Public Employee Legislation: An Emerging Paradox, Impact, and Opportunity

Thomas M. Fiorello
PUBLIC EMPLOYEE LEGISLATION:
AN EMERGING PARADOX,
IMPACT, AND OPPORTUNITY

INTRODUCTION

The [recent] wave of public employee disputes from Harrisburg to Seattle is the likely forerunner of an era of turbulence in the public employees' sector. It is as freighted with political and economic dynamite as the mine and factory organizing disputes of the 1930s.¹

Employees in the United States have become increasingly determined not to be left out of the "scramble for money."² During the 1970's, both public and private employees have been especially concerned about economic conditions.³ The cost of living has increased each year since 1950.⁴ Despite such economic indicators, during the

¹. Broder, Public Employee is Labor's Woe, San Diego Evening Tribune, Sept. 3, 1975, at B-2, col. 4. David Broder is a political analyst whose syndicated articles often focus on public employee-employer relations. Because public employment relations are in a state of rapid development, several newspaper articles are cited in the introductory and strike sections of this article.


³. E.g., Cebulski, Some Recent Trends in Local Government Agreements, 26 CAL. PUB. EMPLOYEE RELATIONALS 52, 53 (Sept. 1975) [This excellent publication of the Institute of Industrial Relations, University of California, Berkeley, is hereinafter cited as C.P.E.R.]. Cebulski notes that inflation may influence the trend in public employee agreements to include cost-of-living escalator clauses and staggered wage increase provisions.

⁴. Benoit, Inflation—Unemployment Tradeoff and Full Recovery, 34 AM. J. ECON. & SOC. 337, 338 (Oct. 1975). In September 1975, employees spent $177.80 to purchase the same quality and quantity of food items which could have been purchased for $100.00 in 1967. UNITED STATES COUNCIL OF ECONOMIC ADVISORS, ECONOMIC INDICATORS 26 (Oct. 1975). During the period from September 1974, to September 1975, the consumer price index increased 11.9 per cent. Id. at 26. Over the ten-year period between 1965 and 1974, the consumer price index for all items increased from 94.5 to 147.7.
mid-1970's recession, which has been described as the worst since World War II, approximately 95,000 state and local governmental workers had jobs that paid less than the minimum wage of $1.90 per hour. Traditional economic theories of supply and demand have shed little light on the problem of spiraling consumer prices and unemployment.

Since 1935, employees in the private sector have been able to press their economic demands on the basis, at least in part, of two rights under the original National Labor Relations Act and the subsequent Labor Management Relations Act (LMRA). Private sector employees have the rights to bargain collectively and to engage in other concerted activities for mutual protection. The courts have construed the right to engage in concerted activities legislation as including the right to strike.

Federal, state, and local governmental employees are expressly excluded from coverage under the LMRA. Thus public employees lack federal protection of the rights to collective bargaining and to

---

BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT, OF THE UNITED STATES 1975, at 422 (96th ed. 1975) [hereinafter cited as 1975 STAT. ABSTRACT]. Over the ten-year period between 1965 and 1974, the median money income of all families increased from $6,957.00 to $12,836.00. Id. at 390.


7. See generally Benoit, Inflation—Unemployment Tradeoff and Full Recovery, 34 AM. J. ECON. & SOC. 337-344 (Oct. 1975). See also Means, Simultaneous Inflation and Unemployment: A Challenge to Theory and Policy, CHALLENGE 6-20 (Sept./Oct. 1975). In September 1975, 7,522,000 people, or 8.1 per cent of the total United States labor force, were unemployed. ECON. INDICATORS, supra note 4, at 10. During the period between January and September 1975, no less than eight per cent of the labor force was unemployed. Id.


9. Id. In 29 U.S.C. § 158(d) (1970), collective bargaining is defined, in part, as:

[T]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party . . . (emphasis added).

10. See Los Angeles Met. Transit Authority v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 689, 355 P.2d 905, 907, 8 Cal. Rptr. 1, 3 (1960). In Met. Transit, the California Supreme Court held, in part: "Terms such as 'concerted activities' are commonly used by the courts as well as legislative bodies to refer to strikes." California transit workers are unique among California's public employees because the Legislature has expressly granted the transit workers the right to engage in concerted activities. Id. at 689, 355 P.2d at 907, 8 Cal. Rptr. at 3.

strike in pressing their economic demands. The effect of the LMRA public employee exclusion has been characterized by one observer in the following terms:

Inconsistency and confusion best describe the legal setting of labor relations for state and local government employees. Each of the 50 states and the 80,000 units of local government does its own thing. There is no set pattern. The labor programs are regulated by state laws, city ordinances, court decisions, attorneys general opinions, county charters, civil service rules, executive orders, school board policies, and other regulations.12

The plethora of public employee laws directly affects a relatively high number of employees and employers. In 1970, state and local governments employed ten million people, or 11.6 per cent of the labor force.13 Sixty per cent of new jobs are positions created by state and local governments.14 In October 1974, California and its more than 2,600 local units15 employed 263,000 state workers and 987,000 local governmental workers.16 This public sector growth has been accompanied by upsurges in public employee union memberships and union organizational endeavors.17 For example, the

---

12. Statement of Jerry Wurf, President of the American Federation of State, County and Municipal Employees (AFSCME), AFL-CIO, Hearings on H.R. 7634, H.R. 9324, and H.R. 12532 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess., at 28 (1972) [hereinafter cited as 1972 Cong. Hearings]. For an analysis of the details of the three bills which would either amend the NLRA to include public employee-employer relations or establish a separate national law, see 1972 Cong. Hearings 22 et seq. For one example of a position against federal intervention in public employee relations, see the position statement of the National League of Cities in 1972 Cong. Hearings 200 et seq. See also Cebulski, Proposed Federal Laws Governing State and Local Public Employee Relations, 23 C.P.E.R. 17 (Dec. 1974).


14. Id.

15. CAL. LEGISLATIVE ANALYST, ANALYSIS OF SENATE BILL No. 275, at 7 (June 17, 1975). The exact breakdown of local governmental units is as follows:

<table>
<thead>
<tr>
<th>Type of Government</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Counties</td>
<td>58</td>
</tr>
<tr>
<td>Cities</td>
<td>411</td>
</tr>
<tr>
<td>School &amp; Community College Districts</td>
<td>1,100</td>
</tr>
<tr>
<td>Independent Special Districts</td>
<td>1,102</td>
</tr>
</tbody>
</table>

**TOTAL** 2,671

16. 1975 STAT. ABSTRACT 273. The figures in the text are reduced to a total of 1,017,000 California public employees if only full-time equivalent employment is considered.

17. See 1972 Cong. Hearings 213-41 for detailed statistical trends regarding municipal employee organizations. See also 1975 STAT. ABSTRACT
American Federation of State, County and Municipal Employees (AFSCME) increased its membership from 5,000 in 1935, to 525,000 in 1972, and to 750,000 in 1976. Furthermore, the AFL-CIO estimates its 2.4 million federal, state, and local public employee membership may double between 1975 and 1977.

