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Labor Law: Sympathy Strikes Uner the Minnesota Public Employment Relations Act

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Labor Law: Sympathy Strikes Under the Minnesota Public Employment Relations Act

Two bargaining units of St. Paul city employees,[1] represented by Council 91 of the American Federation of State, County and Municipal Employees, commenced a lawful primary strike[2] against the city of St. Paul.[3] Anticipating the establishment of picket lines by Council 91, the city advised[4] its other employees that honoring Council 91's picket lines would constitute a sympathy strike[5] in violation of the Minnesota Public Employment Labor Relations Act (PELRA).[6] In response, representatives of the nonstriking employees sought a declaratory judgment that honoring the primary strikers' picket lines would not violate PELRA.[7] The district court ruled that sympathy

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1. The two units were composed of technical and clerical workers. General Drivers Local 120 v. City of St. Paul, 270 N.W. 2d 877, 878 (Minn. 1978).

2. A primary strike is a work stoppage involving only those employees who are participants in the dispute that resulted in the strike. *See* Kaynard v. Local 282, International Bhd. of Teamsters, 275 F. Supp. 19, 26 (E.D.N.Y. 1967).

3. The city had refused Council 91's request to submit the dispute to binding arbitration. 270 N.W.2d at 878. Under the Minnesota Public Employment Labor Relations Act (PELRA), MINN. STAT. §§ 179.61-.76 (1978), public employee strikes are legal when the employer refuses to accept binding arbitration as an impasse resolution technique. *Id.* § 179.64(7); *see* notes 30-32 *infra* and accompanying text.

4. This notification was contained in a memorandum dated May 24, 1976, two days prior to the commencement of Council 91's strike. Appellants' Brief and Appendix at 4, General Drivers Local 120 v. City of St. Paul, 270 N.W.2d 877 (Minn. 1978).

5. A sympathy strike occurs when a bargaining unit not involved in a contract dispute with the employer honors the picket line of a striking bargaining unit that is involved in the dispute. The sympathy strikers need not be employees of the struck employer, although they usually are. *See* notes 40-45 *infra* and accompanying text.

6. MINN. STAT. §§ 179.61-.78 (1978). In addition to the May 24th memorandum, *see* note 4 *supra,* the city also sent a letter to employees who did not appear at work on the first day of the strike. Appellants' Brief and Appendix, *supra* note 4, at 5. Each letter stated,

> You are not a member of a unit that has the legal right to strike and you are, therefore, engaged in an illegal strike. By the terms of the state law, an illegal strike can subject you to disciplinary action, including suspension or termination of employment. Failure to report to work is direct insubordination by you to a proper and lawful order and is violative of the Personnel Rules and is also subject to disciplinary action.
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> I am, therefore, ordering you to report to your supervisor for work for your next normal work shift.

Id. at A-12 (letter to Douglas H. Nevin, city employee). If the strike were found to be illegal, the strikers were subject to several penalties, including termination of employment, probation for up to two years, and loss of pay for all days on which they were on strike. *See* MINN. STAT. § 179.64 (1978).

7. 270 N.W.2d at 879. The unions also sought an injunction to prevent the city from taking any disciplinary action against the union membership. *Id.*

strikes by public employees were not permitted under PELRA. The Minnesota Supreme Court, four justices dissenting, affirmed the trial court decision, *holding* that the exceptions to the prohibition against strikes in PELRA apply only to the bargaining units directly involved in a dispute and do not extend to other bargaining units. *General Drivers Local 120 v. City of St. Paul,* 270 N.W.2d 877 (Minn. 1978).

At common law, public employees were not allowed to engage in either primary or sympathy strikes.[8] This absolute prohibition has been challenged in recent years, however, as the dramatic rise in public employment[9] has increased the bargaining power of public employees. This enhanced bargaining power, coupled with an increase in the political activity of the public employees,[10] has precipitated several strikes that, although illegal,[11] have undoubtedly en-

8. Head v. Special School Dist. No. 1, 288 Minn. 496, 507, 182 N.W.2d 887, 894 (1970), *cert. denied,* 404 U.S. 886 (1971). *See also* Bennett v. Gravelle, 451 F.2d 1011, 1012 (4th Cir. 1971), *appeal dismissed,* 407 U.S. 917 (1972); United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 882 (D.D.C.), *aff'd,* 404 U.S. 802 (1971). Several justifications have been offered for the total ban on public employee strikes. According to supporters of the prohibition, granting public employees the right to strike would enable them to exert undue control over public funds. *See* Herman, *Strikes by Public Employees: The Search for "Right Principles,"* 53 CHI. B. REC. 57, 62 (1971). Strike opponents also contend that the absence of competition or profit motive in government activities places the public employees in a stronger bargaining position than their private counterparts. *See* Riggin, *Public Sector Labour Disputes—Lessons to be Learned,* 4 CAN. B.A.J. July 1973, at 5. Finally, public employee strikes are generally considered to be more harmful to the public than strikes in the private sector because of the essential nature of many public services. *See* City of Webster Groves v. Institutional & Pub. Employees Union, 524 S.W.2d 162, 166 (Mo. Ct. App. 1975).

