

Spring 1974

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Recommended Citation

Ross Eshelman, *Bargaining Units for State and Local Employers*, 39 Mo. L. REV. (1974)

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Comments

BARGAINING UNITS FOR STATE AND LOCAL EMPLOYEES

I. INTRODUCTION

A. Background

No question so crucial to state and local government labor relations has been as neglected as that of bargaining unit determination. Recently, however, the question has received increasing attention.¹ With the growing number, organization, and militancy of state and local government employees, the types as well as numbers of disputes over bargaining units will multiply. This comment explores the nature and significance of the issues in these disputes. First, however, some background on state and local public sector labor law, with particular attention to Missouri,² is necessary.

State and local government employers enjoy virtual freedom from federal regulation. The National Labor Relations Act³ specifically excludes states and their political subdivisions from its definition of "employer."⁴ The wage and hour requirements of the Fair Labor Standards Act⁵ are, however, applicable to state and local school, hospital, health institution, and transit

1. *E.g.*, ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REPORT ON LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENTS, Sept. 1969, 73-74 (1970) [hereinafter ACIR]; Anderson, *Selection and Certification of Representatives in Public Employment*, PROCEEDINGS OF NEW YORK UNIVERSITY'S 20th ANNUAL CONFERENCE ON LABOR 277, 279-88 (1968); Friedman, *Unit Determination by Mini-PERBs*, PROCEEDINGS OF NEW YORK UNIVERSITY'S 21st ANNUAL CONFERENCE ON LABOR 499 (1969); Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 23 HASTINGS L.J. 719, 738-43 (1972); Klein, *Unit Determination in New York State Under the Public Employees' Fair Employment Law*, PROCEEDINGS OF NEW YORK UNIVERSITY'S 21st ANNUAL CONFERENCE ON LABOR 487 (1969); Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 MICH. L. REV. 1001 (1969); Shaw & Clark, *Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems*, 51 ORE. L. REV. 151 (1971); Slavney, *The Public Employee—How Shall He Be Represented in Collective Negotiations?*, 269 GOV'T EMPLOYEE RELATIONS REP. E-1 (1968); Smythe, *Recognition—Unit Determination—Negotiable Issues*, PROCEEDINGS OF THE SECRETARY OF LABOR'S CONFERENCE ON STATE AND LOCAL GOVERNMENT LABOR RELATIONS, Nov. 21-23, 1971, 50-51 (1972); Sullivan, *Appropriate Unit Determinations in Public Employee Collective Bargaining*, 19 MERCER L. REV. 402 (1968); Werne, *Collective Bargaining in the Public Sector*, 22 VAND. L. REV. 833, 844-52 (1969); Comment, *Determination of the Bargaining Unit Under the New Pennsylvania Public Employee Relations Act*, 75 DICK. L. REV. 490 (1971).

2. For a more comprehensive discussion see Loevi, *The Development and Current Application of Missouri Public Sector Labor Law*, 36 MO. L. REV. 167 (1971).

3. 29 U.S.C. § 141 (1970).

4. *Id.* § 152(2). This section excludes the federal government, also, but federal employee labor relations is extensively regulated under Exec. Order No. 11,491, 3 C.F.R. 262 (1973), 5 U.S.C. § 7301 (1970), *as amended*, Exec. Order No. 11,616, 36 Fed. Reg. 17319 (1971); Exec. Order No. 11,636, 36 Fed. Reg. 24901 (1971).

5. 29 U.S.C. § 201 (1970).

employees.⁶ There is some federal constitutional protection of the right of state and local employees to organize, but the extent of this protection is uncertain.⁷

Until recently, state and local employee organization and negotiation has existed, if at all, in a legal vacuum. The last decade, however, has witnessed a rash of state legislation, and presently 44 states and the District of Columbia have laws recognizing, expressly or impliedly, the right of at least some public employees to engage in some type of union activity.⁸ Some of these laws merely give minimal rights to narrow groups,⁹ others are extremely comprehensive.¹⁰ Six states have no public labor relations act.¹¹

B. Missouri Law

Dominating every aspect of Missouri public sector labor law is the landmark case of *City of Springfield v. Clouse*.¹² There the Missouri Supreme Court, in dictum, acknowledged the constitutional right of public employees to organize and petition their respective employers,¹³ subject to certain limitations "for the public welfare."¹⁴ The court held, however, that the state constitutional guarantee of the right to bargain collectively¹⁵ was limited to private employees,¹⁶ and that public employers could not engage in "collective bargaining" in the strict sense of the term because that would amount to an unconstitutional delegation of legislative powers.¹⁷ *Clouse*

6. 29 U.S.C. §§ 203(d), (s) (4) (1970).

7. See text accompanying notes 67-83 *infra*.

8. For a collection of most of these statutes see 1, 2 STATE LAWS CCH LAB. L. REP. ¶ 47,000-47,550 (1973); REF. FILE GOV'T EMPLOYEE RELATIONS REP. 51:1011-51:6023 (1973). The various state laws differ greatly on fundamental aspects like the employer's duty to negotiate, the employees covered, whether the employer is bound by the negotiations, the standards and procedures for determining bargaining units and majority representation, the definition and prevention of unfair labor practices, and the procedures for mediation or arbitration.

9. *E.g.*, ALA. CODE tit. 37, § 450(3)(2) (Supp. 1971) (acknowledging limited right of firemen to organize); IND. ANN. STAT. § 28-4536 (1970) (acknowledging teachers' right to organize).

10. *E.g.*, HAWAII REV. STAT. §§ 89-1 to 89-20 (Supp. 1973).

11. Mississippi, North Carolina, Ohio, South Carolina, Tennessee, and Virginia.

12. 356 Mo. 1239, 206 S.W.2d 539 (En Banc 1947).

13. *Id.* at 1247, 206 S.W.2d at 542, based on U.S. CONST. amend. I; Mo. CONST. art. 1, §§ 8,9 (1945) (freedom of speech and assembly).

14. "[A] public officer or employee, as a condition of the terms of his public service, voluntarily gives up such part of his rights as may be essential to the public welfare . . ." *City of Springfield v. Clouse*, 356 Mo. 1239, 1247, 206 S.W.2d 539, 542 (En Banc 1947).

15. Mo. CONST. art. 1, § 29 provides: "[E]mployees shall have the right to organize and to bargain collectively through representatives of their own choosing."

16. *City of Springfield v. Clouse*, 356 Mo. 1239, 1247, 206 S.W.2d 539, 542 (En Banc 1947).

17. *Id.* at 1250-51; 206 S.W.2d at 545. The court reasoned that all aspects of public employment are legislative matters that cannot be delegated to the public employer or bargained away.

appears to be good law on that point in Missouri today.¹⁸ The only possible exception to the rule prohibiting public sector collective bargaining in Missouri is where the public employer engages in a proprietary function separate from its governmental operations.¹⁹

The court in *Clouse* also pointed out that the city of Springfield must deal with all its employees on the same basis under its civil service system. Thus, any action beyond that authorized by the civil service law would be *ultra vires*.²⁰

18. See *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 41 (Mo. 1969).

19. In *City of Springfield v. Clouse*, 356 Mo. 1239, 1252, 206 S.W.2d 539, 546 (En Banc 1947), the court observed:

We do not say that the General Assembly could not separate corporate functions, and employees engaged therein, and provide for their operation and management in some manner distinctly apart from other city functions (perhaps like the Tennessee Valley Authority under the federal government) so that employer and employee relations could be handled on a basis similar to private industry. However, it is clear that this has not been done in our cities of the second class.

