent conflict is resolved when considered in light of the experience accumulated in the private sector. Here the employer and employees' representative have a legal duty to bargain under similar wage and hour laws.²² For example, the parties could agree to a twenty hour work week without violating this law. The wage and hour law recently enacted by

York Transit Authority Employees. These employees struck for two weeks. The Authority granted an increase larger than it desired to, and as a result, it was reported that:

Nowhere on New York's fiscal front is the situation bleaker than in transit. The strike settlement of last January worsened an already worrisome operating deficit. The loss is now expected to exceed \$50 million by July 1, and in the next fiscal year to be \$115 million. . . . The promise "cure" for this emergency was born in politics. . . . In mid-January, Governor Rockefeller rushed in with an offer to aid. . . . The Governor managed to bludgeon a reluctant Legislature into "advancing" \$100 million. N.Y. Times, April 4, 1966, p. 30, col. 2.

15. *E.g.*, CONN., Pub. A. No. 159 (1965), §§ 3, 4-c.

16. *E.g.*, CONN., Pub. A. No. 159 (1965), § 4-c.

17. The only significant limiting factor being the Fair Labor Standards Act, 52 Stat. 1060 (1938), 29 U.S.C. § 201 (1965).

18. This point is elaborated on later in this article.

19. *E.g.*, see ALASKA STAT. ANN., § 23.10.055(5) (1959); DEL., Pub. A., Ch. 18, L. (1965), § 901(e)(4); NEB., Pub. A. No. 35, L. (1967), § 2(3)(d); N.Y., Pub. A., Ch. 619, L. (1960), as amended by Ch. 649, L. (1966), § 651-5(n).

20. 80 Stat. 830 (1966), 29 U.S.C.A. § 203(d) (1968 Supp.):

Employer includes . . . (employees of a State or a political subdivision thereof employed (1) in a hospital, institute, or school referred to in the last sentence of subsection (r) of this section, or (2) in the operation of a railway or carrier referred to in such sentence)

21. *E.g.*, CONN., Pub. A. No. 159 (1965), §§ 3, 4-c; MICH. COMP. LAWS, Pub. A. 379 (1965), § 15.

22. Note 17, *supra*.

Congress does not cover a broad spectrum of public employees.²³ These employees are regulated by other statutes²⁴ which preclude or limit collective bargaining with regard to this subject.²⁵ The public employer is not given the duty to set the number of hours in a work week, his job is simply to enforce the legislature's decision as to how many hours are to be worked.²⁶ If this is the situation, there appears to be room for bargaining. On the other hand, if the legislature imposes on the public employer the duty to set the hours that a public employee must work, duty would appear to preclude bilateral action.²⁷

To allow public employers and public employees' representatives the exclusive power over determining how many hours the employees must work apparently does not conflict with any policy considerations. Therefore this might be an appropriate mandatory subject of collective bargaining over which the parties have full power to make binding agreements. Surely, this is a clearer case than the one involving wages, and certain terms and conditions of employment.

C. *Terms and Conditions of Employment*

Terms and conditions of employment, unlike wages and hours, are words which in themselves have no clear meaning.²⁸ As applied to the labor-relationship, this lack of a clear definition is compounded by uncertainty as to how the terms are to be used.²⁹ Nevertheless, the public employer is required to bargain about terms and conditions of employment.³⁰ A conflict arises when the public employer is required by one statute to do an act unilaterally,³¹ and required by another statute to bargain collectively about the same subject.³² If the public employer refuses to bargain about:

23. Those not mentioned in the exception in Note 20, *supra*.

24. *E.g.*, WISC. STAT. ANN., State Officers, § 14.59 (2) (1957).

25. In Wisconsin, the statute states: "The standard basis of employment for the state service shall be 40 hours per week divided into 5 days of 8 hours each . . ." WISC. STAT. ANN., State Officers, § 14.59 (2) (1957).

26. WISC. STAT. ANN., State Officers, § 14.59 (2) (1957).

27. Here the duty would be clear, and to allow another party to aid in the decision-making would be a breach of the duty.

28. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE (College Edition 1951), pp. 1503, 305, where the definitions of these words may be found.

29. Note 4, *supra*.

30. *E.g.*, CONN., Pub. A. No. 159 (1965), §§ 3, 4-c.

31. MICH. STAT. ANN., § 5.193 (5) (1965 Supp.), "The civil service commission shall provide by regulation for the hours, and conditions of service, . . . in the township service, . . ."