Many public employers are faced with a complex question: How can governmental units cope with spiraling inflation, the public employees' demands for increased compensation, and the taxpayers' demands for efficient services without increasing tax burdens? The cost of public employees' pay and benefits is ordinarily the largest expense in a governmental budget. For example, in the 1975-76 fiscal year, Los Angeles budgeted $180 million for police services and $77 million for fire protection. When payroll costs amount to tens of millions of dollars, employers are reluctant to agree to annual ten to fifteen per cent pay increases. In California most new pay increases must be passed on directly to the taxpayer, for deficit spending is unconstitutional unless two-thirds of the governmental unit's voters decide otherwise.

---

373 for data regarding private sector union membership. Because 27.2 per cent of all nonagricultural employees belonged to unions in 1972, it is evident that most members of the labor force are not union members.

20. Id. Unions expend large amounts of money in the organizational efforts of public employees. For example, the California Federation of Teachers announced in October 1975, that it would spend $5 million in an effort to become the exclusive bargaining representative for the state's 100,000 teachers. See San Diego Evening Tribune, October 17, 1975, at B-1, col. 2. See table in text accompanying note 79 infra.
22. See, e.g., INTERV HEARING BEFORE THE CAL. ASS. COMM. ON EMPLOYMENT AND PUBLIC EMPLOYEES, WORK STOPPAGES IN PUBLIC JURISDICTIONS 51 (Sept. 13, 1974) [hereinafter cited as 1974 CAL. HEARING]; Gerald Davis, City Manager, Vallejo, Cal., testified that employee salaries and benefits amount to seventy per cent of a city's budget.

In October 1974, the monthly payroll was $805 million for California's state and local employees in six areas: education, hospitals, highways, police and fire protection, and public welfare. 1975 Stat. Abstract 274.

In the 1975 San Francisco mayoral election, city spending for public employee pay increases became a major issue; immediately before the November 1975 election, San Francisco home owners received an average forty-five per cent increase in assessed valuations. L.A. Times, Oct. 23, 1975, § 1, at 3, col. 4. In January 1976, bus drivers in San Diego threatened to strike, but the walkout was averted when the drivers accepted a new three-year contract under which their annual income will be increased from the current level of $18,932 to $21,874. San Diego Evening Tribune, Jan. 14, 1976, at A-1, cols. 3-4.
It is unlikely public employers would deliberately emulate New York's desperate measures in 1975 to stave off default. Public employers outside New York might not soon forget the specter of a public employer firing thousands of public employees, asking other public employees to accept lower benefits than they have already won, and borrowing from employees' pension funds to meet the monthly payroll. Although taxpayers may demand and employees may attempt to create austerity budgets, most observers foresee the continued growth of public employee unionization and the concomitant economic demands for increased pay.

These introductory comments provide a foundation for this article, which encompasses three topics: First, governmental services are increasingly interrupted by public employee strikes; second, different statutory devices are evolving for negotiation and resolution of public employee disputes; and third, at least four provoking features are emerging from the different statutory approaches. Although the focus of the article is upon California legislation, most of the remarks may be relevant elsewhere. Indeed, California is not alone in its current efforts to design vehicles for amicable public employment relations.

PROBLEM: BURGEONING DISRUPTION OF STATE AND LOCAL SERVICES BECAUSE OF PUBLIC EMPLOYEE STRIKES

Although some jurisdictions permit limited strikes by public employees unless public health, safety, or welfare is endangered, most jurisdictions either prohibit or do not authorize public employee strikes. Nevertheless, in efforts to obtain higher compensation, sole reliance on the merit system has been recently rejected. Despite widespread prohibition, public employees often do strike.
When tens of thousands of governmental workers engage in hundreds of strikes\(^1\) for more than one million work-days idle in each of recent years, it becomes altogether clear that many public employees have resorted to the strike.\(^2\) At a 1975 AFL-CIO conference, the president of the AFSCME commented that his union has a strike in some part of the country just about every day and that "most of the strikes are illegal."\(^3\) The concomitant disruption of governmental services has been a widespread consequence of public sector strikes.

In California, except for certain groups of transit workers who have legislative authorization to engage in concerted activities, the Legislature has not authorized public employee strikes.\(^4\) However, except for firemen, the Legislature has not expressly prohibited public employee strikes.\(^5\) California courts have noted that, in the absence of legislative authorization, public employees in general do not have the right to strike.\(^6\) Nevertheless, the California Su-

\(^{1}\) See San Diego Evening Tribune, Sept. 25, 1975, at A-11, col. 3 (New Jersey police); L.A. Times, Oct. 24, 1975, § I, at 2, col. 3 (Oklahoma police); L.A. Times, Oct. 5, 1975, § I, at 11, col. 1 (Kansas City firemen strike); San Diego Evening Tribune, Sept. 4, 1975 at A-1, col. 3 (multi-state teacher strikes); San Diego Evening Tribune, Oct. 28, 1975, at A-4, col. 1 (Illinois doctors' strike). When the policemen attempted to extinguish the fires during the Kansas City firemen strike, the police discovered that some of the fire equipment had been sabotaged. Fire extinguishers had been filled with flammable liquids; water had been poured into fire engine gasoline tanks. L.A. Times, Oct. 5, 1975, § I, at 11, col. 1.

\(^{2}\) 1975 STAT. ABSTRACT 374. In 1973, 196,000 federal, state, and local governmental employees began work stoppages (strikes, slow-downs, boycotts) resulting in 2,299,000 work-days idle during the year.


\(^{5}\) See Los Angeles Met. Transit Authority v. Brotherhood of R.R. Trainmen, 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960); Los Angeles Unified School Dist. v. United Teachers, 24 Cal. App. 3d 142, 100 Cal. Rptr. 806 (1972); City of San Diego v. American Fed'n of State, County and
The Supreme Court has recently held "[i]n the absence of applicable constitutional, legislative, or charter proscriptions, a duly enacted legislative measure cannot be invalidated on the ground it was enacted as a result of an illegal strike." The legality of most strikes by California public employees is uncertain. The debatable illegality of the strikes, however, does not preclude the legality of the settlements and ordinances drafted pursuant to the strike. In short, unauthorized strikes can result in legal post-strike agreements.

