

# THE CHALLENGE FOR PUBLIC SECTOR MANAGEMENT

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# The Challenge for Labor Law Professors

- Private sector labor law: business world equivalent of paleontology
  - Search for optimal presentation time
- Public sector labor law: too much work
  - 50 states and countless localities
  - Statutes, labor relations agencies, contracts, civil service rules, First Amendment and contract impairment clause jurisprudence
  - After all, we are “national law schools”

# Crisis in Public Sector Labor Relations

- Traditionally, public sector labor and management have been closely aligned.
  - Wellington-Winter Thesis: labor negotiates with an ostensible adversary but really influences who the manager is and how hard management will resist union demands. (Harry Wellington & Ralph Winter, *The Union and the Cities* (1991))
    - Government unions are the best organized political group in the locality or state
    - Management agency costs – no clear principal or, better put, a diffuse, divided principal -- Management knows that public does not want cessation of services and that pushing back too hard at the bargaining table will result in job insecurity for them.
    - Legislative over-ride Even where managers do push back, labor will often be able to override their decisions with the politicians who are beholden to them. Repeated play game: managers learn there is little to gain and a lot to lose in their obduracy at the bargaining table.

# Wellington-Winter Thesis: Somewhat Overstated

- Small town collective bargaining: uniformed officers and teachers represent the largest share of local budgets
  - Budgets are financed by highly visible, salient property taxes
  - Officials have a clear, undivided principal
- Labor as island (oasis) in state where they are not in political sync with dominant political forces

# New Pressure on Wellington-Winter Thesis

- Decline in private sector collective bargaining: the perceived anomaly of public sector bargaining gains over largely private sector employee taxpayers
- Demographic differences between certain government labor unions and the community
  - Exacerbated by civil service barriers to hiring and promotion
  - Public perception in large cities that government labor is hampering responsible and responsive delivery of public services
- Economic pressures on municipalities and states
  - Labor costs are about 70% of the budget; one of the few important levers available to cut budgets, and to do so in a politically salient way
  - Threat of bankruptcy (recent filing by Harrisburg PA)
- Political polarization: growing tendency of Republican party to see government labor as principal funders/foot soldiers of their political opposition; need for Democrats to appear responsive to underlying concerns
- Greater political acceptability of contracting out: charter schools; private contracting of sanitation services

# Is There a Need for Change in Public Policy?

- Not clear from the data presented at this conference that a seismic change is called for.
  - Wages (but average data may mask local effects)
  - Benefits: pensions and healthcare
    - Pensions may be unsustainable but political pressure is likely to lead to greater employee contribution; elimination of employee abuse; end of 20 years and out
  - Insurance against discharge/insurance
    - Underlying civil service protections
- Not clear that elimination of CB, even if desirable and politically achievable, is sustainable
  - NY's treatment of pensions as a nonbargainable subject; bargaining will occur politically
  - If you bar bargaining, employee associations will not disappear and may lead to distorted agendas (e.g., NLRB staff union)
  - Civil service framework as underlying framework
  - WI law as non-equilibrium

# Need for Managers to do a Better Job

- Accusing the wrong party: Labor's function is to be a faithful, effective bargaining agent for its members vs. management's function should be to represent the public interest at the bargaining table.

# Improvements Without Statutory Change

- Training/education services for public sector management
  - A Kennedy/Wagner School for State and Local Government
- NGO/public policy think-tanks to study the actual effects of particular institutional arrangements; develop common metrics
- Transparency
  - “fiscal impact statements” for annual state of pension funding and projected pension payouts for next 3-5 years, with annual restatement of projections
  - Enhance visibility of legislative/governor intervention (e.g., Pataki’s giving away the store on extending IA for non-uniformed government employees)
- Collective bargaining: 4/11 UFT-NYC agreement to assign teachers accused of incompetence/misconduct to administrative and non-teaching duties vs. the “rubber room”
- Operating during strikes vs. waiting until the public says “we give up”
  - Uneven penalties of NY’s Taylor Law (e.g., suspension of dues checkoff)

# Improvements Requiring Statutory Change

- Centralize political accountability
  - Chicago: Mayor Emanuel and remove ward-based system for garbage removal
- Move decisional responsibility away from the independent public commission to politically accountable executive
  - NYC public schools under Mayoral control
  - Problem with MTA
- Reconsider public delivery of services where private sector can do the job with equal, if not greater, efficiency
  - Garbage removal

## Improvements Requiring Statutory Change (2)

- Take a hard look at interest arbitration
  - debate between Terry O’Neil & E.J. McMahon, Taylor Made: The Cost and Consequences of New York’s Public-Sector Labor Laws (2007) vs. Thomas Kochan, et al., The Long-Haul Effects of Interest Arbitration: The Case of New York State’s Taylor Law (2009)
  - Design issues:
    - Whole package vs. economic terms only
    - Ability to pay as dominant criterion?
    - Cap awards in relation to COI
    - Publicizing arbitrator awards
- Take a hard look at bargainability rules
  - Staffing levels/rules
  - Retiree benefits
  - Contracting out

# Improvements Requiring Statutory Change (3)

- Reexamine unionization of supervisors
  - E.g., is public school accountability possible if the school principal can join a union and engage in collective bargaining
- Reexamine “*Triborough* doctrine”: should public sector management be able to implement changes once contract expires vs. allowing the contract to serve as status quo?
  - Railway Labor Act experience: air carriers cannot change contracts, as a practical matter, without filing for bankruptcy
  - If management can change the status quo, what can unions do as a self-help measure?
  - Intermediate position: Limit status quo to mandatory subjects vs. staffing levels
- Reexamine government subsidization of grievance arbitration (e.g., NY statute paying for arbitration of public school dismissal for incompetence/misconduct)