32. MICH. COMP. LAWS, Pub. A. 379 (1965), § 15, (hours and other terms and conditions of employment are a subject of bargaining). The Michigan collective bargaining statute for public employees also conflicts with the Michigan Teaching Act where holidays, tenure, sabbaticals, school term, course, and text-

this subject he may be held to have committed an unfair labor practice.³³ The board may order him to bargain,³⁴ and this order may be enforced by a court.³⁵ It is true that an employer need not make concessions on this matter,³⁶ and may still make a unilateral decision. On the other hand, if the experience in the private sector is an indicator he must give a little ground on a subject he must bargain about.³⁷ When this occurs, he clearly violates the statute requiring him to perform the act unilaterally.

The dilution of the legislative power over wages marks a basic change in our system of government. If the legislature were to give up control over certain other subjects that it now controls with specific legislation, *i.e.*, terms and conditions of employment, no fundamental change in our governmental structure would take place. Therefore, collective bargaining about some of these subjects would seem to be in order in certain situations.

Where civil service is concerned, the matter is further complicated. Under this legislation,³⁸ the legislature is attempting to regulate matters of particular concern as it has done with separate legislation,³⁹ and it is attempting to cure the evils of the spoils system.⁴⁰

books are established by statute, MICH. STAT. ANN., §§ 15.3368, 15.3569, 15.3572, 15.3575, 15.3583, 15.3882, 15.3887 (1959). Note also the conflict in the Wisconsin laws: WISC. STAT. ANN., Civ. Serv., § 16.10 (3) (1957).

No person shall be appointed, transferred, removed, reinstated, promoted, or reduced as officer, clerk, employee or laborer in the classified service . . . by any means, other than those prescribed in sections 16.01 to 16.30.

WISC. STAT. ANN., §§ 111.81 (2), 111.84 (d) (1966), "It shall be a prohibited practice for a state employer . . . : to refuse to bargain collectively . . .," (concerning terms and conditions of employment); A violation of the civil service act is a misdemeanor, WISC. STAT. ANN., Civ. Serv., §§ 16.302 (1967 Supp.).

33. MICH. COMP. LAWS, Pub. A. 379 (1965), §§ 10-e, 15.

34. MICH. COMP. LAWS, Pub. A. 379 (1965), §§ 16-(b).

35. MICH. COMP. LAWS, Pub. A. 379 (1965), §§ 16-(d).

36. MICH. COMP. LAWS, Pub. A. 379 (1965), § 15.

37. *E.g.*, it was pointed out in the Congressional hearings on the Labor Management Relations Act that:

Last year, a Company offered to the union one of the largest raises ever granted in its industry. The offer was the most generous one then being discussed in the industry. However, it fell five cents short of meeting the union's demand. The Union wished to bargain about the employer's estimated and prospective profits. Notwithstanding the very intense "bargaining" that had gone on, the Board accused the Company of "refusing to bargain." These cases show that unless Congress writes into the law guides for the Board to follow, the Board may attempt to carry this process still further and seek to control more and more the terms of Collective Bargaining Agreements. NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, U.S. Government Printing Office, Wash., D. C. (1948), pp. 310, 311, 312.

38. MICH. COMP. LAWS, Pub. A. 246 (1965).

39. *E.g.*, the minimum wage for policemen and firemen, provisions for their removal, and pensions are regulated by statute in New York. N.Y. STAT. ANN., Uncon. Laws, § 861 (1923).

40. *Hanley v. Murphy*, 40 Cal.2d 572, 255 P.2d 1 (1953).

Perhaps it is an open question at this stage whether collective bargaining reintroduces a similar evil. Yet there is a conflict with the merit system where an individual is promoted on the basis of seniority rather than merit.⁴¹ Promotion on the basis of seniority is a typical subject for collective bargaining.⁴²

Another conflict occurs when a union demands preferential hiring for union members.⁴³ This precludes any consideration of merit, and obstructs and evades the primary purpose of the legislation dealing with civil service.⁴⁴

The policy considerations apparently favor civil service statutes over public employee collective bargaining statutes. Therefore those subjects that clearly conflict with the basic policy of the former statutes should be precluded from consideration at the bargaining table.⁴⁵ However, where this conflict does not exist, those subjects should not be removed from bargaining.⁴⁶

Terms and conditions of employment as subjects of collective bargaining have a broad range of meaning.⁴⁷ Many of these terms and conditions are found in collective bargaining agreements in the public sector.⁴⁸ In fact some subjects included in these contracts are beyond the scope of collective bargaining.⁴⁹ Yet if no one challenges these provisions, they too as a matter of practice, become subjects of collective bargaining. This can occur by design or because of the lack of expertise⁵⁰ prevailing in this area of labor

41. In the transit field merit may be only a secondary consideration when an employee refused to join a union. *California v. Taylor*, 353 U.S. 553 (1957).

42. *Teamsters, Local 553 v. N.L.R.B.*, 366 U.S. 763 (1961).

43. *California v. Taylor*, 353 U.S. 553 (1957).