Notwithstanding the lack of authorization to strike, California public employees do strike to press their economic and noneconomic demands. Policemen, firemen, and teachers, among others, have resorted to unauthorized strikes. One recent example of a major California strike is the three-day walkout in 1975 by 3,700 San Francisco firemen and policemen; the employee organizations demanded


37. City and County of San Francisco v. Cooper, 13 Cal. 3d 898, 911, 534 P.2d 405, 411, 120 Cal. Rptr. 707, 715 (1975). In Cooper the court briefly focused upon the issue of public employee strike legality. The court observed:

In characterizing the employee work stoppage at issue as "illegal," the taxpayer relies on a series of Court of Appeal decisions which have concluded that under the present state of California law public employees do not have the right to strike. The return filed by the various real party in interest employee associations contests this conclusion, arguing ... that present state statutes implicitly authorize strikes by some categories of public employees ... (citations omitted). Id. at 912, 534 P.2d at 411-12, 120 Cal. Rptr. at 715-16.

In Cooper, the court also noted:

The only general state statute which specifically speaks to the public employee strike issue is Labor Code section 1962, which prohibits strikes by firefighters. The employee associations argue that the absence of a similar statutory prohibition of other public employee strikes represents an implicit authorization of such action. Id. at 912 n.5, 534 P.2d at 412 n.5, 120 Cal. Rptr. at 716 n.5.

After delineating these contrasting views, the court concluded: "We have no occasion to resolve this controversy in the present action ..." Id. at 912, 534 P.2d at 412, 120 Cal. Rptr. at 716. The court also referred to the public employee strike as merely "an allegedly illegal strike." Id. at 918, 534 P.2d at 416, 120 Cal. Rptr. at 720. Thus the court left the door open for further consideration regarding the characterization of public employee strikes as "illegal."


937
and the mayor acceded to a thirteen per cent pay increase. Admittedly frustrated by the upsurge in the cost of living, the employees cast aside any notions of the "public servant mystique." In the course of the strike, the police aroused fear by announcing that the streets were no longer safe. Moreover, because most of the police carried their service revolvers while they picketed during the strike, the police aroused the fear of elected officials that "internece warfare" could erupt if the California National Guard or Highway Patrol were called into service. The police chief said he was "ashamed" that striking policemen had vandalized seventeen police cars during the strike. Final settlement included a "no re-prisal" clause.

Another illustration of public employee strikes is the Berkeley, California, firemen's strike in September 1975. The firemen demanded a 16.5 per cent pay increase. The city offered an eight per cent increase in 1975 and a seven per cent increase in 1976. When the firemen offered to submit the dispute to binding arbitration, the city refused because arbitrators "by nature, are compromisers." After a strike of twenty-four days, settlement was reached on a sixteen per cent increase over two years.

---

43. San Diego Evening Tribune, Aug. 28, 1975, at A-3, col. 2. See Recent Developments in California Public Jurisdictions, 26 C.P.E.R. 57, 68 (Sept. 1975); this reference includes an example of a union's agreement to reimburse the county for vandalism against county property during a strike.
44. N.Y. Times, Aug. 23, 1975, at 38, col. 6. See generally Hilligan, Police Employee Organizations: Past Developments and Present Problems, 24 Lab. L.J. 288 (1973). In the immediate aftermath of the San Francisco police strike, Pomona, Cal. police received a fifteen per cent pay increase by the mere threat of a police strike. San Diego Evening Tribune, Aug. 29, 1975, at A-1, col. 1. Other public employers may view the relatively extreme tactics used in the San Francisco police strike as a precedent which compels the officials to succumb to police demands.
45. L.A. Times, Sept. 21, 1975, § I, at 2, col. 5. See also 1972 Cong. Hearings 89-94; and Recent Developments, supra note 43, at 94. The C.P.E.R. article indicates the International Ass’n of Fire Fighters (IAFF), AFL-CIO,
The Berkeley teachers' strike in September 1975, is a third, although different, example of California employees' resort to the strike. In April 1975, the school board and teachers negotiated an agreement that salaries and benefits would continue at existing levels; there was to be neither an increase nor decrease in compensation rates. When the school district found unexpected deficits during the summer of 1975, the board decided to reduce the teachers' salaries and benefits. An ensuing strike, which lasted thirty-two days, was terminated when the parties agreed to submit the disputes to a fact-finding panel for recommendation. The school board and teachers submitted several proposals to the panel. The panel eventually recommended and the board agreed to restore the April rates of salaries.

A significant and growing minority of public employees have turned to and participated in strikes. For example, between January 1970, and December 1974, there were 115 unauthorized public employee strikes in California. Forty-three of the disruptions occurred in 1974. Furthermore, the 115 California strikes involved more than 74,000 employees and resulted in more than one million work-idle days. The California tide of such strikes continues to roll in; there were fifty unauthorized walkouts between January and October 1975.

Generally, states authorize use of the injunction for prohibition of strikes in the public sector. In a recent opinion, the California Supreme Court "assumed" public employee strikes "may properly

represented 19,000 California firemen in September 1975. In 1974, there were 85,300 state and local police and firemen in California. 1975 STAT. ABSTRACT 274.
50. Cal. Strikes 4. See also 22 Illegal Strikes, supra note 38, at 2-17.
52. Id.
53. L.A. Times, Nov. 6, 1975, § II, at 6, col. 1.
54. See Wellington & Winter 825, 839-42.
be enjoined under a court's equity power . . . or may subject striking employees to a variety of administrative sanctions including dismissal . . . "55 The California court, however, disfavors imposition of mandatory, harsh statutory sanctions against striking public employees. The court observes that "draconian," automatic sanctions tend to prolong rather than to prevent work stoppages.56

A 1972 study of twenty-two California strikes revealed temporary restraining orders and preliminary injunctions have little effect on the termination of the strike; moreover, enforcement by contempt citations or arrest is indeed seldom.57 Court orders neither shorten nor end most public employee strikes in California.58 Employers rarely take punitive measures against strikers, and the overwhelming majority of settlements include no reprisal clauses.59 In short, neither judicial sanctions nor employer sanctions ordinarily impede the disruption of governmental services by striking employees.

Public response to the burgeoning disruption of governmental services has varied throughout the state. A public opinion poll of Los Angeles and Orange County residents revealed forty-nine per cent thought policemen should not have the right to strike, forty-one per cent thought policemen should have the right, and ten per cent did not know.60 Similar percentages resulted when those interviewed were asked whether firemen should have such a right. Thus Los Angeles and Orange County residents were almost evenly split in their responses on the rights of public safety workers to strike.