The strike power, however, is often regarded as an essential element of any collective bargaining system seeking to achieve negotiated settlements. Bernstein, *Alternatives to the Strike in Public Labor Relations,* 85 HARV. L. REV. 459, 463 (1971). Without the right to strike, public employees are faced with an imbalance of power at the bargaining table. *See* Kheel, *Strikes and Public Employment,* 67 MICH. L. REV. 931, 941 (1969). Moreover, a majority of public workers now perform jobs that are often similar to those of employees in the private sector. *See* Note, *Applying Private Sector Law to the Public Sector Strike in Oregon,* 56 OR. L. REV. 251, 253 (1977).

9. In January, 1941, there were four million federal, state, and local employees in the United States. U.S. Bureau of Labor Statistics, 53 MONTHLY LAB. REV. 1171 (1941). By December, 1978, total civilian government employment had risen to approximately 15.4 million workers, a 350% increase in 37 years. U.S. Bureau of Labor Statistics, 102 MONTHLY LAB. REV., Feb. 1979, at 77.

10. *See* Comment, *An Analysis of the Comprehensive Approach to the Public Employee Strike Problem,* 44 MISS. L.J. 766, 769 (1973).

11. According to one commentator, the number of illegal strikes has increased because "[t]he punitive and overly-rigid repressive laws [against public employee strikes] were counterproductive. Rather than promoting labor peace by helping to improve labor relations and prevent strikes, the laws encouraged labor unrest and strikes and served to fuel the uncertainty." Haemmel, *Government Employees and the Right to Strike—The Final Necessary Step,* 39 TENN. L. REV. 75, 83 (1971).

couraged states to develop procedures for the peaceful resolution of public employee bargaining disputes.[12]

In the 1940's, the Minnesota Legislature addressed for the first time the unique problem presented by unresolved labor disputes in the public sector.[13] The first legislation, the Charitable Hospitals Act,[14] was passed in 1947 following employee unrest in Minnesota hospitals.[15] This Act prohibits strikes by employees of nonprofit and government hospitals and provides for binding arbitration as the means of dispute resolution. In 1951, after the Minnesota Supreme Court ruled that courts could not enjoin public employee strikes, except those by public safety officers,[16] the Minnesota Legislature responded with an express prohibition of all public employee strikes.[17] Unlike the Charitable Hospitals Act, however, the legislature did not provide for binding arbitration as a means of resolving disputes; instead, an advisory impasse panel and grievance procedures were established to allow employees to voice their complaints.[18] In 1957, the legislature mandated a broader approach by instructing public employers and employees to meet, with the assistance of a state-

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These strikes have been effective, despite their illegality, because settlements negotiated to end illegal strikes often contain amnesty provisions that prohibit imposing penalties on the strikers. *See* Note, *The Strike and its Alternatives: The Public Employment Experience,* 63 KY. L.J. 430, 431 (1975).

12. Both the federal government and the states have sought to construct systems for the peaceful resolution of public employee bargaining disputes. An important step was taken in 1962 when President Kennedy granted federal government employees collective bargaining rights. Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 Compilation), *superseded by* Exec. Order No. 11, 491, 3 C.F.R. 861 (1966-1970 Compilation), *reprinted in* 5 U.S.C. § 7301, at 576 (1976). The superseding executive order, promulgated by President Nixon in 1969, streamlined the procedure for determining union representation, established a labor council to administer the program and set out a more detailed list of unfair labor practices. *See* Wray, *Crisis in Labor Relations in the Federal Service: An Analysis of Labor-Management Relations in the Federal Service Under Executive Order 11491,* 37 BROOKLYN L. REV. 79, 84-86 (1970). Many states followed the federal lead, maintaining the strike prohibition but establishing dispute settlement techniques based on mediation by impartial panels. Most states have enacted a public employee dispute settlement system. *See, e.g.,* CAL. GOV'T CODE §§ 3500-3510, 3512-3526 (West 1966, Supp. 1978 & Supp. 1979); MASS. ANN. LAWS ch. 150E, §§ 1-15 (Michie 1976 & Supp. 1979); N.Y. CIV. SERV. LAW §§ 200-214 (McKinney 1973 & Supp. 1978); PA. STAT. ANN. tit. 43, § 215.1-.5 (Purdon 1964 & Supp. 1979).

13. *See* Note, *The Minnesota Public Employment Labor Relations Act of 1971: Another Public Employment Experiment,* 57 MINN. L. REV. 134, 134 (1972).

14. *See* Act of Apr. 14, 1947, ch. 335, 1947 Minn. Laws 524 (codified at MINN. STAT. §§ 179.35-.39 (1978)).

15. *See* Note, *supra* note 13, at 134.

16. Board of Educ. v. Public School Employees' Union Local 63, 233 Minn. 144, 152 45 N.W.2d 797, 802 (1951).

17. *See* Act of Mar. 24, 1951, ch. 146, 1951 Minn. Laws 208 (repealed 1971).