44. Note 40, *supra*.

45. There are other ways of alleviating hardships.

46. Providing of course that other statutory policy considerations are not outweighed.

47. FORKOSCH, A TREATISE ON LABOR LAW (1965), p. 855.

48. *E.g.*, in the State of Michigan, as of September of 1967, forty-six cities have signed written agreements with one or more groups of municipal employees. The total number of signed labor agreements exceed sixty. Fifty-six of the agreements call for dues checkoff. Twelve cities have agreed to a union shop provision, and three cities have agreed to an agency shop clause. Letter received from the Manager of the Personnel & Services Division of the Michigan Municipal League in Ann Arbor, Michigan, dated November 7, 1967.

49. *E.g.*, binding arbitration provisions found in public sector collective bargaining agreements, letter received from the Manager of the Personnel & Services Division of the Michigan Municipal League in Ann Arbor, Michigan, dated November 7, 1967, are not legal, Mich. Atty. Gen. Opin. No. 4578 (May 26, 1967); *cf.*, *Re Oakland Cty, Sheriff's Dept. et al.* and *A.F.S.C.M.E., M.L.M.B.* Case No. c 66 F-63, 1968 State of Mich. Lab. Opin. 1 (Jan. 8, 1968).

50. This may be caused by the newness of the relationship. Note 5, *supra*. It is questionable whether the Board has such expertise, *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111 (1944). If it does not, the public employer who becomes involved in collective bargaining once a year certainly does not.

relations. Nevertheless, the legislative policies that place restrictions on these subjects of collective bargaining are merely dormant, and the subjects as a matter of law are limited.

III. A PECULIARITY IN MICHIGAN

In 1965, the State of Michigan enacted a statute providing that a township board may pass a resolution adopting the civil service system set out in the same statute.⁵¹ After this resolution is passed,⁵² the township electorate must also approve it.⁵³ Such a resolution was passed and approved in the township of Redford in August of 1966.⁵⁴ In the same general session the Michigan legislature enacted a public employment relations act.⁵⁵ This act requires the public employer to bargain collectively about wages, hours, and other terms or conditions of employment.⁵⁶ However under the adopted civil service act,⁵⁷ the civil service commission is duty bound to set the working hours and service requirements for vacations, sick leaves, and other matters in the township service.⁵⁸

In April of 1967, a labor organization representing employees of Redford Township brought a charge against Redford Township. It alleged that the township refused to bargain.⁵⁹ A complaint was issued by the Board on May 1, 1967.⁶⁰ The township board answered that it could not bargain with the labor organization because all subjects of collective bargaining were controlled by the civil service commission of the township.⁶¹ The trial examiner held that the civil service commission had complete control over the subjects about which collective bargaining was to take place. Therefore the township of Redford was not required to bargain, but the civil service commission was.⁶² The Michigan Labor Mediation Board affirmed this decision without comment.⁶³

In this case the Board replaced, by interpretation, the township with the civil service commission as the sole arbiter over all matters relating to

51. MICH. STAT. ANN., § 5.193 (1) (1965).

52. MICH. STAT. ANN., § 5.193 (1) (1965).

53. MICH. STAT. ANN., § 5.193 (1) (1965).

54. Township of Redford and Michigan Conference of Teamsters, M.L.M.B. Case No. C 67 D-32, 1967 State of Mich. Lab. Opin. 221 (Sept. 21, 1967).

55. MICH. COMP. LAWS, Pub. A. 379 (1965).

56. MICH. COMP. LAWS, Pub. A. 379 (1965), § 15.

57. MICH. STAT. ANN., § 5.193 (1) (1965).

58. MICH. STAT. ANN., § 5.193 (5) (1965 Supp.).

59. Note 54, *supra*.

60. *Ibid.*

61. *Ibid.*

62. *Ibid.*

63. *Ibid.*

control over township public employees. If the legislature had intended to make such a radical change in representative government, it would have done so expressly. The legislature did expressly leave in the township board the following power:

The classification and standardization of salaries shall not be final until approved by the township board, and salaries shall not be paid except in accordance with the classification and standardization.⁶⁴

Salaries, hence, are within the ultimate control of the township's Board of Supervisors. Yet, the township was not ordered to bargain about them.

The civil service act imposed limitations on the township's power over certain subjects of collective bargaining.⁶⁵ These subjects were put under the jurisdiction of a civil service commission to increase efficiency in the public service by basing any change on merit. The Michigan Labor Mediation Board should have concluded that collective bargaining over these subjects might undermine this purpose. An example would be hiring on the basis of union membership where the employee's qualifications are only of secondary importance.⁶⁶

This decision treats the civil service commission of Redford Township as a public employer. This is inaccurate and unfortunate. These employees are really employed by certain agencies and departments of the Redford Township Board of Supervisors. These agencies and departments, like the Board of Supervisors, are the public employers referred to in the Act. The civil service commission merely establishes certain standards that the employees of the township must meet as a whole in order to insure efficiency in the township's governmental services. Surely, each agency and department, as well as the township Board of Supervisors, must make its own adaptation of the civil service rules to meet its own individual needs. It is in these areas that collective bargaining could take place. Collective bargaining should take place with the individual public employers.