The public response to the 1975 San Francisco police and firemen strike was intense. For example, San Francisco voters overwhelmingly passed three propositions adversely affecting the future benefits of policemen and firemen.61 The voters approved another prop-

55. City and County of San Francisco v. Cooper, 13 Cal. 3d 898, 912, 534 P.2d 403, 412, 120 Cal. Rptr. 707, 716 (1975) (citations omitted). The court observed neither the California Constitution nor the Legislature prescribes mandatory sanctions for striking public employees. Id.
56. Id. at 917, 534 P.2d at 415, 120 Cal. Rptr. at 719.
57. 22 Illegal Strikes, supra note 38, at 6-7; Cal. Strikes 5. See also Gould, Civil or Criminal Contempt—the Problem of Contempt Proceedings for Striking Teachers, 47 Temp. L.Q. 269 (1974).
58. Cal. Strikes 5.
59. Id. For an illustration of the significance of the no reprisal clause in strike settlements, see Recent Developments, supra note 43, at 86. For an example of the "conditions of amnesty" provisions, see id. at 67.
osition reducing the formula for determining pay increases for 5,600 other public employees.62 In the aftermath of the San Francisco strike, the governor said the settlement set a "dangerous precedent" because it allowed the strikers "to get their way through illegality and brute force."63

What are the alternatives, if any, to the increasing disruption of governmental services by striking employees who seek to press their economic demands? One commentator has suggested two innovative strike alternatives: In a "nonstoppage" strike, until impasses are resolved, employees continue working while both employers and employees irretrievably lose certain monies to a trust fund for the public; in a "graduated" strike, employees might walk out on Mondays for a month, then Mondays and Thursdays for a month, and so forth to gradually build up the pressures for settlement.64 The California Legislative Analyst has suggested that one bargaining alternative might be the "automatic increase" whereby compensation increases are adjusted in accordance with predetermined formulas.65 The California Legislature has not enacted these alternatives to public sector strikes. Nevertheless, as discussed in the following section, there are two areas in which the Legislature is responding in an effort to alleviate the burgeoning disruption of governmental services due to unauthorized public employee strikes.

CALIFORNIA LEGISLATIVE RESPONSES TO DISRUPTIVE PUBLIC EMPLOYEE STRIKES: AN ASSORTMENT OF EMERGING MEASURES FOR NEGOTIATION AND RESOLUTION OF INTEREST DISPUTES

California policies and procedures for determining public employee compensation and establishing personnel management practices have changed significantly in recent years.66 Partially in re-

66. Id. at 1. See also Blair, State Legislative Control over the Conditions of Public Employment: Defining the Scope of Collective Bargaining for State and Municipal Employees, 26 Vand. L. Rev. 1, 3-5 (1973). Blair's
sponse to disruptive public employee strikes, the Legislature has enacted an assortment of measures for negotiation of economic demands and resolution of impasses over interest disputes. An interest dispute is a controversy about proposed terms of an employer-employee agreement. 67 This should be contrasted to a rights dispute, which is a controversy over interpretation or execution of the existing terms of an employer-employee agreement. 68 When the parties to an interest dispute reach a point in negotiations at which their differences are so substantial that future meetings are temporarily futile, an impasse has been reached. 69

As of July 1, 1976, three main statutes address public employment. The Meyers-Milias-Brown Act (MMBA) 70 applies to employer-employee relations among local governmental units. For example, the MMBA covers local public safety workers such as policemen and firemen. 71 The George Brown Act 72 concerns employees of state agencies, colleges, and universities. The Public Educational Employment Relations Act (PEERA) 73 applies to approximately 450,000 employees of local school districts and community colleges. PEERA became fully operative on July 1, 1976, repealing the Winton Act, 74 which did not provide for collective bargaining for teachers.

The major types of disputes are economic—those aimed at determining wages, hours, and other conditions of employment; and noneconomic—those concerning the interpretation of a collective agreement, union jurisdiction, union recognition, and sometimes political decisions made by the state.


The survey of public employee statutes among the states indicates recent changes and diversity are not unique to California legislation.

67. ADVISORY COUNCIL ON PUBLIC EMPLOYEE RELATIONS, FINAL REPORT 177-94 (March 15, 1973) [hereinafter cited as the 1973 ADV. COUN. REPORT].

68. Id. at 194-240.

See 1972 Cong. Hearings 24; apparently more than ninety per cent of disagreements over terms of existing agreements do not end in public employee strikes.


71. See also CAL. LABOR CODE §§ 1960-63 (West 1971); these sections and MMBA apply to firemen.

72. CAL. GOV'T CODE §§ 3525-36 (West Supp. 1976); these sections were enacted in 1971 and have not been amended to date.


74. Id. The Winton Act was effective until July 1, 1976.
The MMBA, George Brown Act, and Winton Act have received mounting criticism in recent years because they lack sufficient means to promote the resolution of impasses. Additionally, "[s]upport for [comprehensive governmental employee collective bargaining measures] is growing among members of the Legislature, and the Governor has stated his support for collective bargaining for state employees." Public employee organizations and labor unions in California have registered strong support for collective bargaining legislation to cover all state and local public employees.

Despite recommendations both for the repeal of the multiple statutes and for the enactment of a single, comprehensive law, the California Legislature has failed to enact several bills which would have heeded such advice. During the 1975-76 Regular Session, the Legislature did not pass Senate Bill (SB) 275, which would have provided collective bargaining and extended impasse resolution devices for nearly all public employees. However, the Legislature did

---


77. See, e.g., 1974 Cal. Hearing 54 et seq., 90 et seq., and 100 et seq.


For a comparative analysis of the provisions of six Senate bills and four Assembly bills which would have implemented collective bargaining in the Legislature, see 1975 Cal. Legis. Analyst 11-13. Most of the 1973-74 bills established a board to administer the act, specified unfair labor practices, and provided for exclusive representation. The bills differed as to negotiable items, bargaining unit criteria, and authorization of strikes. Many of the bills were patterned after the LMRA and the model legislation recommended in the 1973 Adv. Coun. Report 1-35 of appendix A; see 1975 Cal. Legis. Analyst 10, 14.
enact Senate Bill (SB) 160 (PEERA), which provides statutory measures for collective bargaining and expanded impasse resolution devices for public education employees.79

<table>
<thead>
<tr>
<th>Provisions</th>
<th>Defeated SB 275* (DILLS)</th>
<th>Enacted SB 160 (RODDA)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title:</td>
<td>Collective Bargaining Act for Public Employment</td>
<td>Public Educational Employer-Employee Relations Act (PEERA)</td>
</tr>
<tr>
<td>Coverage:</td>
<td>State and Local Employees</td>
<td>School District and Comm. College Employees</td>
</tr>
<tr>
<td>Discussion Vehicle:</td>
<td>Collective Bargaining</td>
<td>Meeting &amp; Negotiating</td>
</tr>
<tr>
<td>Administration:</td>
<td>State Board</td>
<td>State Board</td>
</tr>
<tr>
<td>Scope:</td>
<td>Wages, hours, and other terms and conditions of employment</td>
<td>Wages, hours, and other terms and conditions of employment; matters not enumerated reserved to employer</td>
</tr>
<tr>
<td>Provides Exclusive Representation:</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Unit Determination:</td>
<td>Appropriate Unit, reasonable unit meeting specified criteria</td>
<td>Appropriate Unit</td>
</tr>
<tr>
<td>Specified Unfair Labor Practices:</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Organizational Security:</td>
<td>Agency shop or other arrangement</td>
<td>Agency shop</td>
</tr>
<tr>
<td>Impasse Procedures:</td>
<td>Mediation, fact-finding, arbitration</td>
<td>Mediation, fact-finding</td>
</tr>
<tr>
<td>Strikes:</td>
<td>Yes (condition precedent and public health or safety limitations)</td>
<td>Silent</td>
</tr>
<tr>
<td>Labor Code § 923:</td>
<td>Applicable</td>
<td>Inapplicable</td>
</tr>
<tr>
<td>Disposition:</td>
<td>Not passed by Senate Finance Committee</td>
<td>Passed by Legislature, signed by Governor</td>
</tr>
<tr>
<td>Effective Date (s):</td>
<td>N/A</td>
<td>January 1 to July 1, 1976</td>
</tr>
</tbody>
</table>