Later, in *State ex rel. Moore v. Julian*, 359 Mo. 539, 222 S.W.2d 720 (En Banc 1949), the court held that § 91.330, RSMo 1969, which grants second class cities the power to separate the operation and management of city-owned public utilities from other city functions under a board of public utilities, had, in the case of the Springfield bus system operating under the Springfield Board of Public Utilities, rendered the operation of the bus system a proprietary, rather than governmental, function. Thus, the bus system was subject to the provisions of the King-Thompson Act, § 295.010, RSMo 1969 (see note 31 *infra*), which provides for the State Board of Mediation to intervene in the settlement of labor disputes involving public utilities. The union and the bus system had written labor agreements for the years 1946, 1947. The city denied that these were binding contracts. The union gave timely notice of its desire to change certain provisions, and, when the city demurred, sought to invoke the jurisdiction of the State Board of Mediation to compel the city to renegotiate the agreements. The city argued unsuccessfully that public employers like the bus system were not subject to the King-Thompson Act because public employment is not a matter for collective bargaining under *Clouse*.

Ten years later, in *Glidewell v. Hughey*, 314 S.W.2d 749 (Mo. En Banc 1958), the court held that under Springfield's city charter, adopted subsequent to *Julian*, the matter of the wages, working conditions, tenure, *etc.*, of the employees of the city utilities was not part of a proprietary function of the city, and thus the State Board of Mediation had no jurisdiction to mediate labor disputes involving the utilities. The court did not, however, retreat from the proprietary-governmental distinction drawn in *Clouse* and *Julian*.

20. 356 Mo. at 1252-53, 206 S.W.2d at 546-47. Although this dictum may be overstated, there is no doubt that civil service and merit systems limit the scope of public employee labor relations. See J. LELCHOOK & J. LAHNE, *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT AND THE MERIT SYSTEM* (1972). The Attorney General of Missouri has held, for example, that the Division of Mental Health may not agree to make promotions or transfers based on seniority because the law requires that they be made on the basis of merit and fitness to be ascertained by competitive examinations. 28 Opinion of Attorney General of Missouri No. 357, July 22, 1971.

The broader implication of the *Clouse* dictum is that no government employer may negotiate with, reach an agreement with, or legislate regarding any labor union in the absence of express statutory or constitutional authority. See 14 Opinion of Attorney General of Missouri No. 68, March 15, 1957, holding, *inter alia*, that county courts may not enter employment contracts with labor unions because there is no express authority for them to do so. This argument should now

In 1965 Missouri enacted its first public employee labor relations act.²¹ The act gave all public employees, except employees falling generally into the categories of policemen and teachers, the right to organize and to petition their employers regarding salaries and other conditions of employment.²² It further authorized any public body to negotiate with labor organizations,²³ and it provided that the results of any negotiations be reduced to writing and presented to the public body for appropriate action.²⁴ The employer's authority to negotiate was discretionary rather than mandatory,²⁵ and the results of the negotiations were not binding on the employer.²⁶ It has been suggested that the act merely codified *Clouse*.²⁷

This act was superseded in 1967 by the current public employee relations act,²⁸ which made two significant changes. First, it requires the public body to "meet and confer"²⁹ with labor representatives regarding salaries and other conditions of employment. This requirement is not an unconstitutional delegation under *Clouse* because the governing body is not bound by the results of the negotiations.³⁰ Second, it gives the Missouri State Board of Mediation [hereinafter the Board] jurisdiction to resolve issues respecting bargaining units and majority representation.³¹

be obsolete. See text accompanying notes 21-27 and note 27 *infra*; but see note 81 *infra*.

21. Mo. Laws 1965, at 232, §§ 1-4 (repealed, Mo. Laws 1967, at 192-94, § 1, enacting in lieu thereof §§ 105.500-.530, RSMo 1969).

22. Mo. Laws 1965, at 232, § 2. Certain public employers like the Missouri Conservation Commission (Mo. CONST. art. IV, §§ 40(a), 42) and the University of Missouri (Mo. CONST. art. IX, § 9(a)), whose authority over management is constitutional, may not be covered by the act. A circuit court has held to the contrary regarding the University of Missouri. *Curators of U. of Mo. v. Public Serv. Employees Local 45, No. 54787* (Cir. Ct. Boone County, filed Nov. 6, 1972), *appeal docketed*, No. 58646, Missouri Supreme Court, April 15, 1974.

The act may not apply to constitutional charter cities. "No law shall be enacted creating or fixing the powers, duties, or compensation of any municipal office or employment, for any city framing or adopting its own charter under this or any previous constitution . . ." Mo. CONST. art. VI, § 22. See *State ex rel. Burke v. Cervantes*, 423 S.W.2d 791 (Mo. 1968); 35 Mo. L. REV. 86 (1970).

23. Mo. Laws 1965, at 232, § 3.

24. *Id.*

25. 23 Opinion of Attorney General of Missouri No. 68, May 6, 1966.

26. *Id.*

27. Nickolaus, *Public Employee-Employer Relations: A Discussion of S.B. 112*, 30 MO. MUN. REV. 262, 266 (1965). The act seemingly eliminated any argument that it was ultra vires for some public employers to deal with unions at all because it covered all public bodies. See note 20 *supra*; but see note 81 *infra*.

28. §§ 105.500-.530, RSMo 1969.

29. § 105.520, RSMo 1969.

30. *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35 (Mo. 1969); 24 Opinion of Attorney General of Missouri No. 373, Oct. 17, 1967.

31. § 105.525, RSMo 1969. The five-man Board was established in 1947 by § 295.030, RSMo 1969, which is a part of the King-Thompson Act, §§ 295.010-.210, RSMo 1969, to regulate public utility labor disputes. Provisions of this act allowing seizure and operation of public utilities by the state to prevent strikes were invalidated under the supremacy clause of the federal Constitution because they conflicted with § 7 of the NLRA, which guarantees private employees the right to strike, in *Division 1287, Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Missouri*, 374 U.S. 74 (1963). The remainder of the act, regarding the existence of the Board, its power and its jurisdiction to

The Missouri statute³² has been construed as codifying the common law prohibition³³ against public employees striking.³⁴ The prohibition covers threats to strike and work slowdowns as well.³⁵ Though an injunction lies against such strikes, threats to strike, and slowdowns,³⁶ the deterrent effect of that potential remedy is debatable.³⁷

Having outlined Missouri public sector labor law, this comment will next examine one participant in the bargaining unit determination process, the Missouri State Board of Mediation, and then turn to the issues involved in such determinations.

II. THE BOARD

The Missouri public employee relations act³⁸ provides:

Issues with respect to appropriateness of bargaining units and majority representative status shall be resolved by the state board of mediation. In the event that the appropriate administrative body or any of the bargaining units shall be aggrieved by the decision of the state board of mediation, an appeal may be had to the circuit court of the county where the administrative body is located or in the circuit court of Cole County. The state board of mediation shall use the services of the state hearing officer in all contested cases.³⁹

The Board's procedures are governed by the Missouri Administrative Procedure Act.⁴⁰ The Board has chosen to conduct its hearings informally, and has not adopted rules of procedure.⁴¹ This has led to criticism of Board proceedings as "lacking in fundamental fairness and . . . arbitrary and

mediate public utility labor disputes, is severable and remains in force. *State ex rel. State Bd. of Mediation v. Pigg*, 362 Mo. 798, 244 S.W.2d 75 (En Banc 1951) (declining to consider constitutionality of seizure provisions in action by the Board against the state comptroller for payment of salaries and expenses).

32. "Nothing contained in sections 105.500 to 105.530 shall be construed as granting a right to employees covered in sections 105.500 to 105.530 to strike." § 105.530, RSMo 1969.

33. *See* Annot., 37 A.L.R.3d 1147, 1156 (1971).