In this case, the conflicting provisions of a civil service statute⁶⁷ and a public employee collective bargaining statute⁶⁸ were resolved improperly. If such reasoning were used in the private sector we might conclude that since wages and hours of employment under the Fair Labor Standards Act⁶⁹

64. MICH. STAT. ANN., § 5.193 (8) (1965 Supp.).

65. MICH. STAT. ANN., § 5.193 (1) *et seq.* (1965).

66. Notes 41, 42 *supra*.

67. MICH. STAT. ANN., § 5.193 (1) *et seq.* (1965).

68. MICH. COMP. LAWS, Pub. A. 379 (1965).

69. 52 Stat. 1060 (1938), 29 U.S.C. § 201 *et seq.* (1965).

are administered by a public officer,⁷⁰ this officer is the person the employees' representatives should bargain with rather than employers. This is because he resolves questions concerning wages and hours which bind employers within certain limits.⁷¹ This agency regulates the private employee's labor relationship as the civil service commission in Redford Township regulates the relationship of public employees. The only difference is that the commission has the rule making power to regulate on broader matters. For example, it can set hours of employment.⁷² To require bargaining with agencies such as these takes away from the parties who are most familiar with the relationship, the immediate employer and his employees, the collective bargaining tool which would make resolution of their difficulties possible.

IV. CLASSIFICATION OF SUBJECTS

In the private sector of employment, the courts have set up three classifications into which the subjects of collective bargaining fall: mandatory, permissive, and illegal.⁷³ Mandatory subjects must be bargained about in good faith. Either party commits an unfair labor practice if he refuses to bargain about a mandatory subject,⁷⁴ and may be ordered to bargain about this subject.⁷⁵ The parties may bargain about permissive subjects if both are willing. Either party may refuse to bargain about such subjects.⁷⁶ Illegal subjects of collective bargain may not be bargained about. If these subjects are bargained about, the parties are said to have committed an illegal act.⁷⁷

In the area of public employment the limitation on the discussion of illegal subjects clearly applies as it does in the private sector.⁷⁸ While there

70. 52 Stat. 1060 (1938), 29 U.S.C. § 3-m (1965).

71. 52 Stat. 1060 (1938), 29 U.S.C. § 10 (1965).

72. MICH. STAT. ANN., § 5.193 (5) (1965 Supp.), "... The civil service commission shall provide by regulation for the hours. . . ."

73. N.L.R.B. v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958).

74. *Id.* at 347.

75. *Id.* at 348.

76. *Id.* at 344.

77. *Id.* at 346.

78. *E.g.*, agreements to let an arbitrator settle public sector labor disputes by a binding decision, Mich. Atty. Gen. Opin. No. 4578 (May 26, 1967); Hours of labor in excess of those provided by law, and permitting working conditions prohibited by law, LA. REV. STAT. ANN., § 23:890 (B) (1964); making a contract for more than one year, Wyo., Pub. A., Ch. 197, L. (1965), § 27-268; making a contract for more than three years, R. I. GEN. LAWS, § 28-9.3-4 (1966); prerogatives of: promotion, layoff, position classification, compensation, fringe benefits, examinations, discipline, merit salary determination policy, and other actions provided for by law and rules governing civil service, WISC. STAT. ANN., § 111.91

are many limitations on the discussion of permissive subjects of collective bargaining in the public sector, there is a close analogy to the private sector's treatment of this classification.⁷⁹ It is here suggested that mandatory subjects of collective bargaining is an inappropriate classification in the public sector. The government may, but is not required to discuss a subject.⁸⁰ Therefore, the analogy to the private sector's experience is of no help.⁸¹ The statutes⁸² creating the right in public employees to bargain

(2) (1965); determining whether to reduce a collective bargaining agreement to writing in the form of an ordinance, resolution, or agreement, Mulcahy, *A Municipality's Rights and Responsibilities Under The Wisconsin Municipal Labor Law*, 49 MARQ. L. REV. 512, 515 (1966), note 5.