*On June 17, 1975 SB 275 was incorporated by amendment into SB 4. The SB 275 provisions in this table are drawn from the version of the bill as it was introduced on Jan. 23, 1975; the SB 160 provisions are in accordance with the version as enacted on Sept. 22, 1975.

For further discussion on SB 275, see Legislation: SB 275 and Practitioner Reaction, 24 C.P.E.R. 72 (March 1975).

SB 275 closely followed the terms of the recommended “model legislation” in the 1973 Adv. Coun. Report 1-35 of appendix A. Hereinafter, SB 275 is mentioned as one illustration of recent defeat of the recommended
Hypothesizing the city of Sealand, California, may help illustrate certain concepts and observations. Sealand is a coastal city of 200,000 people. It employs 250 policemen and 250 firemen. The public school districts and Sealand Community College employ six-hundred teachers and other educational employees. In addition, 150 employees of the University of California, Sealand, and other state departments provide state services in Sealand. As we turn to the assortment of negotiation vehicles and impasse resolution devices which the Legislature has enacted, we shall again consider Sealand.

**Evolving Statutory Vehicles for Negotiation**

Under the principal California public sector statutes, different vehicles are available for negotiation of the employees' demands for increased pay and benefits. The MMBA provides that local public employment discussions shall take the form of conferences: Parties must “meet and confer” in good faith regarding wages and other terms and conditions of employment.\(^\text{80}\) Employers are required to consider the employees' proposals before the employer determines the final decision.\(^\text{81}\) Moreover, the parties must endeavor to reach agreement on subjects within the scope of representation.\(^\text{82}\) If the representatives of the parties reach an agreement, its terms are reduced to a nonbinding memorandum of understanding that is presented to the governing local board for final determination.\(^\text{83}\)

In the hypothetical city of Sealand, however, the five-hundred public safety workers have proposed a twelve per cent pay increase so they can keep pace with the twelve per cent increase in the consumer price index. The city manager, under pressures from the comprehensive approach. Also, all references to SB 275 are to its introductory version as of Jan. 23, 1975.

\(^{80}\) CAL. GOV'T CODE § 3505 (West Supp. 1976). See Blair, supra note 66, at 3-5; Blair observed that twenty-three states, including California, defined their discussion vehicles and scope of bargaining in terms of the LMRA.

\(^{81}\) CAL. GOV'T CODE § 3505 (West Supp. 1976).

\(^{82}\) Id.


The most notable qualities of the Meyers-Milias-Brown Act is its sketchiness and its vagueness. It does not say very much about the critical issues which confront labor-management relations in the public sector, and what it does say it says with confusing lack of clarity. Id. at 760.
council to agree to no more than a 3.5 per cent increase, and the public safety workers have been unsuccessful in their endeavor to reach agreement. Consequently, no memorandum of understanding has been drafted. Sealand and its local employees are stalemated.

What is the negotiation vehicle for state employees? Under the George Brown Act, the representatives of the parties are required simply to meet and confer. Employers are required merely to fully consider the employees' proposals. State employees residing and working in Sealand also demanded a twelve per cent pay increase. Unlike the MMBA for local employees, the George Brown Act, covering state employees, does not require parties either to endeavor to reach agreement or to negotiate in good faith. When the Legislative Analyst recently delineated the procedures and parties involved in determining the compensation for state employees, the state employees were not listed as a party, and the “meet and confer” conferences were not listed as part of the process.

What is the vehicle for negotiation under the newly enacted PEERA? The Legislature provided that public educational discussion shall be conducted through “meeting and negotiating.” In defining the vehicle, the Legislature incorporated language from the MMBA and the LMRA. Although PEERA does not expressly use the term collective bargaining, one could assume the term meeting and negotiating probably is its functional equivalent. However, PEERA may prove to be somewhat ambiguous on collective bargaining because PEERA makes section 923 of the California Labor Code inapplicable. Section 923 grants employees the rights to collective bargaining and to strike.

85. Grodin, supra note 83, at 721. In his discussion of the differences among California's public sector statutes, Grodin suggests: This statutory melange produces curious results. Many of the statutory distinctions appear to be the product of ad hoc political compromises, unsupported by any national policy. Id.
86. 1975 CAL. LEGIS. ANALYST 17-19.
87. CAL. GOV'T CODE § 3540.1(h) (West Supp. 1976) provides: "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, shall not be subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years. Id.
90. CAL. GOV'T CODE § 3549 (West Supp. 1976); see note 35 supra.
Under PEERA, the exclusive representative of the Sealand educational employees would meet and negotiate in a good faith effort to reach an agreement on the issues of a twelve per cent pay increase. If an agreement is reached, its terms would be reduced to a written document. The document becomes binding on the Sealand school district and employees when the terms are accepted by both parties.

We should perhaps take a moment to explore the negotiation vehicle included in recently considered but defeated comprehensive bills such as Senate Bill (SB) 275. SB 275 included a provision which was straightforwardly labeled “collective bargaining.” Collective bargaining under SB 275 was defined in terms similar to the Legislature’s PEERA definition of meeting and negotiating. Under California’s MMBA, PEERA, and SB 275, the three respective discussion vehicles of meeting and conferring, meeting and negotiating, and collective bargaining have emerged with practically the same statutory definitions.

The end product of the negotiation vehicles somewhat varies: Under MMBA, negotiations may result in a nonbinding memorandum of understanding; under PEERA, negotiations may end in a binding written document; under SB 275, negotiations may result in a binding written contract.

**Evolving Statutory Impasse Resolution Measures**

Thus far we have seen economic conditions were a factor in the upsurge of public employee unionization and resort to the usually unauthorized strike. Also, the disrupted governmental services and employee demands apparently influenced the Legislature to evolve different vehicles for discussion of interest disputes. Additionally, the Legislature has enacted and considered various measures for the resolution of impasses.