34. *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 41 (Mo. 1969) (dictum); *City of Grandview v. Moore*, 481 S.W.2d 555 (Mo. App., D.K.C. 1972).

35. *City of Grandview v. Moore*, 481 S.W.2d 555 (Mo. App., D.K.C. 1972).

36. *Id.*

37. From 1966 through 1971 there were at least 43 strikes by state and local government employees in Missouri, causing over 35,000 man-days idle. UNITED STATES DEPT OF LABOR, PUBLIC SECTOR LABOR RELATIONS IN THE MIDWEST REGION 48 (1973).

38. § 105.500, RSMo 1969.

39. *Id.* § 105.525.

40. § 536.010, RSMo 1969; *City of Kirkwood v. Mo. State Bd. of Mediation*, 478 S.W.2d 690 (Mo. App., D. St. L. 1972).

41. Mo. CONST. art IV, § 16, and § 536.020, RSMo 1969, require all rules and regulations of administrative agencies to be filed with the secretary of state, but do not require that such ever be adopted in the first place. *City of Kirkwood v. Mo. State Bd. of Mediation*, 478 S.W.2d 690, 699 (Mo. App., D. St. L. 1972). Section 295.070(1), RSMo 1969, provides that "[t]he board shall by regulation prescribe the methods of procedure before it." This statute was apparently not argued in *Kirkwood*. Because it is part of the King-Thompson Act (§ 295.010, RSMo 1969), which deals with public utilities only (*see* note 31 *supra*), it may not be applicable to Board functioning vis à vis public employers generally.

capricious,⁴² and Board findings of fact have been alleged to be too general and vague.⁴³ In *City of Kirkwood v. Missouri State Board of Mediation*,⁴⁴ however, the Missouri Court of Appeals sanctioned the Board's informal hearings and procedure,⁴⁵ rejected contentions of arbitrariness,⁴⁶ and found Board findings of fact and conclusions of law to be sufficient.⁴⁷

The Board's policy is to encourage the parties, typically the union and the city, to agree on the appropriate bargaining unit or majority representative status.⁴⁸ Most disputes are in fact settled, often with the participation of the Board, without a hearing.⁴⁹ This Board policy has been cited as an abuse of discretion,⁵⁰ but has been held to be proper.⁵¹ In *City of Kirkwood v. Missouri State Board of Mediation*⁵² the court held that, because section 105.525⁵³ does not state the criteria the Board is to follow in its determinations, the General Assembly left this to the Board's discretion.⁵⁴

42. *City of Kirkwood v. Mo. State Bd. of Mediation*, 478 S.W.2d 690, 697-98 (Mo. App., D. St. L. 1972); *State ex rel. Missey v. City of Cabool*, 66 CCH LAB. CAS. ¶ 52,669, at 68,478 & n.7, 424 GOV'T EMPLOYEE RELATIONS REPORT B-6 (Mo. Cir. Ct., Texas County 1971).

43. *City of Kirkwood v. Mo. State Bd. of Mediation*, 478 S.W.2d 690, 693-94 (Mo. App., D. St. L. 1972). A frequent uncertainty in Board proceedings is the statutory requirement in § 105.525 (see statute quoted at note 39 *supra*) that the Board utilize the services of the state hearing officer. It has been asserted that the lack of a hearing officer at a hearing deprives the Board of jurisdiction. *City of Kirkwood v. Mo. State Bd. of Mediation*, 478 S.W.2d 690, 695-97 (1972). The court in *Kirkwood* found that no such officer existed, and read the requirement out of the statute. 478 S.W.2d at 697. *But cf.* *State ex rel. Missey v. City of Cabool*, 66 CCH LAB. CAS. ¶ 52,669, at 68,478, 424 GOV'T. EMPLOYEE RELATIONS REPORT B-6 (Mo. Cir. Ct., Texas County 1971).

44. 478 S.W.2d 690 (Mo. App., D. St. L. 1972).

45. *Id.* at 697-98.

46. *Id.*

47. The court stated that if the city wanted more specific findings it should have requested them. *Id.* at 699. Section 536.090, RSMo 1969, requires findings and conclusions to be stated separately.

48. *E.g.*, *IBEW Local 2 v. City of Kirkwood* 3,4 (Mo. State Bd. of Mediation, Sept 19, 1970) [hereinafter *Kirkwood Hearing*]; *In re Employees at City of Sikeston* 34-35 (Mo. State Bd. of Mediation, Jan. 25, 1968) [hereinafter *Sikeston Hearing*]. The court of appeals in *City of Kirkwood v. Mo. State Bd. of Mediation*, 478 S.W.2d 690 (Mo. App., D. St. L. 1972), found that this policy was not necessarily improper. *Id.* at 697-98.

49. From 1967 through 1972, the Board acted *officially* on only 27 of at least 69 requests for determinations of appropriate units and majority representation, and in all but 8 of those 27 the parties stipulated the appropriate unit and the Board simply supervised the representation election.

50. *City of Kirkwood v. Mo. State Bd. of Mediation*, 478 S.W.2d 690, 697-98 (Mo. App., D. St. L. 1972).

51. *Id.*

52. *Id.*

53. See statute quoted at note 39 *supra*.

54. 478 S.W.2d at 695. The Board has engaged in fact-finding concerning wages and other conditions of employment in the absence of statutory authority; it did so at the request of the parties, however, so jurisdiction was not questioned. *In re Employees at the Div. of Mental Health at State Hosps.* (Mo. State Bd. of Mediation, Dec. 14, 1970, & June 10, 1971). If there are no bargaining unit or election issues, the Board is technically without jurisdiction, but it has often offered to officially ratify stipulations by the parties as to majority representation in stipulated units, *e.g.*, *Kirkwood Hearing*, *supra* note 48, Respondent's Exhibit B.

The court in *Kirkwood* assumed that the Missouri Administrative Procedure Act governed review of Board orders.⁵⁵ Section 105.525, however, can be interpreted as providing specific statutory review.⁵⁶ In either case Board determinations⁵⁷ are reviewed under the "competent and substantial evidence upon the whole record" test.⁵⁸

III. CHOOSING THE APPROPRIATE BARGAINING UNIT

A. Nature and Importance of the Bargaining Unit⁵⁹

A bargaining unit is a specified group of employees that is represented as a unit by a labor organization in labor negotiations and in the administration of agreements arrived at in negotiation. A majority of the unit members determine what, if any, labor organization will be the unit's "exclusive

If the Board is asked to determine majority representation in a stipulated unit which includes employees excluded from the act by § 105.510 (*see* statute quoted at note 66 *infra*), the Board should arguably reject such a stipulated unit. *See* Camden Cty. & Local 1965, American Federation of State, County, and Municipal Employees [hereinafter AFSCME], 335 GOV'T EMPLOYEE RELATIONS REP. B-8 (N.J. Pub. Employment Relations Comm'n 1969) (rejecting smaller units stipulated among employer and unions in favor of employer-wide unit on ground that stipulated units might not give full deference to employees' community of interest).

Section 295.080, RSMo 1969, directs the Board to take whatever steps it deems expedient to bring about a settlement of a dispute, including assisting in negotiating and drafting a settlement agreement. This section is part of the King-Thompson Act and relates to the Board's function vis 'a vis public utilities and is not directly concerned with public employers generally (*see* note 31 *supra*). It fairly implies, however, a legislative intent to give the Board considerable discretion in its manner of operation.