79. Recently, it was suggested that the following might be permissive subjects for consultation under Executive Order 10988, 27 Fed. Reg. 551 (1962):

A. Policy on Grievances and Internal Agency Appeals: Development and operation of grievance and appeals systems; B. Policy on the Work Environment: light, heat, ventilation, cleanliness and sanitation, and safety practices and equipment; C. Policy on Design and Scheduling of Work: Assignment of work is a management prerogative, but this does not preclude consultation on: tours of duty, rotation assignments, joint employee-management cooperation committees, meal periods, and vacation scheduling; D. Policy on Career Policies and Procedures: Promotion plans (coverage, methods, etc.), opportunities for career mobility (reassignment, detail procedures, etc.), opportunities for training, apprenticeship, reduction-in-force procedures, and disciplinary practices and procedures; E. Policy on Employee Benefits and Services: Lunch rooms, snack bars, coffee breaks, banking, check-cashing services, provision or use of recreation facilities, and transportation and parking arrangements; F. Policy on Pay: Where law permits, the implementation of pay policies may be subject to consultation. For example, the prevailing rate wage policy is a matter of law, but such matters as participation in periodic wage surveys are not necessarily fixed. Similarly, implementation of other types of pay policy may be discussed, such as overtime, call back, and differential pay, particularly with respect to how opportunities to earn such special types of pay are granted; G. Policy on Services to Employee Organizations: Bulletin boards, use of intra-office distribution system, official newspapers, and on-site meeting facilities. U.S. Civ. Serv. Comm., *Sectional Analysis of Executive Order 10988*, L.R.R. Rpt., L.R.X. 4437, 4441-2 (April 24, 1962).

See also, Mulcahy, *A Municipality's Rights and Responsibilities Under the Wisconsin Municipal Labor Law*, 49 MARQ. L. REV. 512, 514 (1966), note 3(4).

80. The governments own laws determine which subjects are bargainable. See, *Munic. Employer v. Neff*, 64 L.R.R.M. 2627 (Ore. 1965).

81. If the legislature has the power to appropriate government monies, MICH. CONST. of 1963, art. IV § 30, 31, how can it be said that a public employer below the level of the legislature has the power to enter into binding collective bargaining agreements which could call for expenditures of money not as yet appropriated, MICH. COMP. LAWS, Pub. A. 379 (1965), § 15. But even a statutory repeal would not apply in the face of a constitutional provision such as the one in Massachusetts. It follows a provision creating the power in a public employer to bargain collectively on wages, salaries, hours, health benefits, pensions, and retirement allowances:

The provisions of general or special laws relative to rates of wages, hours of employment and working conditions of public employees and relating

collectively about wages, hours, and other terms and conditions of employment apparently mean something different than the similarly worded requirement in the private sector statute.⁸³ For example, since the legislature must appropriate money to pay the wages of state employees, a department head cannot bargain about those wages if they have not been appropriated.⁸⁴ If he should refuse to bargain about this subject, it would seem reasonable to say that he did not commit an unfair labor practice for refusing to do something that he did not have the full power to do. Therefore unless the legislature specifically delegated its power, no subject in the public employment labor relations sector would fall within the mandatory classification. Legislative functions can be delegated,⁸⁵ but the delegation may be withdrawn at any time. Since all governmental powers cannot be spelled out to the last word, a certain amount of discretion exists within those powers

to contracts for public works, shall not apply to the authority nor to the employees thereof, nor to employees of contractors with the authority but the authority and its employees shall be governed with respect to hours of employment, rates of wages, salaries, hours, working conditions, health benefits, pensions, and retirement allowances of its employees and with respect to contracts for construction, maintenance and repair by the laws relating to street railway companies. MASS. ANN. LAWS, Ch. 161A, § 19 (1964).

82. *E.g.*, CONN., Pub. A. No. 159 (1965), §§ 3, 4-c; MICH. COMP. LAWS, Pub. A. 379 (1965) § 15. A more sensible section might be added on to this requirement, to read:

In the event that any part or provision of any such agreement is in conflict with any law, ordinance or by-law, such law, ordinance or by-law shall prevail so long as such conflict remains. If funds are necessary to implement such written agreement, a request for the necessary appropriation shall be submitted to the legislative body. If such request is rejected, the matter shall be returned to the parties for further bargaining . . .

MASS. Pub. A., Ch. 763 (1965), § 178L.

83. 49 Stat. 449 (1935), 29 U.S.C. § 8-(d). Certainly a school board may not surrender control of educational policies to teachers by contract. A county road commission, by contract, may not surrender control of selection of road projects to its employees. A city may not surrender the choice of the areas to be protected to firemen. A Lapeer County, Michigan Circuit Court has this to say on the matter:

The contract with which we are concerned goes full range. It, by its terms, requires participation in all programs within certain categories without regard to cost or local need. I am unable to find from the language of the statute, or otherwise, a legislative intent to make such a sweeping alteration in the structure of government. Rather, it is my opinion that the legislature intended to authorize collective bargaining with public employees with respect to working conditions within the framework of policies and projects selected, from time to time, by duly elected officials, the contract provision is invalid.