18. *Id.*

appointed mediator.[19] Under these provisions, a neutral mediator could determine the facts underlying the dispute and offer the parties compromise proposals, but could not force the parties to reach agreement.[20] Finally, in 1965, additional measures to encourage negotiated settlements and determine formal bargaining units were added.[21]

Despite these legislative efforts, public employees were dissatisfied because none of the procedures enacted required "employee demands . . . to be formally recognized and there was no final authority to resolve conflict."[22] After a protracted illegal strike by Minneapolis teachers in 1970,[23] the Minnesota Legislature also realized that these initial steps did not give public employees the bargaining strength necessary to avoid disruptive work stoppages.[24] In an effort to avoid future labor problems,[25] the 1971 legislature replaced the prior statute concerning public employees with PELRA, "a comprehensive attempt to develop a bargaining relationship similar to the private sector labor relations model."[26] PELRA was designed to encourage the settlement of labor disputes through negotiations,[27] and it placed an affirmative obligation on both employers and employees "to meet and negotiate in good faith" about the "terms and conditions of employment."[28] If negotiations failed to result in settlement, the 1971 Act allowed the dispute to be sent to binding arbitration[29] upon the

19. *See* Act of Apr. 27, 1957, ch. 789, § 1, 1957 Minn. Laws 1073 (repealed 1971). In 1965, the law was changed to require parties to meet and *confer*. Act of May 26, 1965, ch. 839, § 2, 1965 Minn. Laws 1072 (repealed 1971).

20. Note, *supra* note 13, at 135.

21. *See* Act of May 26, 1965, ch. 839, 1965 Minn. Laws 1072 (repealed 1971).

22. Note, *supra* note 13, at 135.

23. The Minneapolis teachers conducted a three week illegal strike in April, 1970. The impasse was finally resolved when the teachers accepted a compromise wage package accompanied by a no-reprisal clause preventing the school board from imposing any penalties on the teachers for the illegal strike. *Minneapolis Teachers Strike Settlement Provision Circumvents Anti-strike Law*, [1970] 347 GOV'T EMPL. REL. REP. (BNA) B8-B9.

24. *See* Note, *supra* note 13, at 135-36.

25. The Act states that "the legislature has determined that overall policy may best be accomplished by: . . . establishing special rights, responsibilities, procedures and limitations regarding public employment relationships which will provide for the protection of the rights of the public employee, the public employer and the public at large." MINN. STAT. § 179.61 (1978).

26. Note, *supra* note 13, at 136.

27. International Bhd. of Teamsters Local 320 v. City of Minneapolis, 302 Minn. 410, 415, 225 N.W.2d 254, 257 (1975).

28. MINN. STAT. § 179.65(4), .66(2)-(4) (1978).

29. The method of selecting an arbitrator has remained unchanged since 1971. The arbitration is conducted by the Public Employee Relations Board (PERB). PERB presents a list of seven arbitrators to the disputing parties. The parties alternatively strike names from the list until three remain or, if either party requests, until only a single arbitrator is left on the list. *Id.* § 179.72 (5)-(6) (1978).

agreement of both parties.[30] The absolute prohibition against public employee strikes, however, was continued.[31]

Because PELRA was essentially a voluntary system, it still did not provide public employees with sufficient negotiating strength.[32] Recognizing this deficiency in the original Act,[33] the 1973 legislature attempted to further encourage negotiated settlements by amending PELRA to allow public employee strikes in two situations.[34] The amendment provided nonessential[35] public employees with a defense to an illegal strike charge if the employer either refuses to submit the dispute to binding arbitration upon impasse[36] or rejects the arbitra-

30. *Id.* § 179.72(10) (1971) (amended 1973).

31. *Id.* § 179.64(1) (1971) (amended 1973).

32. *Proposed Amendments to the Minnesota Public Employment Labor Relations Act: Hearings on H.F. 295 Before the Minnesota House Comm. on Governmental Operations,* 68th Sess. Mar. 5, 1973 (statement of Representative Jack LaVoy, author of the amendments) (tape recording available at Minnesota State Capital Legislative Reference Library, St. Paul, Minnesota.) Representative LaVoy stated that the voluntary negotiation system created by the 1971 statute failed to provide public employees with sufficient "leverage" to encourage their employers to accept reasonable terms. *Id.*

33. *Id.*

34. The 1973 amendments maintained the general strike prohibition:

> No person holding a position by appointment or employment in the government of the state of Minnesota, or in the government of any one or more of the political subdivisions thereof, . . . may engage in a strike, nor shall any such person or organization of such person or its officials or agents cause, condone, instigate, encourage, or cooperate, in a strike except as may be provided in subdivision 7.

MINN. STAT. § 179.64(1) (1978). Two exceptions to this general prohibition appeared in subdivision 7:

> Either a violation of section 179.68, subdivision 2, clause (9), [employer's duty to comply with valid arbitration agreement], or a refusal by the employer to request binding arbitration when requested by the exclusive representative pursuant to section 179.69, subdivision 3 or 5, is a defense to a violation of this section, except as to essential employees.

Id. § 179.64 (7) (1978). *See also* note 38.