55. 478 S.W.2d at 693. The review provision is § 536.140, RSMo 1969. If the provisions for review in the APA are applicable, it may be possible to have the case removed to a circuit court when there is unreasonable delay by the Board. §§ 536.100-110, RSMo 1969. The contrary argument is that the Board has primary jurisdiction and mandamus is the appropriate remedy. *Cf.* State *ex rel.* Pub. Serv. Comm'n v. Padberg, 346 Mo. 1133, 1136-37, 145 S.W.2d 150, 151 (En Banc 1940); *accord*, Universal Org. of Munic. Foremen, Superv. and Admin. Pers. v. Wis. Employment Relations Comm'n, 42 Wis. 2d 315, 166 N.W.2d 239 (1969).

56. *See* statute quoted at note 39 *supra*. Section 105.525 gives the "administrative body" and any of the bargaining units a right to appeal. If "administrative body" means the employer, it is inconsistent with the universal use of the term "public body" to describe the public employer in other sections of the act.

57. Mandamus has been used to force the Board to act. State *ex rel.* Missey v. Mo. State Bd. of Mediation, No. 53552 (Mo. S. Ct., Jan. 11, 1968). A declaratory judgment of the Board's powers may be obtained. §§ 527.010-.020, RSMo 1969.

58. City of Kirkwood v. Mo. State Board of Mediation, 478 S.W.2d 690, 693 (Mo. App., D. St. L. 1972).

59. *See* Bakke, *Reflections on the Future of Bargaining in the Public Sector*, 93 MONTHLY LABOR REV. 21, 24 (July 1970); Rock, *supra* note 1.

Unit issues typically arise either between the public employer and the union, or between or among competing unions. For example, a city may prefer a city-wide unit in which no union could obtain majority representation or with which, if majority representation were obtained, it would be easier to negotiate. A union may prefer a smaller, more homogeneous unit in which it would be certain of solid support. If there are competing unions, one may have overwhelming support within a specific group of a city's employees with little or no support outside that group, while another may be able to obtain majority representation on a city-wide basis without any support from the smaller group.

bargaining representative.”⁶⁰ Exclusive representation means that no other organization may represent members of that unit.⁶¹ Until there have been valid determinations of an appropriate unit and majority representation, the employer has no duty to “meet and confer.”⁶²

Unit disputes are resolved in a number of ways. The parties themselves may agree formally on the appropriate unit or units. Care should be taken in drafting the agreement to describe explicitly and comprehensively, not only those employees included, but also those excluded, by department, division, job classification, job description, or other sufficient identification.⁶³ The parties may, if they wish, send a copy of such an agreement to the Board, and it will make a finding of the appropriate unit as stipulated.⁶⁴ If the parties are unable to agree, one of them may request that the Board resolve the unit issues. A final alternative is an informal arrangement in which there is no meaningful resolution of potential unit issues. The union alleges that it represents a group of employees, and the employer replies that the door is always open for discussion of employee grievances. This kind of arrangement leaves uncertain whether certain employees are included and whether there actually is majority support for the union.⁶⁵

Two basic issues arise respecting the appropriateness of a bargaining unit. The first deals with the necessary exclusion of certain employees from the unit, and the second relates to the appropriate size of the unit. This comment approaches these issues primarily from the perspective of contested cases; the extent to which parties may validly stipulate otherwise is another question.

B. *Employees Excluded From the Unit*

1. Statutory Exclusions

Section 105.510 provides, in part, as follows:

Employees, except police, deputy sheriffs, Missouri state highway

60. § 105.500(2), RSMo 1969.

61. This does not prevent dissenting individual members of the unit from bypassing negotiations and expressing their views directly to the employer. *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 43 (Mo. 1969). The validity of a union shop agreement, which requires all members of the unit to join the union, in the Missouri public sector is uncertain. The act does not expressly prohibit a union shop, but such a prohibition conceivably could be inferred from the following portion of § 105.510, RSMo 1969:

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, by intimidation or coercion, compel or attempt to compel any such employee to join or refrain from joining a labor organization. . . .

62. If the appropriate unit and majority representation have not been established, there can be no designated representatives of the employees. The employer can hardly be expected to “meet and confer” on an ad hoc basis with any and all of its employees.

63. A. DRACHMAN, *MUNICIPAL NEGOTIATIONS: FROM DIFFERENCES TO AGREEMENT* 21 (1970).

64. See note 49 *supra*.

65. A public employer may be wise to concede in this manner since there is no duty to negotiate until there have been valid determinations of the appropriate unit and majority representation.

patrolmen, Missouri national guard, all teachers of all Missouri schools, colleges and universities, of any public body shall have the right to form and join labor organizations and to present proposals to any public body relative to salaries and other conditions of employment through the representative of their own choosing.⁶⁶

Construed literally, the section seems to deny the excepted groups the right to unionize. The traditional view was that the sovereign could prohibit its employees from organizing, either on the theory that public employees waived certain rights as a condition of employment,⁶⁷ or on grounds of public policy.⁶⁸ Recent federal cases have rejected this view, holding that the first amendment protects the right of public employees to form and join labor organizations.⁶⁹ The Supreme Court has never ruled on the question, but there are indications it would follow these decisions.⁷⁰

The groups that are excluded from section 105.510 have a constitutional right to organize, but the character and extent of the permissible organization is unclear. *City of Springfield v. Clouse*,⁷¹ in dictum, recognized limitations on the constitutional right of public employees to organize,⁷² citing the companion case of *King v. Priest*,⁷³ which held that a city could deny policemen the right to organize, reciting the waiver doctrine and pub-

66. § 105.510, RSMo 1969.

67. *City of Springfield v. Clouse*, 356 Mo. 1239, 1247, 206 S.W.2d 539, 542 (En Banc 1947). Put succinctly by Oliver Wendell Holmes, "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

68. *E.g.*, *Perez v. Bd. of Police Comm'rs of the City of Los Angeles*, 78 Cal. App. 2d 638, 178 P.2d 537 (D. Ct. App. 1947); *CIO v. City of Dallas*, 198 S.W.2d 143 (Tex. Civ. App. 1946); *Carter v. Thompson*, 164 Va. 312, 180 S.E. 410 (1935); *see* Annot., 31 A.L.R.2d 1142, 1154-55 (1953).

69. *AFSCME v. Woodward*, 406 F.2d 137 (8th Cir. 1969) (street department employees); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968) (teachers); *Melton v. City of Atlanta*, 324 F. Supp. 815 (N.D. Ga. 1971) (policemen); *Atkins v. City of Charlotte*, 296 F. Supp. 1068 (W.D.N.C. 1969) (firemen). For more detailed discussion of the constitutional right of public employees to organize see Eisner, *First Amendment Right of Association for Public Employee Union Members*, 20 LAB. L.J. 438 (1969); Kilberg, *Labor Relations in the Municipal Service*, 7 HARV. J. LEGIS. 1, 2-6 (1969); Leahy, *From McAuliffe to McLaughlin: A Revolution in the Law of Constitutional Rights of Public Employees*, 57 ILL. B.J. 910 (1969); Note, *Labor-Management Relations and Public Employees Engaged in Protective Functions: Policemen and Firemen as Sui Generis*, 5 GA. L. REV. 540 (1971).

70. *See Pickering v. Board of Educ.*, 391 U.S. 563 (1968); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

Even assuming a constitutional right to organize, some public employees, particularly policemen, can likely be prohibited from affiliating with organizations that represent other types of employees because such affiliation could cause conflicts of interest in the performance of their duties. *See* Annot., 40 A.L.R.3d 728, 736-37 (1971). New Jersey, for example, prohibits membership by policemen in unions that admit nonpolicemen. N.J. STAT. ANN. § 34:13A-5.3 (Supp. 1972).

71. 356 Mo. 1239, 206 S.W.2d 539 (En Banc 1947).

72. *Id.* at 1247, 206 S.W.2d at 542.