Lapeer Cty. School Bd. v. Teachers Union, Case No. 345680 (Cir. Ct., Lapeer Cty., Jan. 3, 1967).

84. Note 83, *supra*.

85. DAVIS, ADMINISTRATIVE LAW, 31 (1959).

delegated to a subordinate of the legislature.⁸⁶ However, the discretionary power of the subordinate cannot be expanded to the point where the legislatively delegated power is considered to be only secondary to the discretionary power that springs from this delegated power.

Even though the above analysis may be correct as a matter of principle, in practice a Wisconsin Circuit Court has accepted the mandatory classification by holding that the school calendar is a compulsorily negotiable subject of collective bargaining to the extent that it affects wages, hours, and conditions of employment.⁸⁷

The use of the classifications of mandatory, permissive, and illegal terms in the public sector apparently encounters the same difficulty as the use of the words wages, hours, and conditions of employment. This is because collective bargaining in the public sector is only as workable as elected officials want it to be.⁸⁸ In the private sector, sometimes the employer does not have a choice.⁸⁹

V. TENNESSEE VALLEY AUTHORITY

In 1933 the Tennessee Valley Authority was established by Congress.⁹⁰ It was set up for agricultural and industrial development, to improve navi-

86. *San Antonio v. Zogheib*, 70 S.W.2d 333, 334 (Tex. Civ. App. 1934).

87. *School Board v. W.E.R.B.*, 65 L.R.R.M. 2488 (Wisc. Cir. Ct. 1965); see also a decision by a trial examiner of the Michigan Labor Mediation Board which held that the following subjects were mandatory subjects of collective bargaining:

Request for information that the union may need during negotiations and/or enforcement of the contract; Compensated release time for any teacher on any committee, agency, or other body established by the employer; The right of the union to have a regular staff member visit schools to investigate teacher conditions or teachers' problems; The right of the union to appear on the school board agenda; The right of the teachers to appeal discharge or demotions to the board of education; The right of the teachers to evaluate curriculum and class schedule; Size of classes; Selection of textbooks materials; Supplies; Planning of facilities and special education; Establishment of in-service training of teachers; Procedures for the rating of effectiveness of teachers; The establishment of self-sustaining summer school programs for remedial purposes; and Severance pay.

Re N. Dearborn Heights School Dist., and Loc. 1439, N. Dearborn Heights Fed. of Teachers, and M.F.T., M.L.M.B. Case No. C-66 E-46, 1966 State of Mich. Opin. 434 (Nov. 1, 1966); The agency shop is also a mandatory subject of collective bargaining, *Re Oakland Cty. Sheriff's Dept., et al. and A.F.S.C.M.E.*, M.L.M.B. Case No. C 66 F-63, 1968 State of Mich. Lab. Opin. 1 (Jan. 8, 1968); and checkoff must be bargained about, *Sanilac Cty. Rd. Comm. & Teamsters Local 1339*, 165 G.E.R.R. B-1 (M.L.M.B. 11-8-66).

88. U.S. CONST., art. 1, § 2, cl. 1.

89. He lacks a realistic choice when the employees have sufficient power to force him out of business.

90. 48 Stat. 58 (1933), 16 U.S.C.A. 831 *et seq.* (1960).

gation in the Tennessee River, and to control the destructive flood waters in the Tennessee River and Mississippi River Basins.⁹¹ T.V.A. presently has approximately 17,000 employees.⁹² These employees are for all intents and purposes not covered by civil service laws.⁹³ The Authority has the power of eminent domain,⁹⁴ and the power to sell bonds to finance future construction.⁹⁵ The statute requires that the prevailing wage be paid the employees of the Authority.⁹⁶ In addition to selling bonds, other sources of revenue are the sale of fertilizer⁹⁷ and electricity.⁹⁸ If these sums are not sufficient to run the Authority, all appropriations necessary to carry out the provisions of the Act are authorized.⁹⁹

The Authority is autonomous with respect to almost all areas of labor relations. When operating on a self sustaining basis its determination as to the prevailing wage is not reviewable by Congress.¹⁰⁰ Because of the

91. 48 Stat. 58 (1933), 16 U.S.C.A. 831 (1960).

92. Massey, *Labor-Management Cooperation In T.V.A.*, 1965 Pub. Personnel Rev. 130, 131 (July, 1965).

93. 48 Stat. 58 (1933), 16 U.S.C.A. 831(b) (1960).

94. 48 Stat. 58 (1933), 16 U.S.C.A. 831(b) (1960).

95. 48 Stat. 58 (1933), 16 U.S.C.A. 831(b) (1960).