---

92. SB 275, 1975-76 Cal. Legislature, Reg. Sess. (1975); when the bill was introduced on Jan. 23, 1975, it proposed that Cal. Gov’t Code § 3501 provide as follows:

Collective bargaining means discussing and negotiating in good faith in an effort to reach mutual understandings in respect to all matters within the scope of bargaining, and executing a written contract, if requested by either party, incorporating any and all such understandings so reached, provided that such obligation does not compel either party to agree to a proposal or to make a concession. Id.
The following chart is designed to illustrate certain distinctions among legislative provisions for impasse resolutions.

### Comparative Analysis of Emerging Impasse Resolution Devices Under Enacted & Defeated California Legislation Enacted, Proposed, and Unauthorized

<table>
<thead>
<tr>
<th>Cal. Statute or Bill</th>
<th>Scope</th>
<th>Impasse Resolution Devices</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brown Act (MMBA)</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>George Brown Act (GBA)</td>
<td>State employees</td>
<td>X</td>
</tr>
<tr>
<td>Pub. Educ. Emp’t Relations Act (PEERA)</td>
<td>Public educ. employees</td>
<td>X X X</td>
</tr>
<tr>
<td>Pub. Emp’t Relations Bill (Defeated SB 275)</td>
<td>State and local employees</td>
<td>X X X X</td>
</tr>
</tbody>
</table>

The remainder of this section will summarize the distinctions among the different measures on the chart. This table has been included for two reasons: First, there is a wide array of recognized impasse resolution mechanisms which have not been enacted in California or in most other states; second, since July 1, 1976, while 450,000 employees have two statutory devices available for resolving impasses without resorting to strikes, 750,000 employees have one or no statutory device available.

Most of the enacted or proposed statutory schemes include a mediation measure. Mediation is a process whereby a neutral third party attempts to assist in the resolution of disputes. Assistance is offered through interpretation, suggestion, and advice. Under

---


94. Cal. Gov’t Code § 3501(e) (West Supp. 1976); 1975 Cal. Legis. Ana-
MMBA, PEERA, and SB 275 the parties may agree on a mutually acceptable mediator, and the parties divide the costs therefor.\(^{95}\) Under PEERA and proposed comprehensive bills such as SB 275, when either the representative of the employer or the representative of the employee's organization declares the existence of an impasse, the party may request a state board to appoint a mediator.

In addition, if the board determines that an impasse exists under PEERA, the board shall appoint a mediator, for whom the board bears the costs.\(^{96}\) Under SB 275, when either party requests a state appointed mediator, state appointment and payment would ensue.\(^{97}\) In light of both the unilateral initiation of mediation and the state payment of appointed mediators under PEERA and comprehensive bills, continued use of mediation for impasse resolution can be anticipated.

Will the state pay the costs of the mediator in Sealand's public safety dispute over the twelve per cent pay increase? The answer is no. The public safety workers are covered by MMBA, not by PEERA. However, as of July 1, 1976, the public school teachers in Sealand could secure a state appointed and remunerated mediator in an impasse. Conversely, teachers at the University of California, Sealand, are completely without a statutory impasse resolution procedure.

Apart from mediation, the table reveals MMBA provides no other express devices for resolution of impasses reached by local public employees. The MMBA, however, permits parties to consent to additional procedures; MMBA also allows local governments and agencies to adopt reasonable rules and regulations that may include provisions for additional dispute resolution procedures.\(^{98}\) Perhaps predictably, the local option provision has resulted in widespread variation of impasse mechanisms affecting California's more than

---


900,000 local public employees. Recently, the Legislature has resisted both specific recommendations and comprehensive bills which would extend statutory impasse resolutions beyond the mediation stage. After mediation has been discussed, the legislators, among others, have thus far reached an impasse over other impasse procedures.

In the table at the beginning of this section, it is obvious PEERA and SB 275 provide a new specific statutory impasse resolution—fact-finding with recommendations. PEERA's tripartite fact-finding may be summarized in the following illustration:

1. The Sealand public educational employees and employer cannot reach agreement over a proposed pay increase. An employees' organization declares an impasse and requests the appointment of a mediator. Unfortunately, the mediator cannot effect a settlement. However, the mediator may determine fact-finding is appropriate, and the employee organization may thereafter request appointment of a fact-finding panel.

2. The panel is tripartite: One member is selected by the employee association; one is selected by the employer; one is selected by the state board.

3. The panel meets with the parties and may conduct inquiries, investigations, and hearings. In determining its findings and recommendations, the panel must consider certain criteria, including applicable laws, party stipulations, public interests, public welfare, financial ability of the public school employer, wage comparison among comparable communities, and consumer price index.

4. The panel's findings of fact and advisory recommendations for settlement must be submitted first to the parties; the employer must then publicly disclose the panel's report within ten days after


100. See generally 1972 Cong. Hearings 31.


103. Id.

104. Id. § 3548.2.
If the panel’s recommendation is accepted by both the Sealand employer and employees’ organization, the interest dispute is settled, and the impasse is circumvented. We shall assume the panel recommends a ten per cent pay increase that the Sealand School District refuses to accept.

A return to the table of measures for resolving interest disputes makes it apparent that neither the MMBA nor the newly enacted PEERA provides express statutory mechanisms beyond mediation or mediation and fact-finding. Nevertheless, the table indicates legislators should be at least cognizant of other impasse resolution devices.

For example, the Legislature is doubtlessly aware of voluntary but final and binding arbitration. Essentially, binding arbitration involves the final resolution of a dispute by a neutral third party who considers the position of both parties. Under voluntary binding arbitration, both the employer and employee agree to accept the decision of an arbitrator. Put differently, the parties may submit to arbitration; but once they submit, they must accept the decision. However, under compulsory binding arbitration, the parties must submit to arbitration and must accept the decision.

One variation on binding arbitration was included as part of a 1973 model recommendation to the Legislature. Binding arbitra-

105. Id. § 3548.3.

106. See also Cal. Gov’t CODE §§ 3548.5-6 (West Supp. 1976); these sections provide for a voluntary binding arbitration device for impasse resolution. Note, however, that the arbitration is expressly limited to disputes arising out of existing agreements. Therefore, the device is applicable to rights disputes rather than interests disputes.


tion was originally included in SB 275 and in similar bills. Under SB 275, there was one exception to the strictly advisory status of the fact-finding panel's recommendations. Specifically, the recommendations were to have been accepted when the following had occurred:

(1) Either the employer or employee rejects the recommendation of the fact-finding panel;

(2) A superior court enjoins a public employee strike on the ground that such a disruption would imminently imperil public health or safety; and

(3) The court directs the parties to accept the panel's recommendations.\(^{110}\)

When these three acts occur, fact-finding becomes the equivalent of compulsory arbitration. The transformation from advisory fact-finding to compulsory arbitration would follow a readily foreseeable route. First, one party, probably the employee organization, unilaterally declares an impasse. Second, the mediator is requested and appointed. Third, one party unilaterally requests fact-finding, but the other party refuses to accept the recommendation. Finally, because the court finds a threatened strike imperils public safety, it enjoins the strike but also requires the acceptance of the panel's recommendations. In short, under SB 275, advisory fact-finding has the potential to become compulsory binding arbitration.\(^{111}\)