73. 357 Mo. 68, 206 S.W.2d 547 (En Banc 1947), *appeal dismissed*, 333 U.S. 852 (1948).

lic policy as rationales.⁷⁴ Dictum in *Bergmann v. Board of Education*,⁷⁵ however, can be read as acknowledging a right of teachers to unionize.⁷⁶ But, in *State ex rel. Missey v. City of Cabool*,⁷⁷ the Missouri Supreme Court, in dictum, cited *American Federation of State, County, & Municipal Employees v. Woodward*,⁷⁸ an Eighth Circuit case holding that public employees have a constitutionally protected right to organize, but, also in dictum, stated that the exclusion of policemen and teachers from the act is not an unreasonable classification because they are *sui generis*, citing *King*.⁷⁹

Shortly after *Missey* the legislature repealed and reenacted section 105.510 in substantially the same form with the following addition: "[Except] that the above excepted employees have the right to form benevolent, social, or fraternal associations."⁸⁰ The only case since then is *Peters v. Board of Education*.⁸¹ There the supreme court said that section 105.510 prohibited teachers from being members of labor organizations, but held that they have a constitutional right to "organize for any proper purpose . . . and to present their views and desires to any public officer or legislative body."⁸² The court stated that this right is different from being a member of a labor organization. Because the agreement in controversy between the school board and the teachers' organization provided for resolution of disagreements in an advisory and nonbinding manner which the board was free to reject, the agreement was not a labor contract and was not beyond the power of the board to enter into. A federal court recently refused to rule on the constitutionality of section 105.510 for lack of a federal question because Missouri courts had never construed the section to prohibit organization.⁸³

Whatever the resolution of this issue, there are questions of interpretation as to who falls within the excluded groups. The Board has excluded

74. *Id.* at 84-88, 206 S.W.2d at 555-57.

75. 360 Mo. 644, 230 S.W.2d 714 (1950).

76. *Id.* at 654-55, 230 S.W.2d at 720-21.

77. 441 S.W.2d 35 (Mo. 1969).

78. 406 F.2d 137 (8th Cir. 1969).

79. *State ex rel. Missey v. City of Cabool*, 441 S.W.2d 35, 42-43 (Mo. 1969).

80. Mo. Laws 1969, at 186, § 1; § 105.510, RSMo 1969. The Attorney General of Missouri has said that a city can, by ordinance, exclude persons from the coverage of a labor agreement because § 105.520 provides that the governing body may adopt, modify, or reject the results of negotiations. Letter Opinion of Attorney General of Missouri No. 84, Mar. 6, 1970.

81. 506 S.W.2d 429 (1974). The Attorney General of Missouri has held that teachers have a right to organize and that § 105.510 merely excludes them from the other provisions of the act. 25 Opinion of Attorney General of Missouri No. 276, Dec. 12, 1968. This opinion was reaffirmed in 1970. 27 Opinion of Attorney General of Missouri No. 57, June 1, 1970. The 1970 opinion also held that school boards may not grant teachers a third level of negotiation and contained dictum that school boards cannot negotiate with teachers' unions at any level, even though such negotiations would not be binding. The rationale for this holding and dictum was that such negotiations would be *ultra vires* since § 105.510 excludes teachers from the act.

82. *Peters v. Board of Edu.*, 506 S.W.2d 429, 432 (Mo. 1974), quoting *City of Springfield v. Clouse*, 356 Mo. 1239, 1246, 206 S.W.2d 539, 542 (En Banc 1947).

83. *Fitzgerald v. di Grazia*, 354 F. Supp. 90 (E.D. Mo. 1972). The court suggested that the plaintiffs promptly seek a construction in Missouri courts. *Id.* at 93.

persons classified as "teachers" from a unit of employees at a state correctional facility on the grounds they were excluded from the act,⁸⁴ but has included persons classified as "Teacher I," "Teacher II," "Education Assistant I," and "Education Assistant II" in a unit of state mental health institution employees.⁸⁵ The problem is not merely who is a "teacher," but also what is a "school" within the section. The Attorney General of Missouri has held that "Missouri national guard" means only guardsmen; thus, civilian employees of the Guard are not excluded. The Attorney General also held that guardsmen who work as civilian employees of the Guard may participate in union activities related to their civilian employment.⁸⁶ There may be questions whether such employees as meter maids, crossing guards, and correction officers are "police;"⁸⁷ there may even be questions of who is an "employee."⁸⁸ Determining appropriate units under the act could become extremely bewildering where large numbers of employees excluded by section 105.510 are in the same department with nonexcluded employees.⁸⁹

The Advisory Commission on Intergovernmental Relations has taken the position that exclusions such as contained in section 105.510 are counterproductive to effective public labor relations and has recommended that state public employee labor relations acts deal uniformly with all state and local occupational groups.⁹⁰ One author has observed that the inclusion of policemen, even in units with non-policemen, has not caused serious problems.⁹¹

84. *In re Training School for Girls at Chillicothe* (Mo. State Bd. of Mediation, June 30, 1969). For support of the Board's decision see §§ 219.020, .320, RSMo 1969; Letter Opinion of Attorney General of Missouri No. 292, Nov. 6, 1968.

85. *In re Employees of the Div. of Mental Health at State Hosps.* (Mo. State Bd. of Mediation, Oct. 15, 1970).

86. 25 Opinion of Attorney General of Missouri No. 285, Dec. 10, 1968. The opinion discussed neither the fact that the old section excluded "Missouri State Highway Patrol" and "Missouri National Guard" (Mo. Laws 1965, at 232, § 2 (repealed Mo. Laws 1967, at 192-94, § 1, enacting in lieu thereof § 105.510, RSMo 1969)), while the current section excludes "Missouri state highway patrolmen" and "Missouri national guard," nor potential conflicts of interest for guardsmen with dual employment status. (Emphasis added).

87. See, e.g., *County of Gloucester v. Public Employees Rel. Comm'n*, 107 N.J. Super. 150, 257 A.2d 712 (Super. Ct. 1969), *aff'd*, 55 N.J. 333, 262 A.2d 1 (1970).

88. Such a question may exist with respect to hospital interns, for example. Compare *Regents of the U. of Mich. v. Michigan Employment Relations Comm'n*, 389 Mich. 96, 204 N.W.2d 218 (1973), with *In re Employees of Albert Einstein Medical Center*, 3 STATE LAWS CCH LAB. L. REP. ¶ 49,998.61 (Pa. Labor Relations Bd. 1971).

89. For example, a city could merge its police and fire departments into a single department of public safety in which policemen and firemen maintained their separate police and firefighting responsibilities but occupied the same building and shared housekeeping and similar responsibilities under central supervision. The chairman of the board has expressed doubts that the firemen could be considered an appropriate unit under such circumstances. Interview with Daniel C. Rogers, Chairman of the Mo. State Bd. of Mediation, in Columbia, Mo., Feb. 17, 1973.