35. Strikes by essential public employees are illegal in Minnesota. MINN. STAT. § 179.64 (1) (1978). PELRA originally defined "essential employees" as workers "whose employment duties involve work or services essential to the health or safety of the public and the withholding of such services would create a clear and present danger to the health or safety of the public." Act of Nov. 3, 1971, ch. 33, § 3, 1971 Ex. Sess. Minn. Laws 2709. A 1979 amendment changed the definition to mean "firefighters, police officers, highway patrolmen, guards at correctional institutions, employees of hospitals other than state hospitals and registered nurses, as defined in section 148.171, engaged in the practice of professional nursing and employed in a state hospital or state nursing home." Act of June 5, 1979, ch. 332, § 58, 1979 Minn. Sess. Law Serv. 934 (West) (to be codified as MINN. STAT. § 179.63(11)). Essential employee disputes that reach the impasse stage are sent to binding arbitration. MINN. STAT. § 179.72(10) (1978). In this Comment, all references to Minnesota public employees are to nonessential employees only, unless specifically noted otherwise.

36. Under PELRA, the Bureau of Mediation Services certifies when an impasse

tor's decision in a dispute that has been submitted to binding arbitration.[37] In 1979, two additional defenses were added for state employees.[38] By giving public employees a qualified right to strike, Minnesota joined a group of only seven other states that allow any type of public employee strikes.[39]

The language of the PELRA provision granting the limited right to strike does not specify whether sympathy strikes are permitted.[40] In the private sector, however, sympathy strikes by employees of a common employer are clearly legal.[41] Moreover, courts generally do

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has been reached. MINN. STAT. § 179.69(3) (1978).

37. MINN. STAT. 179.64(7) (1978). *See* note 34 *supra.*

38. Non-essential state employees are provided with a defense to an illegal strike charge if there is a "disapproval by the legislative commission on employee relations pursuant to section 3.985 or a failure by the legislature to approve a negotiated agreement or arbitration award pursuant to section 179.74 . . . ." Act of June 5, 1979, ch. 332, § 58, 1979 Minn. Sess. Law Serv. 934 (West) (to be codified as MINN. STAT. 179.64(7)).

39. The following states grant a limited right to strike to public employees: Alaska, ALASKA STAT. § 23.40.200 (1972); Hawaii, HAWAII REV. STAT. § 89-12 (1976); Montana, MONT. CODE ANN. § 39-31-201 to -311 (1978); Oregon, OR. REV. STAT. § 243.726-.736 (1977); Pennsylvania, PA. STAT. ANN. tit. 43, § 1101.1003 (Purdon Supp. 1979-1980); Vermont, VT. STAT. ANN. tit. 21, § 1730 (1978); Wisconsin, WIS. STAT. ANN. § 111.70 (West 1974 & Supp. 1979-1980).

40. For discussion of the conflicting inferences to be drawn from this omission, see note 52 *infra.*

41. The National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), protects private workers when they engage in "concerted activities" for "mutual aid or protection." *Id.* § 157. Courts have construed this language as permitting sympathy strikes. *See, e.g.*, Kellogg Co. v. N.L.R.B., 457 F.2d 519 (6th Cir.), *cert. denied*, 409 U.S. 850 (1972); General Tire and Rubber Co. v. N.L.R.B., 451 F.2d 257 (1st Cir. 1971). Public employees, however, are not covered by the Act. *See* 29 U.S.C. § 152(2) (1976). Moreover, following the United States Supreme Court opinion in National League of Cities v. Usery, 426 U.S. 833 (1976), it is unclear whether any federal attempt to control state and local government labor relations would be constitutional. In *National League of Cities*, the court refused to allow the federal government to enforce the minimum wage and maximum hour provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 206(a), 207(a) (1976), against state and local governments, holding that "Congress may not exercise [the power to regulate interstate commerce] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." 426 U.S. at 855. Commentators disagree on the effect of the decision on the federal government's power to regulate state and local public employee collective bargaining. *Compare* Noble & Kilroy, *The Constitutionality of a National Public Employee Relations Act: A Case for States' Rights*, 13 VAL. U. L. REV. 1, 31 (1978) *and* Note, *Constitutional Implications of a Federal Collective Bargaining Law for State and Local Government Employees*, 11 CREIGHTON L. REV. 863, 892 (1978) *with* Shaller, *The Constitutionality of a Federal Collective Bargaining Statute for State and Local Employees*, 8 CAP. U. L. REV. 59, 77 (1978) ("Since the state would retain the authority to decide the terms and conditions of employment, the encroachment on its sovereignty would not approach the threshold level found necessary to invalidate the [Fair Labor Standards Act] 1974 Amendments in [*National League of Cities*].").

not require employees to cross picket lines established against employers other than their own.[42] Describing the status of private sector sympathy strikers, one court stated that "sympathy strikers stand in the same shoes as the striker with whom they sympathize."[43] This legal attitude is highly valued by organized labor because sympathy strikes not only increase the economic pressure on the employer, but also reinforce the feeling of solidarity among all unionized workers.[44]

In *General Drivers,* the Minnesota Supreme Court held that sympathy strikes[45] are not permitted under PELRA's exception to the general strike prohibition allowing employees to strike when the employer refuses the workers' request to submit the dispute to binding arbitration.[46] The court reasoned that this exception permits strikes