The preceding discussion reveals that SB 275 authorizes public employee strikes if either party rejects the fact-finding panel's recommendations. When the public-peril exception precludes an authorized strike, the employees secure, in effect, compulsory binding arbitration. In the private sector, the authorized strike is considered the lubricant for the design of a reasonable and realistic bargaining vehicle.\(^{112}\) Likewise in the private sector, an agreement to submit disputes to binding arbitration is ordinarily the *quid pro quo* for the agreement not to strike.\(^{113}\) Accordingly, the authorized


\(^{111}\) See Wheeler, *Is Compromise the Rule in Fire Fighter Arbitration?*, 29 *Ann. J.* 176 (1974). Wheeler observed that although the employer's proposals are often accepted by the arbitrator or factfinder, the employer usually wins no new advantage when it wins because the original proposal is generally made by the employees' organization. Id. at 180-81.

\(^{112}\) *Alternatives, supra* note 64, at 463. See also 1972 *Cong. Hearings* 87-88.

\(^{113}\) Feller, *supra* note 76, at 757. For an example of the United States Supreme Court's adherence to the *quid pro quo* notion, see United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 (1960).
public sector strike under SB 275 may be viewed as an additional mechanism for creating pressures to resolve impasses. If public interests preclude the authorized strike, compulsory binding arbitration is available under SB 275 in lieu of the strike mechanism.

In summary, the table on impasse resolution of interest disputes reveals four enacted and proposed statutory schemes. Local employees may resolve interest disputes only by mediation unless local rules provide procedures beyond MMBA. State employees do not have a statutory impasse resolution device under the George Brown Act. Public educational employees may use statutory devices of mediation and advisory fact-finding. However, most public employees and employers could use mediation, advisory fact-finding, and compulsory arbitration or authorized strikes under recommended model legislation such as the proposed but defeated SB 275.

**AN ANALYSIS OF FOUR FEATURES EMERGING FROM THE FOREGOING LEGISLATIVE RESPONSES**

**Feature 1: An Emerging Paradox**

In 1972 the California Assembly expressed its concern about public employees' increasing participation in work stoppages. Moreover, the Assembly explicitly recognized "the possibility of further disruptions at an alarming rate." Thus the Legislature has recognized the need to prevent teachers' strikes. Consequently, under PEERA, the Legislature provides impasse resolution devices—points one and two on the impasse resolution table. Are teachers' strikes as disruptive as strikes by policemen and firemen? School children do not ordinarily attend public schools at night, on weekends, or during extended vacations. If the Sealand public school teachers walk out for the first two weeks after Labor Day, the children may make up the days the following June. Additionally, the teachers probably realize that they may make up the salary lost during the strike. Although teachers' strikes do result in disrupted services, the temporary disruption may be less critical than in other services. Nevertheless, PEERA expands impasse resolution devices for public education employment relations.

114. 1973 ADV. COUN. REPORT 36 in appendix B.
115. Id.
The Legislature has expressed the need to prevent public safety strikes. However, policemen and firemen can see only one statutory hurdle between impasse and an unauthorized strike. Under the MMBA, the Sealand public safety workers may elect to circumvent or engage in mediation. In any event, with mediation aside, the public safety workers have no statutory alternative to the unauthorized strike other than to concede defeat. Public safety services are provided and required twenty-four hours per day. Indeed, cessation of police and fire protection could be chaotically and tragically disruptive. Nevertheless, the table portrays the absence of statutory devices to prevent future disruptions of critical services. Paradoxically, the Legislature has expanded the devices for resolving teachers’ disputes in which disruptions are at most inconvenient but has declined to expand such devices for highly disruptive public safety strikes.

**Feature 2: An Emerging Fiscal Impact**

There is a dearth of information regarding the fiscal impact of legislation such as PEERA and SB 275. On June 16, 1975, the California Legislative Analyst estimated the fiscal effects of the passage of the bills. The estimated impact can be summarized as follows:

<table>
<thead>
<tr>
<th>Fiscal Effect</th>
<th>PEERA$^{117}$</th>
<th>SB 275$^{118}$</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. General fund appropriated for initial support of Board:</td>
<td>$300,000</td>
<td>$300,000</td>
</tr>
<tr>
<td>2. Estimated annual cost for support of Board:</td>
<td>1,000,000</td>
<td>5,400,000</td>
</tr>
<tr>
<td>3. Mandated local program:</td>
<td>Undetermined</td>
<td>Undetermined</td>
</tr>
</tbody>
</table>

Moreover, the Legislative Analyst indicated: “Collective bargaining by state employees would impose drastic changes in present state personnel management and employee compensation practices and would have a substantial impact on state costs.”$^{119}$ The pre-

---

$^{117}$ CAL. LEGIS. ANALYST, ANALYSIS OF SENATE BILL No. 160, 1975-76 Reg. Sess. (Aug. 21, 1975). Although the Legislative Analysis estimates the annual administrative cost of the Board at $100,000, the Institute of Industrial Relations, Univ. of Cal., Berkeley, estimates the cost to be $545,000. Id. at 2.

$^{118}$ CAL. LEGIS. ANALYST, ANALYSIS OF SENATE BILL No. 275, 1975-76 Reg. Sess. (June 17, 1975). In this analysis, estimates of annual administrative costs range from $3.6 to $5.4 million. Id. at 4. At 5, however, the analysis portrays only the highest estimates of the costs. Compare the presentation of the highest estimated costs at 5, with the presentation of the range of estimated costs in 1975 CAL. LEGIS. ANALYST 54-58.

$^{119}$ 1975 CAL. LEGIS. ANALYST 47.
ceding costs and the idea of drastic changes were not widely heralded during the hearings on SB 275 and kindred proposals. Potential fiscal impacts of other similar proposals may emerge as an increasingly debatable feature in forthcoming proposed vehicles for negotiations and impasse resolution. Under PEERA, approximately 450,000 public education employees are covered for an estimated $1 million in administrative costs. Under SB 275, more than 1,000,-
000 state and local employees would be covered; however, the estimated administrative costs may be as high as $5.4 million. The fiscal impact of SB 275 was probably a quiet but potent factor in its defeat.120

Feature 3: An Emerging Peril

Testifying before a 1974 hearing on work stoppages in California, one union official forthrightly predicted there will be “more and more” strikes by firemen unless the laws are changed.121 In addition, since 1972 the Assembly has recognized “the possibility of further disruptions at an alarming rate.”122 The union leader’s and the Assembly’s forecasts were both accurate.