96. 48 Stat. 58 (1933), 16 U.S.C.A. 831(b) (1960). The following gives some idea of the various wage comparison standards that could be used. These are cited by the factfinder under the Wisconsin Municipal Employees Collective Bargaining Law, WISC. STAT. ANN., § 111.70(4) (D) (1962):

1. The absolute amount of increase granted to employees doing the same work in a neighboring municipality;
2. The absolute amount of increase granted to employees doing similar work in private industry in the same community;
3. The present wage compared with average wages (existing wages, rather than wage increases) paid to workers of comparable experience doing comparable work in other cities;
4. The increase requested as opposed to that given to other employees of the same unit of government who are not in the collective bargaining unit;
5. The existing wage as against that paid for similar work in the same geographic area by different units of government (city, county, state, and federal);
6. Present take-home pay contrasted with former take-home pay when working longer hours.

Additional comparison that did not require the same reliance on statistics included: A. "Social usefulness (of deputy sheriffs) when compared with other workers (teachers) . . . receiving higher wages."; B. "Without creating morale problems, the county cannot offer to a boy just out of high school a wage in excess of that offered a teacher who is a college graduate."; C. The similarity of the wage increase granted to the amount "to which free collective bargaining would have carried the parties absent the interference of a third party."; D. Whether the wage increase requested would put the workers "in an unrealistically high income category as compared to other townspeople."; E. Whether "relationships which had existed in prior years" will be disturbed if no increase is given," STERN, KRINSKY, & TENER, *FACTFINDING UNDER WISCONSIN LAW*, p. 16 (1966).

97. 48 Stat. 58 (1933), 16 U.S.C.A. 831(d) (1960).

98. 48 Stat. 58 (1933), 16 U.S.C.A. 831(i) (1960).

99. 48 Stat. 58 (1933), 16 U.S.C.A. 831(z) (1960).

100. There is no provision in the Tennessee Valley Authority Act stating that the prevailing rate found to be correct by that authority has to be approved by Congress.

T.V.A.'s autonomous powers, the scope of its power is even greater than in those bodies that have had their scope of power specifically set up by legislation.¹⁰¹ Because of this power the analogy between private and public employment is more appropriate.¹⁰² Here the delegation of legislative authority is constitutional because of the necessity of the situation.¹⁰³ There was no other practical way to cope with the problem. Congress set up a body that, if financially successful, was answerable to no one.

VI. THE PUBLIC TRANSIT EXCEPTION

The most significant exception to the limitations noted above on what subjects are bargainable in the public sector is the publicly owned transit system exception.¹⁰⁴ Questions of unlawful delegation of legislative authority are overridden by the need for uniformity throughout the states to make such a system work.¹⁰⁵ Ten years ago the Supreme Court of the United States rendered a decision dealing with this situation.¹⁰⁶

In 1942, a labor organization representing employees of the Belt Railroad asserted that the State in conducting this facility came under the jurisdiction of the National Railroad Adjustment Board¹⁰⁷ set up by the Railway Labor Act.¹⁰⁸ The railroad was owned and operated by the State of California as a part of the facilities of the San Francisco Harbor. The Union asserted that, being under this Act, the State was required to bargain collectively¹⁰⁹ and to reduce any agreement to writing. As a result, an agreement was entered into and remained in effect until the suit of *California v. Taylor*¹¹⁰ was initiated.

In 1948, the Attorney General sought a declaratory judgment in a California court to determine whether the San Francisco Harbor Board was required to bargain collectively with the labor organization. In 1949 and

101. This is true since the Authority can determine what the prevailing wage is and pay it if it has the funds. Other governmental bodies must wait for appropriations.

102. Since the Tennessee Valley Authority has so much independence from legislative control, its labor relations policy is quite similar to the policy existing in the private sector.

103. *Cf. California v. Taylor*, 353 U.S. 553 (1957).

104. This term could include intrastate railroads, *California v. Taylor*, 353 U.S. 553 (1957).

105. *California v. Taylor*, 353 U.S. 553 (1957).

106. *Ibid.*

107. 44 Stat. 577 (1926), 45 U.S.C. § 153 (1965).

108. 44 Stat. 577 (1926), 45 U.S.C. § 151 (1965).

109. *California v. Taylor*, 353 U.S. 553 (1957).

110. *Ibid.*

1951, the labor organization filed claims with the National Railroad Adjustment Board seeking to enforce the agreement entered into in 1942. The Board withheld jurisdiction in these cases pending the outcome of the declaratory judgment suit.¹¹¹

The trial court held that the state was subject to the Railway Labor Act.¹¹² The California District Court affirmed.¹¹³ In 1951 the California Supreme Court reversed and held the Act did not apply to the State of California.¹¹⁴ Certiorari was denied by the United States Supreme Court.¹¹⁵ On the basis of this case, the Board refused to hear the claims that were filed.¹¹⁶