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42. *See, e.g.,* Redwing Carriers, Inc., 137 N.L.R.B. 1545, 1547 (1962), *enforced sub nom.,* Teamsters Local 79 v. N.L.R.B., 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 905 (1964) ("[T]he employees of Redwing engaged in protected concerted activity when they refused to cross the . . . picket line [established by workers striking against the Virginia-Carolina Chemical Corporation]."). *See also* T. KHEEL, LABOR LAW, § 30.05, at 30-183 (1976) ("The Board and the courts have interpreted [§ 8(b)(4) of the Taft-Hartley Act, 29 U.S.C. § 158(b)(4) (1976)] to protect the right of employees of a secondary employer, in the case of a lawful primary strike, to refuse to cross the primary picket line.") *But see* N.L.R.B. v. C.K. Smith & Co., 569 F.2d 162, 165, n.1 (1st Cir. 1977), *cert. denied,* 436 U.S. 957 (1978) ("[when employees] honor . . . stranger unions' picket lines at another employer's premises . . . [s]uch conduct is arguably unprotected . . . inasmuch as the . . . employees' self-interest is not directly or indirectly implicated in the primary strike.").

43. Newspaper Prod. Co. v. N.L.R.B., 503 F.2d 821, 828 (5th Cir. 1974); *see* N.L.R.B. v. Southern Greyhound Lines, 426 F.2d 1299, 1301 (5th Cir. 1970).

44. Judge Learned Hand once described this feeling of solidarity engendered by sympathy strikers: "[T]he immediate quarrel does not itself concern them, but by extending the number of those who will make the enemy of one the enemy of all, the power of each is vastly increased." N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 506 (2d Cir. 1942).

45. The court decided initially that honoring a picket line constitutes a "strike" under the PELRA definition of that term:

> "Strike" means concerted action in failing to report for duty, the willful absence from one's position, the stoppage of work, slowdown, or the abstinence in whole or in part from the full, faithful and proper performance of the duties of employment for the purposes of inducing, influencing or coercing a change in the conditions or compensation or the rights, privileges, or obligatons of employment.

270 N.W.2d at 879 (quoting MINN. STAT. § 179.63(12) (1978)). This definition is supplemented by a provision in the section that prohibits public employee strikes:

> [A]n employee who is absent from any portion of his work assignment without permission, or who abstains wholly or in part from the full performance of his duties without permission from his employer on the date or dates when a strike occurs is prima facie presumed to have engaged in a strike on such date or dates.

MINN. STAT. § 179.64 (3) (1978).

46. 270 N.W.2d at 880. The court phrased its holding in terms of the statutory

only by bargaining units directly involved in a dispute, because only those units can make the request for arbitration required by the exception.[47] In support of its interpretation, the majority found that the exception's provision that only "the exclusive representative"[48] of the bargaining unit in the dispute can request arbitration reflects a legislative recognition that separate bargaining units are an important means of preventing "disputes involving some public employees from automatically expanding to involve all public employees and thus paralyzing an entire governmental body."[49] The court then examined the statutory purpose and historical background of the exceptions. According to the court, the legislature intended the exceptions to act "only as a limited instrument for encouraging effective arbitration,"[50] and not as a reversal of the general prohibition against public employee strikes.[51] Noting that, until 1973, all public employee strikes had been prohibited, the court reasoned that if the legislature had wished to overturn this longstanding prohibition with respect to sympathy strikes, the amendments would have been phrased broadly, unlike the limited terminology of the exceptions.[52]

Contrary to what the majority opinion asserted, the express language of the statute offers little guidance in determining the availability of sympathy strikes. As the dissenting justice recognized, the statute does not "expressly [limit its application] to only employees represented by the exclusive representative requesting arbitration nor to only members of the striking bargaining unit."[53] Instead of disclos-

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exception permitting strikes when an employer does not submit disputes to arbitration upon request. It is not certain, therefore, whether the court would also prohibit sympathy strikes claimed to fall under the exception allowing strikes when the employer refuses to comply with a valid arbitration decision. Because an employer who ignores an arbitration decision engages in an unfair labor practice, *see* MINN. STAT. § 179.68 (2)(9) (1978), the court may be less willing to give such an employer protection against sympathy strikes. On the other hand, because the reasoning in *General Drivers* appears to apply equally well to both exceptions, the court may not have intended to limit its holding.

47. 270 N.W.2d at 880; *see* note 34 *supra.*

48. MINN. STAT. § 179.64(7) (1978), *quoted in* 270 N.W.2d at 880.

49. 270 N.W.2d at 880.

50. *Id.* at 881.

51. *Id.*

52. *Id.* The majority also noted that two of the eight states that allow public employee strikes, Pennsylvania and Oregon, specifically prohibit sympathy strikes. *Id.* The majority cited statutes from these two states to show that a prohibition of sympathy strikes was not "unprecedented." *Id.* The dissent, on the other hand, used the Pennsylvania and Oregon provisions to support the position that the legislature would have expressly prohibited sympathy strikes had it not wished them to occur. *Id.* at 882 (Scott, J., dissenting).