90. ACIR, *supra* note 1, at 94, 103-04.

91. Sullivan, *supra* note 1, at 416. It is questionable whether there is sufficient data to rely on that observation.

2. Other Exclusions

Managerial, confidential, security, and other employees are, in private as well as public employment, excluded by case law, if not expressly by statute, either because their inclusion could create conflicts of interest in the performance of their duties or because they lack sufficient community of interest with the employees included.⁹² The only statutory ground for exclusion of such employees in Missouri is inability to establish "a clear and identifiable community of interest."⁹³

Employees directly involved in formulation of management policy or exercising substantial discretion in its execution are excluded as managerial.⁹⁴ Elected and high-ranking appointed officials should obviously be excluded, since they belong on the other side of the bargaining table.⁹⁵ The justification for exclusion of various levels of supervisory employees is frequently debated, however. Supervisors in public employment, particularly lower level supervisors, often lack the management identification manifested by their counterparts in private employment, and they are frequently persons who have been active in union affairs.⁹⁶ Some authorities have concluded that supervisors can be included in units with employees they supervise without serious harm,⁹⁷ although others strongly oppose such a unit.⁹⁸ Some states grant supervisors the right to organize and negotiate in units separate from those of employees they supervise, but this can still lead to conflicts of interest where the supervisors' organization is affiliated with the supervised employees' organization.⁹⁹ The Advisory Commission on Intergovernmental Relations has therefore recommended that supervisors be excluded entirely from the rights conferred by state public labor relations acts.¹⁰⁰

But, who is a supervisor? Many statutes and decisions have followed the National Labor Relations Act definition of "supervisor."¹⁰¹ Some state

92. Regarding managerial employees see 29 U.S.C. § 152(11) (1970); NLRB v. North Ark. Elec. Co-op., 446 F.2d 602 (8th Cir. 1971); NLRB v. Metropolitan Life Ins. Co., 405 F.2d 1169 (2d Cir. 1968). Regarding confidential employees see ACIR, *supra* note 1, at 95-96. See generally Shaw & Clark, *supra* note 1, at 168.

93. § 105.500(1), RSMo 1969.

94. Cases cited note 92 *supra*.

95. Sullivan, *supra* note 1, at 408 n.54.

96. Slavney, *Experiences with Current Substantive Practices in Administering Wisconsin Public Employee Relations Statutes: Wisconsin*, PUBLIC EMPLOYEE ORGANIZATION AND BARGAINING 65, 68 (H. Anderson ed. 1968).

97. *E.g.*, Sullivan, *supra* note 1, at 416.

98. *E.g.*, Rains, *Collective Bargaining in the Public Sector and the Need for Exclusion of Supervisory Personnel*, 23 LAB. L.J. 275 (1972).

99. ACIR, *supra* note 1, at 95-96.

100. *Id.*

101.

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to 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.

29 U.S.C. 152 (11) (1970).

boards have established specific criteria to be followed in determining whether an employee is a supervisor.¹⁰² That so many public employees have supervisory titles without genuine supervisory responsibilities complicates the problem.¹⁰³ There may be special problems with employees who are "seasonal" supervisors during heavy workload months when there is extra help and regular employees during slack months.¹⁰⁴

Employees with access to information directly related to labor-management relations are excluded as confidential.¹⁰⁵ These employees should be excluded not only from units with other employees, but from any representation in collective negotiations.¹⁰⁶ Employees directly involved in personnel matters may fall into this category.¹⁰⁷ Assistants to elected officials, such as a deputy clerk, deputy register of deeds, or a deputy treasurer, have been included in units with other employees against employers' contentions that they were confidential employees.¹⁰⁸ City attorneys not directly involved in labor relations, and even attorneys directly involved in labor relations with other city employees but not involving their own organization, have been allowed bargaining units.¹⁰⁹ In Missouri, the Board has excluded confidential secretaries of managerial employees.¹¹⁰ Other states have held that such

102. See Slavney, *supra* note 96, at 68.

103. See Slavney, *supra* note 1, at E-3. One Missouri city changed the titles of manual laborers in three-man and four-man departments from "foreman" to "supervisor" or "superintendent" two months prior to a Board hearing on the unit issue. *In re Employee at City of Cabool 12-16* (Mo. State Board of Mediation, Jan. 25, 1968).

104. *In re Schoolcraft Cty. Rd. Comm'n and Teamsters Local 328*, 3 STATE LAWS CCH LAB. L. REP. ¶ 49,784 (Mich. Labor Mediation Bd. 1966). The Missouri Board has consistently excluded ad hoc supervisors because they lack sufficient community of interest with the employees they supervise. See, e.g., *School Dist. of Kansas City and Serv. School Employees Local 12* (Mo. State Bd. of Mediation, Aug. 16, 1971); *In re Employees at the State Fed. Soldiers' Home of Mo. at St. James* (Mo. State Bd. of Mediation, Jan. 4, 1971); *In re Employees of the Div. of Mental Health at State Hosps.* (Mo. State Bd. of Mediation, Oct. 15, 1970). But, in *In re Fire Department at City of Grandview* (Mo. State Bd. of Mediation, May 28, 1969), the Board held, in a split decision, that two fire "captains" who shared meals, sleeping quarters, and housekeeping chores with eight other firemen, who directed and supervised firefighting in the absence of the fire chief, and who kept records of fires, were "working foremen" whose duties were not sufficiently supervisory in amount or kind to justify exclusion from the unit. Cf. *City of Grand Island v. AFSCME*, 186 Neb. 711, 185 N.W.2d 860 (1971).

105. *Ethyl Corp.*, 118 NLRB 1369 (1957); *Hoover Co.*, 55 NLRB 1321 (1944). See ACIR, *supra* note 1, at 95-96.

106. ACIR, *supra* note 1, at 95.

107. E.g., *In re AFSCME Local 188 and Dep't of Personnel of the City of New York*, 3 STATE LAWS CCH LAB. L. REP. ¶ 49,994.16, 273 GOV'T EMPLOYEE RELATIONS REP. B-3 (N.Y.C. Office of Collective Bargaining, Certif. Bd. 1968).

108. E.g., *In re Gratiot County Bd. of Supervisors and Mich. Council 55*, AFSCME, 309 GOV'T EMPLOYEE RELATIONS REP. B-12 (Mich. Labor Mediation Bd. 1969).

109. E.g., *In re Ass'n of Munic. Att'ys of Milwaukee*, 3 STATE LAWS CCH LAB. L. REP. ¶ 49, 870 (Wis. Employment Relations Bd. 1967), *aff'd sub nom. City of Milwaukee v. Wis. Employment Relations Comm'n*, 267 GOV'T EMPLOYEE RELATIONS REP. B-13 (Wis. Cir. Ct. 1968), *aff'd*, 43 Wis.2d 596, 168 N.W.2d 809 (1969).

110. *In re Employees of the Div. of Mental Health at State Hosps.* (Mo. State Bd. of Mediation, Oct. 15, 1970).

secretaries should not be excluded where the confidential relationship does not extend to labor relations matters.¹¹¹

Security personnel are excluded, if not from representation entirely, from units with nonsecurity personnel. The justification is that inclusion of guards in units with nonguards could lead to a conflict of interest with the guards's duties to protect public property.¹¹² Although the Board has excluded "security employees,"¹¹³ it has included "watchmen" in units with nonsecurity employees.¹¹⁴

Miscellaneous groups of employees may be excluded from a particular unit because they lack sufficient community of interest with the other employees. Part-time, provisional, temporary, and seasonal employees are usually excluded, in Missouri and elsewhere, from units of regular employees.¹¹⁵ Persons classified as "trainees" for managerial positions have also been excluded in Missouri.¹¹⁶

C. Size of the Unit

Section 105.500(1) defines an appropriate bargaining unit as "[A] unit of employees at any plant or installation or in a craft or in a function of a public body which establishes a clear and identifiable community of interest among the employees concerned."¹¹⁷ From this language the Board must determine such things as the types and number of employees to be included, and the geographical area that the unit should encompass. The statute does not require that a unit be the most appropriate one, but only that it be *an* appropriate one. The problem of determining the size of the unit using the community of interest criterion is a pervasive one whose resolution depends largely on the facts and circumstances of each case.¹¹⁸ The employer frequently seeks the broadest unit possible; the union tends to seek a unit coinciding with its organizational strength. Some unions, such as the American Federation of State, County, and Municipal Employees, seek to organize broad groups of public employees, while others, like the Teamsters, seek to organize narrower groups along occupational lines.¹¹⁹

111. *E.g.*, *In re* Bd. of Educ. of New Buffalo Area Schools and Dist. 50, UMW, 3 STATE LAWS CCH LAB. L. REP. ¶ 49,944.05 (Mich. Labor Mediation Bd. 1968). One case went so far as to include secretaries with direct access to labor relations information whose duties were removed from the negotiation process. *In re* Lake Mich. College, Employer and Secretarial Chap. of Lake Mich. College Fed'n of Teachers, 3 STATE LAWS CCH LAB. L. REP. ¶ 49,997.18 (Mich. Employment Relations Comm'n 1970).