When public employees decide it is in their self-interest to disobey the law, a peril to public order emerges. Self-interest is one underlying rationale for both obedience and disobedience of the law. For example, self-interest is one motivation for most people to obey traffic signals. Likewise, self-interest is apparently one motivation for disobeying statutes which preclude proven methods for pressing economic demands. In the absence of sufficient legal vehicles for negotiation and resolution of interest disputes, the public may have to face the peril of rewarding disobedient employees.123

120. What are the alternate sources of funding for pay increases secured through PEERA and SB 275? The scope of this article does not permit detailed pursuit of this question. Briefly, if the Sealand teachers eventually secure the ten per cent increase recommended by the fact-finding panel, increased property tax assessments are likely to be the main source of additional income. In short, through PEERA, the Legislature provides another mechanism under which local pay increases are financed by local tax increases.

What is the source of funds for pay increases under SB 275? The main source of funding would be the general fund. Thus, by defeating legislation which could result in additional pay increases for state employees, the Legislature perhaps averts the necessity of increasing state taxes.

121. 1974 CAL. HEARING 106.

122. 1973 ADV. COUN. REPORT 36 of appendix B.

123. See generally Hoover, Police, Firemen, Doctors: Self-Interest Erases
For example, the City of Sealand’s “last offer” to the public safety workers was a 3.5 per cent increase. The employees first held out and then walked out, demanding a twelve per cent increase. We have seen that existing legal sanctions are relatively limited in terminating the disruption. Besides, it is axiomatic that the court could not order the arrest of five-hundred policemen and firemen for contempt. After residential and commercial properties were destroyed by unattended fires, Sealand reconsidered its “last offer” and agreed to a nine per cent pay increase. This article suggests an emerging peril to the stability of social order in the Sealand scenario. There is perhaps the risk of chaos when public employees turn to the extreme behavior of disrupting vital community services.

Feature 4: An Emerging Opportunity

The Legislature’s enactment of PEERA, notwithstanding defeat of SB 275, presents an opportunity. From the standpoint of the public and public employees, SB 275 presented the advantage of interposing additional impasse resolution devices between impasse declarations and disruption of governmental services. The table graphically depicts the absence of statutory mechanisms under bills such as MMBA and GBA and the potential presence of statutory mechanisms under proposals such as SB 275. Enactment of PEERA perhaps represents middle-of-the-road progress. Nevertheless, the provision of additional impasse resolution devices presents an opportunity to experience statewide use of fact-finding. In addition, there is an opportunity under PEERA to explore the question of whether the shift in statutory language from “meet and confer” to “meeting and negotiating” results in a statewide atmosphere of discussions and bargaining among equals.

In the opening words of PEERA, the Legislature declares it is a desirable state policy to expand the jurisdiction of the newly created public education board to cover other employers and employees in the public sector. Such a legislative expansion would result in the transformation of the Educational Employment Relations Board into the Public Employment Relations Board (PERB). In short, the 1975-1976 Legislature laid the foundation


125. Id.
for expanding PEERA into a comprehensive public employment statute. At least in part, the statutory transformation may be affected by the extent to which the potential opportunities in PEERA are successfully converted into positive accomplishments.

Disputes over interests, in both the public and private sectors, are passing through certain phases in at least three paradigms or models. The characterization can be related to emerging opportunities in evolving public sector legislation.

### Comparative Analysis of Phases and Paradigms of Interest Dispute Resolutions

<table>
<thead>
<tr>
<th>Paradigms</th>
<th>Phases</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Negotiation</td>
</tr>
<tr>
<td>B</td>
<td>Impasse</td>
</tr>
<tr>
<td>C</td>
<td>Strike</td>
</tr>
</tbody>
</table>

Neither the phases nor the paradigms are intended to be exhaustive. However, useful considerations may be gleaned from the chart. For example, interest disputes in each model begin and end with negotiation and settlement phases. Although settlement may be merely an agreement to disagree, the employees nevertheless continue to perform or resume performance of their functions. Under paradigm A, an employees' organization may initially demand a compensation increase of twelve per cent during phase I discussions. If the employer offers a four per cent increase but the parties compromise on an eight per cent increase, the discussions under model A would be complete because the two essential phases of negotiation and settlement have been completed.

Even though paradigm B begins with negotiation and ends with settlement phases, an impasse phase has been added. For several reasons the discussion mechanism, either through its design or use, has temporarily become an inadequate vehicle for transporting the parties to settlement. In the language of the Legislature, further discussions become temporarily "futile."\(^\text{126}\)

Notwithstanding the impasse under model B, the parties may eventually reach agreement without the employees resorting to the

---

\(^{126}\) Id. § 3540.1(f).
strike. For example, the employees may demand a fourteen per cent increase. The employer's counteroffer is four per cent. Although the employer is willing to "compromise" the difference, the offer is only for a five per cent increase and is presented on a take-it-or-leave-it basis. If the employees "leave it" without leaving the job, further negotiations become temporarily futile. So long as the employees do not resort to the strike, the employer and employees under paradigm B eventually settle. Either implicitly or explicitly the parties agree to an increase at some rate within the four to fourteen per cent range.

Model C demonstrates that disputes begin with negotiation of a proposal and end with settlement. However, impasse and strike phases are added to the route. When disputes pass through the four phases of paradigm C, governmental services are disrupted. In California, ninety-five per cent of public sector strikes of more than one day are settled either by an agreement on terms or by an agreement to submit the issues to a neutral party. If strikes are almost invariably ended by agreement, striving to procure the agreement before rather than after the governmental disruption is a highly worthwhile undertaking.

CONCLUSION

In PEERA, the Legislature has taken another modest step in the design of vehicles for negotiation and impasse resolution. PEERA offers certain parties the opportunity to avert strikes in the course of reaching agreement. Conceivably, the Legislature could further help avert public sector strikes by enacting two measures: First, the Legislature could amend PEERA to cover the remainder of state and local public employees in California; second, the Legislature could amend PEERA to include other impasse resolution devices.

Other states and countries have successfully enacted public sector legislation providing a complete system of collective bargaining and impasse resolution devices which include the right to strike. A blanket proscription of public employee strikes does not work, for it may rob a bargaining vehicle of its usefulness and reasonableness.

Under existing California statutes, there are either no, one, or two impasse resolution devices for interest disputes. When public em-

129. Alternatives, supra note 64, at 470-75.
130. Id.
employees deem the statutory mechanisms inadequate, many have demonstrated their willingness and ability to participate in unauthorized strikes to press their economic demands.

The legislative architects in California and the majority of other states have at least two choices on public sector strikes. Legislators may choose not to design improved vehicles for negotiation and resolution of impasses. Such a decision may indicate the Legislature’s intention to permit the public to endure the consequences of disrupted governmental services. Alternatively, the Legislature may choose to design other vehicles for additional employees to avert some, if not most, public employee strikes. In California more than 2,600 public employers, 1,000,000 public employees, and 20,000,000 residents may be affected by the Legislature’s choice.

THOMAS M. FIORELLO