53. *Id.* at 881 (Scott, J., dissenting).

ing a legislative intent to prevent sympathy strikes, the exception's requirement that only the exclusive representative of the disputing bargaining unit request arbitration appears to serve two other unrelated functions. First, the exception merely identifies when a strike can legally occur by requiring an arbitration request as a condition precedent to application of the exception. Second, the requirement ensures that bargaining units not involved in the primary dispute are not able to dictate the dispute resolution technique to be used by the conflicting parties. Thus, it does not seem as if the exception was drafted for the purpose of prohibiting sympathy strikes.[54] Nevertheless, the majority in *General Drivers* correctly recognized that the contrary conclusion—that sympathy strikes were intended to be permissible under the exception—is also unlikely; had the legislature intended to overturn the general strike prohibition it would not have drafted the exception in the limited manner that it did.[55]

Like the language of the statute, the policy considerations underlying PELRA provide no satisfactory resolution to the sympathy strike question. The traditional ban on all public employee strikes reflected a fear that such work stoppages would virtually paralyze the government.[56] The majority's conclusion that the qualified right to strike created in 1973 does not include the sympathy strike was based in part on this concern.[57] Due to several factors, however, a right to

54. The dissent's attempt to construe the language of the statute to favor the legalization of sympathy strikes is also unconvincing. Citing the rule of statutory construction that "the expression of one thing is the exclusion of the other," *id.*, Justice Scott concluded that the express exclusion of essential employees from the exceptions indicates a legislative preference to allow "all 'nonessential' employees to have the right to invoke these defenses." *Id.* at 882. The rule of statutory construction is of little help, however, since the exclusion of "essential employees" from the right to strike fails to address the salient issue of whether the legislature intended that right to strike to include sympathy strikes.

The dissenting opinion also emphasized that the Minnesota Legislature has specifically addressed the question of sympathy strikes in other contexts. With private sector employees, the legislature denied unemployment compensation benefits to sympathy strikers. *See* MINN. STAT. § 268.09(3) (1978). Thus, according to the dissenting justices, the failure of the legislature to expressly address sympathy strikes in the exceptions evidenced a legislative intent to allow such strikes. 270 N.W.2d at 882 (Scott, J., dissenting). The connection between private employee benefits and the right of public employees to strike, however, is tenuous, at best. The unemployment compensation benefits provision specifically referred to sympathy strikers because primary strikers are clearly ineligible for such benefits. *See* MINN. STAT. § 268.09(3) (1978). In the public strike situation, on the other hand, the legislature focused its attention on the needs of primary strikers and thus was not concerned with the secondary question of sympathy strikes.

55. *See* note 52 *supra* and accompanying text.

56. *See* note 8 *supra.*

57. *See* notes 48-49 *supra* and accompanying text.

engage in sympathy strikes under PELRA would not necessarily lead to paralysis. First, the right to strike granted by PELRA is limited to nonessential employees.[58] Second, a bargaining unit may choose not to strike in sympathy with the primary striking unit, either because its membership does not want to forego the income lost during a strike or because it does not wish to arouse public animosity toward public workers. Third, government employers can easily avert an imminent sympathy strike by choosing to submit the dispute to arbitration when requested by the disputing unit. Thus, although sympathy strikes could temporarily deprive the public of some governmental services, the court's fear that sympathy strikes would "automatically . . . involve all public employees, [thereby] paralyzing an entire governmental body"[59] is largely unwarranted.

In addition to overestimating the potential for public harm from sympathy strikes, the court failed to give any consideration to the effect of the decision on PELRA's goal of encouraging reasonable settlements by providing sufficient negotiating strength to public employees. The dissenting justices recognized that the availability of sympathy strikes could determine the efficacy of the statutory right to strike: "Without the effective right to engage the support of their fellow employees, the statutory right to strike of the members of a small unit would be meaningless, since the bargaining power exerted by a unit is largely proportional to the size of the unit."[60] Indeed, during oral argument in the *General Drivers* case, the city of St. Paul, presumably acting on the assumption that no sympathy strike would occur, "candidly admitted that the City deliberately refused to arbitrate because . . . it believed it would fare better in a strike."[61]

It is apparent, therefore, that as a result of the *General Drivers* decision, PELRA's objective of developing "a bargaining relationship similar to the private sector labor relations model"[62] will remain largely unattained. Without the assistance of other bargaining units, public employees might decide that they will receive more favorable terms by compromising during the negotiating stage rather than risking the harm and uncertainties that accompany a strike. At the same time, government employers, assured of the illegality of sympathy strikes, will tend to become more confident of their ability to endure strikes. As a result, employers will not only be less likely to offer reasonable terms during the negotiating stage, but also will be more

58. *See* note 35 *supra.*

59. 270 N.W.2d at 880.

60. *Id.* at 883 (Scott, J., dissenting).

61. Appellant's Petition for Rehearing at 3, n.1, General Drivers Local 120 v. City of St. Paul, 270 N.W.2d 877 (Minn. 1978).