112. Shaw & Clark, *supra* note 1, at 172.

113. *E.g.*, School Dist. of Kansas City and Serv. School Employees Local 12 (Mo. State Bd. of Mediation, Aug. 16, 1971); *In re* Employees of the Div. of Mental Health at State Hosps. (Mo. State Bd. of Mediation, Oct. 15, 1970).

114. *In re* Employees at the State Fed. Soldiers' Home of Mo. at St. James (Mo. State Bd. of Mediation, Jan. 4, 1971); *In re* Employees of the Div. of Mental Health at State Hosps. (Mo. State Bd. of Mediation, Oct. 15, 1970).

115. *E.g.*, *In re* Employees of the Div. of Mental Health at State Hosps. (Mo. State Bd. of Mediation, Oct. 15, 1970).

116. *Id.*

117. § 105.500(1), RSMo 1969.

118. See Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQUESNE L. REV. 357, 369 (1972).

119. Gitlow, *Public Employee Unionism in the United States: Growth and Outlook*, 21 LAB. L.J. 766, 774 (1970).

It is universally recognized among states using the community of interest and similar criteria that attorneys, scientists, engineers, and other employees in professions requiring specialized knowledge can have their own separate unit if they desire.¹²⁰ Professional employees naturally have considerably different pay scales and working conditions than nonprofessionals, and, although there are many professionals in the public sector,¹²¹ they are frequently a distinct minority among the employees working for a particular employer. Their interests would be inadequately represented in units with nonprofessionals.¹²² There may, of course, be questions of who is a professional, especially in fields like medicine and teaching where there are numerous occupational status levels.¹²³ There may also be disputes over the rights of specialists within professions to have their own units.¹²⁴

Skilled craftsmen constitute a second group generally held to have a right to separate units.¹²⁵ Section 105.500(1) authorizes craft units, but what constitutes a craft? The only Missouri case in point is *In re Employees of the Forestry Department of the City of Kirkwood*.¹²⁶ There the Board held that four employees in the Forestry Department who performed routine labor constituted a "craft of specialized workmen" and were therefore an appropriate bargaining unit.¹²⁷ This determination may indicate a strained defini-

120. *In re Employees at the State Fed. Soldiers' Home of Mo. at St. James* (Mo. State Bd. of Mediation, Jan. 4, 1971); *In re Employees of the Div. of Mental Health at State Hosps.* (Mo. State Bd. of Mediation, Oct. 15, 1970). In neither case is there any indication whether inclusion of the professionals was requested.

121. Sullivan, *supra* note 1, at 416.

122. *Id.* at 409.

123. *Leedom v. Kyne*, 358 U.S. 184 (1958); Sullivan, *supra* note 1, at 409-10.

124. *E.g.*, *In re Highland Park Gen. Hosp. and Mich. Ass'n of Nurse Anesthetists*, 3 STATE LAWS CCH LAB. L. REP. ¶ 49,856 (Mich. Labor Mediation Bd. 1967).

125. *Mallinckrodt Chemical Works*, 1967 CCH NLRB ¶ 20,981; *American Potash & Chemical Corp.*, 107 NLRB 1418 (1954); *National Tube Co.*, 76 NLRB 1199 (1948).

126. (Mo. State Bd. of Mediation, Sept. 25, 1970), *aff'd sub nom.*, *City of Kirkwood v. Mo. State Bd. of Mediation*, 478 S.W.2d 690 (Mo. App., D. St. L. 1972).

127. *Kirkwood Hearing*, *supra* note 48, at 42; Mo. State Board of Mediation Order, Sept. 25, 1970. Local 2 of the International Brotherhood of Electrical Workers sought a Board determination that four manual laborers in the Kirkwood Forestry Department constituted an appropriate bargaining unit. Kirkwood, a city of approximately 32,000, had approximately 265 employees, over 100 of which did manual labor in a wide variety of departments. IBEW Local 2 already represented 18 employees in the Electric Department and the employees of 6 private contractors who performed functions similar to those performed by employees of the Forestry Department. No city employees except those in the Electric Department were represented by any labor organization, and the city had previously rejected an offer by IBEW Local 2 to have an election conducted by the Board to determine representation of a larger unit of employees in the street, sanitation, water, and forestry departments. The city had recently carved the Forestry Department out of the Street Department and hired a "professional" forester as Superintendent of Forestry in an effort to upgrade forestry work. Forestry work consisted primarily of planting, trimming, and removing trees, clearing brush, raking leaves, and mowing grass. The Superintendent of Forestry supervised Forestry Department employees exclusively, and had a separate office. The

tion of the term "craft." Yet, the statute does not require a skilled craft, but merely "a craft or function . . . which establishes a clear and identifiable community of interest."¹²⁸

Section 105.500(1) also authorizes "plant or installation" units.¹²⁹ Although it may seem on first appraisal that employees working at the same installation should have little difficulty establishing a community of interest, an installation unit may be inappropriate.¹³⁰ There is also a conflict inherent in the application of the community of interest criterion to an installation unit versus a craft unit. An employer may have numerous craftsmen scattered in different departments and installations. Arguably, craftsmen should be allowed to cut across departmental and installation lines to form craft units in which their special interests will be represented.¹³¹

The Board's chairman believes, as a general proposition, that the fact of a common employer is often a sufficient community of interest among the various city employees.¹³² Presumably, therefore, one bargaining unit is appropriate for all, regardless of the difference in their functions. Possible exceptions to this would be separation of clerical and nonclerical employees¹³³ and separate representation for certain excluded groups.¹³⁴

The drawback of allowing various groups separate units is that it can lead to such a proliferation of units that it seriously fragments the negotiation process for the employer. This fragmentation leads to at least four prob-

Forestry Department had tools, a tool shack, and trucks identified as belonging to the Forestry Department. However, the tool shack was located in the Street Department building, and the trucks were kept on the Street Department lot. Forestry Department tools were used regularly by employees of other departments. Job descriptions, benefits, and wage ranges for Forestry Department and Street Department employees were identical, and Forestry Department employees were regularly transferred, on a seasonal basis, to perform functions such as snow removal and trash pickup under the supervision of the Street Department and the Sanitation Department.

The court of appeals affirmed the board after the circuit court had reversed the Board. 478 S.W.2d at 694.

128. § 105.500 (1), RSMo 1969. Thus, clerical employees may be "craftsmen" within the statute. Where the Board has included clerical employees with laborers there is no indication that separate units were requested. See, e.g., *In re Employees at the State Fed. Soldiers' Home of Mo. at St. James* (Mo. State Bd. of Mediation, Jan. 4, 1971); *In re Employees of the Div. of Mental Health at State Hosps.* (Mo. State Bd. of Mediation, Oct. 15, 1970).

