Panel: Public & Private Sector Negotiations: Distinctions & Similarities (CLE)

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Recommended Citation
DOI: https://doi.org/10.58188/1941-8043.1482
Available at: https://thekeep.eiu.edu/jcba/vol0/iss10/21

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THREE TYPES OF BARGAINING SUBJECTS

- **MANDATORY SUBJECTS**
  required to negotiate

- **PERMISSIVE SUBJECTS**
  allowed to negotiate

- **PROHIBITED SUBJECTS**
  precluded from negotiating
The nature of the bargaining rights controls:

• whether the employer is required to provide information to the union

• whether an employer may make unilateral changes in a practice during the life of the bargaining agreement

• whether an employer must negotiate the impact of a change

• whether an employer has committed an unfair labor practice

• whether the parties have bargained in good faith

• whether the parties have reached impasse

• what matters can be submitted to fact finding or interest arbitration
IN THE PRIVATE SECTOR MANDATORY BARGAINING
SUBJECTS ARE DEFINED BY SECTION 8(d) OF THE NLRA

(d) Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the 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, …
New York

“PERB must decide whether the demand has a greater impact on the employees’ wages, hours and working conditions, or on the employer’s right to determine the manner, method, and extent of the governmental services it offers.” Bridge & Tunnel Officers Benevolent Ass’n, 12 PERB ¶ 4614 at p. 4739 (1979)

Texas

… bargaining is required “only if it has a greater effect on working conditions than on management prerogatives.” Texas Corpus Christi Fire Fighters Association v. City of Corpus Christi, 10 S.W.3d 723, 728 (Tex. App. 1999)

California

“If an action is taken pursuant to a fundamental managerial or policy decision, it is within the scope of representation only if the employer’s need for unencumbered decision making in managing its operations is outweighed by the benefit to employer-employee relations of bargaining about the action in question.” Bldg. Material & Constr. Teamsters’ Union v. Farrell, 715 P. 2d 648, 653 (Cal. 1986)
BARGAINING RIGHTS DEFINED BY STATUTE

All matters relating to the relationship between the employer and employees shall be the subject of collective bargaining except those matters which are prescribed or controlled by statute. 3 V.S.A. § 904(a)

This statutory grant to the trustees of the authority to determine these subjects is not inconsistent with the idea of bargaining about whether and by what process the faculty will be given an opportunity to advise the board of trustees of its views on these issues. The statute does not provide that a subject is not open to bargaining if mentioned or referred to by statute, but only if prescribed or controlled thereby… We think it plain that the exception dealing with matters prescribed or controlled by statute under 3 V.S.A. § 904(a) precludes collective bargaining only where the outcome of any negotiations has been statutorily predetermined or expressly committed exclusively to the discretion of one party. Vermont State Colleges Faculty Federation v. Vermont State Colleges, 418 A.2d 34, 38 (Vt. 1980) (emphasis added)
EMPLOYER MOTIVE CONTROLS

- Drug testing of firefighters for disciplinary purposes mandatory, but not if motivated by safety concerns.
- Drug testing of police officers where reasonable suspicion not mandatory, but random drug testing mandatory.
- Payment of debts to city as condition of employment or promotion mandatory if motivated by financial concerns, not if motivated by reputational concerns.
ARE ANY OF THESE TESTS USEFUL AND PREDICTIVE

Virtually every managerial decision in some way relates to salaries, wages, hours, and other working conditions, and is therefore arguably negotiable. At the same time, virtually every such decision also involves educational policy considerations and is therefore arguably nonnegotiable.

DOES PUBLIC SECTOR BARGAINING USURPE THE RIGHTS OF THE ELECTORATE

There would be little room for community involvement if agreements concerning educational policy matters could be negotiated behind closed doors … A private employer may bargain away as much or as little of its managerial control as it likes. However, the very foundation of representative democracy would be endangered if decisions on significant matters of governmental policy were left to the process of collective bargaining negotiation, where citizen participation is precluded. Ridgefield Park Education Association v. Ridgefield Park Board of Education, 393 A.2d 278, 287 (N.J. 1978)
Designating a subject as bargainable means that the decision making process has moved from the open public forum of normal political processes to a closed forum where the union speaks for all employees. *It is a form of delegation of public decision making.* Whether a subject is considered bargainable depends on whether it is appropriate to move the particular decision from the open political process to the closed negotiation process. (emphasis added)

SUMMERS’ PROPOSED CONSTRUCT

“…those who have a significant interest in the decision should have a proportionate effective voice”

- where the two opposing political interests – taxpayer/residents and employees – are grossly unbalanced, collective bargaining serves to adjust the imbalance
- where public management and the employees have opposing interests, but taxpayers or other groups have no substantial interests, the two interest groups can be allowed to work out their differences collectively
- if bargaining by the two parties shuts out other groups that have substantial interests, depriving them of effective voice in the decision, the collective bargaining is inappropriate
- if the employees have strongly opposing interests among themselves, then the union ought not be able to shut out from public discussion those who have different views
SUMMERS’ ANALYSIS AS APPLIED

- Economic terms such as salaries, medical benefits, or pensions, have a direct impact on the budget and taxes and must be bargained because public employees are at a distinct political disadvantage in the normal political process.

- Decisions concerning employee discipline, seniority, or job assignments are appropriately bargained because they are issues in which taxpayers have little interest.

- Decisions concerning discipline of students should not be decided through bargaining because parents have strong interests which should be represented.
DOES PUBLIC SECTOR BARGAINING CAUSE GOVERNMENTAL INEFFICIENCIES

“Do we really want some work rule negotiated prior to 9/11 to prevent us from finding somebody who is carrying a bomb on a plane with your momma?” Senator Phil Gramm

“When it comes to responding to new intelligence or terrorist threats on a moment’s notice, we don’t have time to check with a shop steward.” TSA spokesperson

“…Democrats argue that TSA employees have a right to collective bargaining, and maybe they do. OK. But that is not the question. The question is will unionized screeners make air travel safer? Let’s see. Have teachers’ unions made the schools better? Have government employee unions improved [the] service at the DMV? …” MSNBC Tucker Carlson
INCONSISTENT RESULTS AMONG STATES

- class size
- school calendar
- drug testing
- smoking
- subcontracting