62. *See* Note, *supra* note 13, at 136.

willing to permit strikes to occur when an impasse is reached.[63]

Because PELRA does not discuss sympathy strikes, either directly or indirectly, the court in *General Drivers* was forced to choose between the two extremes of either generally permitting or totally prohibiting sympathy strikes. In light of the conflicting policy considerations, neither of these choices would have been satisfactory. Yet, it would have been improper judicial behavior, in view of the scant statutory guidance, for the court to impose a compromise solution on the parties. Rather, the permissibility of sympathy strikes is a question for the legislature.[64]

The possible legislative solutions to the sympathy strike issue cannot be adequately assessed, however, until a more fundamental issue is resolved: The extent to which public employees should be given negotiating strength commensurate with that of their employers. Two factors have been responsible for the traditional absence of bargaining parity between public employers and employees. First, legislators have feared that allowing bargaining parity would permit public employees to have a substantial impact on public spending, thereby resulting in undue employee influence on the political decisionmaking process.[65] Second, it has been contended that, given sufficient negotiating strength, public employees would regularly deprive the public of essential services.[66]

The strength of these rationales for maintaining unequal bargaining power, however, is uncertain. It seems unlikely that restrictions on public employee bargaining power are necessary to protect the public from undue incursions by government employees into the political process. Given that public opinion polls have consistently found that the general public does not approve of granting public employees the right to strike,[67] government officials are more likely to listen to constitutent sentiment opposing strikes than to be coerced by union pressures for settlement.

The argument that bargaining parity would result in a loss of essential public services is also unconvincing. According to some

63. An additional potential consequence of *General Drivers* is that bargaining units in Minnesota may become larger in order to increase their bargaining power.

64. *See* 270 N.W.2d at 881.

65. *See* Herman, *supra* note 8, at 62.

66. *See* City of Webster Groves v. Institutional & Pub. Employees Union, 524 S.W.2d 162, 166 (Mo. 1975); note 8 *supra.*

67. In February, 1978, the Gallup Poll reported that a majority of Americans opposes granting the right to strike to teachers, firefighters, and police. [1978] 746 GOV'T EMPL. REL. REP. (BNA) 15. Similarly, a recent Harris Poll found that most Americans oppose giving a right to strike to teachers, firefighters, and police, but favored granting the right to garbage collectors. [1978] 790 GOV'T EMPL. REL. REP. (BNA) 25, 26.

scholars in the public labor relations field, providing public employees with bargaining parity wuld reduce the number of disputes that would otherwise result in strikes.[68] With equality of negotiating power, neither side would be capable of successfully pressing unreasonable demands on the other, because the unreasonable party could not expect to emerge victorious from a strike. Moreover, as noted earlier, several aspects of the Minnesota law decrease the potential for harm from public employee strikes.[69]

Permitting public employees to engage in sympathy strikes could lead to bargaining parity in Minnesota by increasing the negotiating power of public employees. Yet, even though public employers could still choose between an arbitrated decision and a potential strike,[70] giving public employees an unlimited right to honor picket lines might shift the balance of negotiating power too far in the employees' favor. The fears of undue political influence and government paralysis could become legitimate if public employees were given excessive negotiating strength. If unlimited sympathy strikes were allowed, the government would be faced with the threat of a strike by all nonessential employees in every contract negotiation, regardless of the size or demands of the bargaining unit negotiating. Should such a widespread strike continue for more than a short period of time, the loss of public services would be substantial, and government officials would be more likely to accede to what may be unreasonable demands by the employees.

Because of the harm that could occur if the balance of negotiating strength shifted too far toward the employees in the public sector, it is important that the legislature resolve the sympathy strike issue in a way that will protect the public from harm and ensure the integrity of the political process. One possible solution would be to amend PELRA to permit sympathy strikes generally, but allow the governor to seek an injunction to halt any strikes that materially endanger the health, safety, or welfare of the citizenry.[71] Under this

68. *See, e.g.,* Kheel, *supra* note 8, at 941 ("In an environment conducive to real bargaining, strikes will be fewer and shorter than in a system where employees are in effect invited to defy the law in order to [strike]."). *See also* Bernstein, *supra* note 8, at 463 ("While potentially very destructive weapons, strikes are seldom employed; their salutary persuasive effect results from the mere existence of the possibility of a strike. What damages strikes cause are, arguably, the relatively small price paid to make collective bargaining work.").

69. *See* notes 58-59 *supra* and accompanying text.

70. *See* notes 36-37 *supra* and accompanying text.

71. This option would be analogous to the provisions of the Taft-Hartley Act, 29 U.S.C. §§ 141-144, 151-168, 171-183, 185-187 (1976), that allow the President to seek an injunction against any strike that endangers the health, safety, or welfare of the public. Some states use the injunction as a tool to control the availability of primary

plan, employees would have substantial bargaining power, yet significant disruptions of public services could be avoided. Furthermore, the danger of undue political influence by public employees would be reduced because government officials would probably not be coerced into a settlement if there were less danger of a long-term deprivation of public services. This option, however, could potentially be manipulated by a governor using this power selectively to favor individuals or organizations for political reasons. On the other hand, it might be politically unwise for the governor to appear to abuse this authority, since an unwarranted decision to seek an injunction could weaken political support from organized labor. Similarly, a decision not to seek an injunction when such action is appropriate would alienate the general public, which would be well aware of the deprivation of government services.