Employees covered by the collective bargaining agreement then brought an action in the United States District Court to compel the Board to hear the claims. The District Court held¹¹⁷ that the State was not covered by the Railway Labor Act, but the Seventh Circuit Court of Appeals reversed.¹¹⁸ It ordered the Board to take jurisdiction of the claims. The Supreme Court granted certiorari.¹¹⁹

The principal issues before the high court were whether it was the intent of Congress to impliedly include the State under the Act, and if so whether it was unconstitutional because of the eleventh amendment.¹²⁰ The court realized that there were a number of similar federal statutes¹²¹ that did not expressly include the states which had been interpreted to include them.¹²² The Court held that since this act required uniform regulation in order to prevent disputes in the railroad industry, states should be included by implication.¹²³ The Court indicated that the eleventh amendment was

111. Petitioner's brief before the Supreme Court of the United States in *California v. Taylor*, 353 U.S. 553 (1957), pp. 6-9.

112. *California v. Taylor*, 222 P.2d 27 (1950).

113. *Ibid.*

114. 37 Cal.2d 412, 232 P.2d 857 (1951).

115. 342 U.S. 876 (1951).

116. *In Re Taylor*, Case R. 11-12 (Nat'l. Railroad Adjustment Board 1952).

117. 132 F. Supp. 356 (D.C.N.D. Ill. 1955).

118. 233 F.2d 251 (7th Cir. 1956).

119. 352 U.S. 940 (1956).

120. Respondent's brief before the Supreme Court of the United States in *California v. Taylor*, 353 U.S. 553 (1957), p. 1.

121. *E.g.*, 35 Stat. 65 (1908), 45 U.S.C.A. §§ 51-60 (1954), (Federal Employee Liability Act); 36 Stat. 913 (1911), 45 U.S.C.A. 22 (1962), (Federal Boiler Inspection Act); 27 Stat. 531 (1893), 45 U.S.C.A. §§ 1-7 (1954), (The Safety Appliance Act); 34 Stat. 1415 (1907), 40 U.S.C.A. §§ 321-325 (1962), (Federal Hours of Service Act); 24 Stat. 379 (1887), 49 U.S.C.A. § 1 (1955), (Interstate Commerce Act).

122. *E.g.*, *Ohio v. C.I.R.*, 292 U.S. 360 (1934); *U.S. v. California*, 297 U.S. 175 (1936); *Ga. v. Evans*, 316 U.S. 159 (1942).

123. The court did this by using the commerce clause, *California v. Taylor*, 353 U.S. 553, 568 (1957).

subservient to the commerce clause in this case because of the necessity that uniformity prevail in the railroad industry in order to prevent labor disputes.¹²⁴

The case established that: 1) the California Civil Service Commission's right to regulate the State's employer-employee relationship is limited;¹²⁵ 2) voluntary binding arbitration engaged in under the Railway Labor Act may dispense state funds against the will of state officials;¹²⁶ and 3) the State of California may be required to hire only those people who are willing to join a union after working for a short period of time.¹²⁷

The result is that here wages, hours, and other terms and conditions of employment are bargainable subjects with the same meanings as used in the private sector. The parties who bargain control the appropriating power of the state legislature. A union security agreement can restrict the hiring policies of the state.

VII. CONCLUSION

It is clear that collective bargaining in the public sector differs from collective bargaining in the private sector. Taxing and appropriating powers and the necessity for running government efficiently and continuously explains the difference. Consequently such classifications as mandatory and permissive subjects of collective bargaining do not transcend the public-private sector line.

Collective bargaining in the public sector is unique. In the final analysis it is primarily a unilateral decision making process. The only exceptions exist where money is amply appropriated and discretionary powers are broad.

The Tennessee Valley Authority falls into this category when it is financially self-sustaining. This Authority was set up to meet an emergency. Perhaps under normal circumstances such an arrangement would be improper.

A second bargaining relationship in this category is the one in the public transit systems. As with the Tennessee Valley Authority, a need was created when private enterprise was unable to continue to run those systems that were vital to the maintenance of commerce. The transit systems have less autonomy, but have control over the legislature's appropriating power.

124. *Ibid.*

125. *Id.* at 560.

126. *Id.* at 559.

127. *Id.* at 567.

It is doubtful whether this type of power should be extended to other governmental bodies without a similar necessity.

A workable definition of wages, hours, and other terms and conditions of employment in the public sector must evolve around democratic representative government. Wages are a legislative matter, and only bargainable to a limited degree. Hours are only limited as a bargainable subject by basic wage and hour law considerations. Terms and conditions of employment include such a broad area that each demand must be considered separately. If it is controlled by other law or discretionary power it must be decided which basic purpose should prevail. If it is not controlled by other law or discretionary power it must be decided whether bargaining is in the best interest of the public. Therefore collective bargaining in public employment with regard to hours and terms and conditions of employment should proceed on a case by case basis with public policy being the basic consideration.