129. See statute accompanying note 117 *supra*.

130. For example, over 9,000 employees at state mental hospitals in Nevada, Farmington, St. Joseph, Marshall, Higginville, and St. Louis are in a single unit represented by the AFSCME. When the Teamsters sought to organize employees at the state mental hospital in Fulton, the chairman of the board informally assured the Director of the Division of Mental Health that he had doubts concerning the appropriateness of a Fulton unit and thought it better that the Fulton employees, if they organized, be in the same unit with the other state mental hospital employees. Interview with Daniel C. Rogers, Chairman of the Mo. State Bd. of Mediation, in Jefferson City, Mo., Mar. 15, 1973.

131. See *In re City of Detroit and Teamsters Local 299*, 3 STATE LAWS CCH LAB. L. REP. ¶ 49,782 (Mich. Labor Mediation Bd. 1966).

132. Conversation with Daniel C. Rogers, Chairman, Mo. State Board of Mediation, in Columbia, Mo., March, 1974.

133. See note 128 *supra*.

134. See part III, § B of this comment.

lems for the employer. First, competing unions will play leapfrog; when one has reached an agreement with the employer, another will demand a more favorable agreement.¹³⁵ Second, the negotiating sessions required can become an administrative burden, causing complications in budget preparation¹³⁶ and excessive negotiation cost in money and manpower.¹³⁷ Third, it can make it more difficult for the employer to maintain uniform benefits and working conditions.¹³⁸ Fourth, it invites disputes between units over work jurisdiction.¹³⁹ Fragmentation has reached 'nightmare proportions in some cities. New York City once had over 200 separate units to deal with,¹⁴⁰ and Detroit had 146.¹⁴¹

Several solutions to the fragmentation problem have been suggested. One suggestion is more specific statutory criteria, since statutory ambiguity has contributed to fragmentation.¹⁴² Recently, states have required the effect on administrative efficiency and the effects of fragmentation to be considered in unit determination.¹⁴³ Hawaii has limited possible units to 13 types on an employer-wide basis; neither skilled craftsmen nor workers at different installations are entitled to units separate from other blue-collar workers.¹⁴⁴ Although some authorities favor this approach because it increases governmental efficiency,¹⁴⁵ others are strongly opposed because it smothers the special interests of the smaller groups.¹⁴⁶

A second suggested solution is employer education. The public employer frequently lacks expertise in labor relations, and this has contributed to fragmentation.¹⁴⁷ Missouri has taken advantage of federal assistance to educate public employers in the field of labor relations.¹⁴⁸

A third suggested solution is coalition negotiating in which representatives of the different units negotiate jointly with the employer. A drawback to this approach is that larger organizations may smother the interests of smaller ones.¹⁴⁹ Conversely, if smaller units are given a veto they may have unfair negotiating strength.¹⁵⁰

135. Kilberg, *supra* note 69, at 24-26.

136. Rock, *supra* note 1, at 1007.

137. Kilberg, *supra* note 69, at 24.

138. Shaw & Clark, *supra* note 1, at 152.

139. Zagoria, *Municipal Labor Relations*, 36 MO. MUN. REV. 6, 7 (April 1971).

140. Rock, *supra* note 1, at 1003.

141. Zagoria, *supra* note 139, at 7.

142. Shaw & Clark, *supra* note 1, at 155.

143. *E.g.*, KAN. STAT. ANN. § 75-4327(e)(1), (5) (Supp. 1972); PA. STAT. ANN. tit. 43, § 1101.604(1)(ii), (4) (Supp. 1973).

144. *See* HAWAII REV. STAT. § 89-6 (Supp. 1973).

145. *E.g.*, Edwards, *supra* note 118, at 369.

146. *E.g.*, Sullivan, *supra* note 1, at 402, 416.

147. Zagoria, *supra* note 139, at 7.

148. *Intergovernmental Personnel Act of 1970, Special Missouri Municipal League Staff Report*, 36 MO. MUN. REV. 8 (Oct. 1971).

149. Rock, *supra* note 1, at 1014-15. A potential solution for the analogous problem of nearby employers being whipsawed by competing unions is coalition negotiating, in which employers negotiate jointly through an employer association and the results are reduced to a master plan. ACIR, *supra* note 1, at 109-10; Smythe, *supra* note 1, at 50-51.

150. Rock, *supra* note 1, at 1014-15.

IV. PROPOSED LEGISLATION

There has been a rash of bills and resolutions in the Missouri legislature recently relating to public sector labor relations.¹⁵¹ With respect to bargaining units, two things stand out. First, many of these bills have included teachers, an occupational group that presents complex unit determination issues.¹⁵² Second, at least one bill has seemingly restricted the definition of "supervisor."¹⁵³

Federal legislation to place various aspects of state and local employee labor relations under federal jurisdiction has also been proposed.¹⁵⁴ The simplest and most drastic¹⁵⁵ would put state and local employee labor relations under the jurisdiction of the National Labor Relations Board along with private sector labor relations by striking the words "or any state or political subdivision thereof"¹⁵⁶ from the National Labor Relations Act.¹⁵⁷ Thus, bargaining unit determination at the state and local level would be according to the comparatively well established criteria applied in the private sector. Placing state and local governments under the National Labor Relations Act would probably be constitutional,¹⁵⁸ but it is undesirable because labor-management structures in the public sector vary greatly from those in the private sector, and public sector structures vary greatly from state to state.¹⁵⁹

151. *E.g.*, S.B. 190, 77th Mo. Gen. Ass., 1st Sess. (1973); S.B. 233, 77th Mo. Gen. Ass., 1st Sess. (1973); H.B. 1324, 76th Mo. Gen. Ass., 2d Sess. (1972); H.B. 1250, 76th Mo. Gen. Ass., 2d Sess. (1972); H.B. 865, 76th Mo. Gen. Ass., 1st Sess. (1971); H.B. 587, 76th Mo. Gen. Ass., 1st Sess. (1971); H.B. 474, 76th Mo. Gen. Ass., 1st Sess. (1971); S.J.R. 28, 76th Mo. Gen. Ass., 2d Sess. (1972); H.J.R. 88, 76th Mo. Gen. Ass., 2d Sess. (1972); H.J.R. 37, 76th Mo. Gen. Ass., 1st Sess. (1971).

152. *See* M. MOSKOW, *TEACHERS AND UNIONS* 139-69 (1968); Doherty, *Determination of Bargaining Units and Election Procedures in Public School Teacher Representation Elections*, 19 *IND. & LAB. REL. REV.* 573 (1966).

153. S.B. 190, 77th Mo. Gen. Ass., 1st Sess. (1973), contained the following definition of "supervisor":

[A]ny individual having authority, in the interest of the employer, to perform the preponderance of the following acts of authority: To hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them and to adjust their grievances, 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 . . .

Id. § 1 (5). Even some city managers may not, in the technical sense, have the "authority" to do the preponderance of the enumerated acts. *See* § 77.046, RSMo 1969; 27 Opinion of Attorney General of Missouri No. 479, at 5, Dec. 10, 1970.

154. *E.g.*, H.R. 12532, 92d Cong., 2d Sess. (1972); H.R. 9324, 92d Cong., 1st Sess. (1971); H.R. 7684, 92d Cong., 1st Sess. (1971).

155. H.R. 12532, 92d Cong., 2d Sess. (1972).

156. 29 U.S.C. § 152(2) (1970).

157. 29 U.S.C. § 141 (1970).

158. *See* Maryland v. Wirtz, 392 U.S. 183 (1968).

159. *See* Wellington & Winter, *Structuring Collective Bargaining in Public Employment*, 79 *YALE L.J.* 805, 811-13 (1970). The variance among states is also an argument against blanket adoption of one of the many proposed state model acts, *e.g.*, AFSCME MODEL STATE COLLECTIVE BARGAINING LAW FOR PUBLIC SECTOR WORKERS, REF. FILE GOV'T EMPLOYEE RELATIONS REP. 51:251-55 (1973).