Bargaining parity between public employers and employees could also be achieved without amending PELRA to allow sympathy strikes. A unique method of dispute resolution in the public sector has been used for several years in Canada. This "Canadian Plan"[72] allows employees to choose the technique of impasse resolution that will be used if a deadlock occurs. The employees may choose either to submit the dispute to binding arbitration or to a conciliation board for mediation.[73] If mediation is unfavorable, the employees have a right to strike.[74] The choice, however, must be made at the outset of negotiations[75] so that employees do not gain the added advantage of being able to choose the technique that would best resolve the impasse in their favor once deadlock is reached. Under PELRA, by

public employee strikes by permitting government employers to enjoin their employees' strikes whenever public health or safety is endangered. *See, e.g.*, OR. REV. STAT. § 243.726(3) (1977); WIS. STAT. ANN. § 111.70(7m)(b) (West Supp. 1979-1980).

72. *See* Coughlin & Rader, *Right to Strike and Compulsory Arbitration: Panacea or Placebo?* 58 MARQ. L. REV. 205, 220 (1975). The plan, enacted in 1966, applies to Canadian federal employees. Public Service Staff Relations Act, ch. 72, § 1 (1966-67) (codified at CAN. REV. STAT. ch. P-35 (1970)).

73. CAN. REV. STAT. ch. P-35, § 36(1) (1970). Section 36(1) allows the bargaining agent for an employee bargaining unit to choose either of two processes for resolution of a dispute contained in the definition section of the act. *Id.* The bargaining agent may choose either "referral of the dispute to arbitration" or "referral thereof to a conciliation board." *Id.* ch. P-35, § 2. Disputes referred to the conciliation board are mediated. If mediation is unsuccessful, strikes are permitted seven days after the conciliation board reports to the parties on the results of the mediation. *Id.* ch. P-35, § 101(2)(b).

74. Only "nondesignated" employees are permitted to strike under the Canadian Plan. *Id.* ch. P-35, § 101. "Designated" employees are those workers who perform duties "which at any particular time or after any specified period of time is or will be necessary in the interest of the safety or security of the public." *Id.* ch. P-35, § 79(1).

75. *Id.* ch. P-35, § 37(2).

contrast, the employer not only selects the means of impasse resolution, but also waits until an impasse has occurred to make that selection.[76] By allowing employees to select the impasse procedure, the Canadian Plan results in substantial equality of bargaining power; employers are deprived of the ability to prevent public employees from striking. Yet, this gain in bargaining strength is tempered by the fact that the employees must choose their method of dispute resolution at the beginning of the negotiations. By forcing this early choice, the plan prevents employees from gaining the additional advantage of being able to select the method that appears most favorable to them in light of the circumstances present when impasse occurs.

If the Canadian Plan were adopted, the sympathy strike would no longer appear to be necessary to assist employees in achieving a just settlement. The small bargaining units, which have the greatest need for sympathy strikes,[77] would simply choose arbitration and thus would not be forced into a strike that would be ineffective due to the size of the unit. It seems, therefore, that PELRA's objective of establishing the bargaining parity necessary to achieve reasonable settlements would be realized under the Canadian Plan.[78]

It is unfortunate that neither the option allowing the governor to seek to enjoin sympathy strikes nor the Canadian Plan was available to the *General Drivers'* court. By choosing to prohibit all sympathy strikes rather than create the potential for government paralysis, the Minnesota Court left public employees with inadequate negotiating strength. A legislative solution such as the gubernatorial injunction power or the Canadian Plan, is necessary, therefore, to realize PELRA's objective of minimizing public employee labor disputes by equalizing the bargaining strength of the parties.

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76. *See* notes 36-37 *supra* and accompanying text.

77. The relationship between the size of the bargaining unit and the amount of negotiating strength the unit has varies among different occupations, of course, depending on how essential the services performed are thought to be.

78. Amendment of PELRA to conform to the Canadian Plan could encounter at least one obstacle—the nondelegation doctrine. According to this principle, legislative authority cannot be delegated to an agency of the government unless the agency, in carrying out the delegation, is required to conform to standards set forth by the legislature. Lee v. Delmont, 228 Minn. 101, 112-13, 36 N.W.2d 530, 538 (1949). Binding arbitration, some argue, illegally delegates the contracting power of the governmental body to the arbitrator. A recent Minnesota Supreme Court case, however, ruled that PELRA's compulsory binding arbitration for essential employees was not an improper delegation of legislative authority. City of Richfield v. Local 1215, Int'l Ass'n of Fire Fighters, 276 N.W.2d 42, 48 (Minn. 1979). The court concluded that by establishing standards to guide the decisions of the arbitrators, PELRA did not improperly delegate legislative authority. Although the case involved only essential employees, the court's rationale for upholding the compulsory binding arbitration provisions of PELRA did not appear to depend on the essential nature of the employees' services. Thus, the nondelegation doctrine should not bar the use of the Canadian Plan in Minnesota.