Joseph Grodin's Contributions to Public Sector Collective Bargaining Law

Alvin L. Goldman

University of Kentucky College of Law, algold00@uky.edu

Follow this and additional works at: https://uknowledge.uky.edu/law_facpub

Part of the Labor and Employment Law Commons

Repository Citation


https://uknowledge.uky.edu/law_facpub/566
HONORING
JOSEPH R. GRODIN:

Joseph Grodin’s Contributions to
Public Sector Collective Bargaining Law

ALVIN L. GOLDMAN*

INTRODUCTION

The Labor Law Group, established in the early 1950s, is a unique consortium of labor law professors, and usually a practitioner or two, devoted to improving labor and employment law teaching and scholarship. Its primary activities have been publication of course books and sponsorship of conferences on important new developments. All royalty income goes into a trust fund used solely for carrying on the Group’s work. By luck more than by merit, I was invited to join the Group around 1969. Because I had practiced labor law for only a few years on the East Coast before entering law teaching in Kentucky and because I have never been a diligent reader of scholarly articles, the name Joseph Grodin was unfamiliar to me when, around 1971 or 1972, the late Professor Benjamin Aaron proposed him for membership in the Labor Law Group.
Realizing that most of us were from the east, south and mid-west, Ben, as I recall, explained that his nominee had recently entered law teaching full-time at Hastings and, though still a young man, had already distinguished himself as a leading California practitioner.¹ Ben most likely also noted his candidate’s adjunct teaching experience, a few of his publications, and probably mentioned his doctorate from the London School of Economics. The potential value of this addition to the Group was immediately recognized,² and we unanimously invited him into membership with a plea to Ben to persuade him to accept our invitation. About a year later the Group met in Denver. It was there I met Joe and Janet Grodin for the first time and discovered the broad range of their interests³ and accomplishments as well as their congenial personalities. In time, my wife got to meet them both and we developed a friendship that Ellie and I cherish.

The scope and intensity of Joseph Grodin’s intellectual drive have resulted in his making important contributions to developments in a variety of areas of law. Because our relationship grew out of a shared interest in labor and employment law, this essay focuses on his work in one subcategory of that field — the law of public sector collective bargaining representation.

DEVELOPING THE LAW OF PUBLIC SECTOR COLLECTIVE BARGAINING

Prior to joining academe, Joe had published pieces dealing with private sector labor–management law. At the time he began teaching fulltime, his scholarly efforts initially shifted to public sector labor–management relations, an area of growing importance that was in need of more academic scrutiny and law school course materials. In time, as a scholar, law teacher and jurist, Joe Grodin helped meet both needs.

While on leave of absence from his law firm, Joe taught labor law, constitutional law and administrative law at the University of Oregon. Despite

¹ Joe’s time in practice was especially long and impressive in comparison with the experience of all but two or three of the Group’s academicians.
² Indeed, I was awed by his credentials.
³ The Grodins’ passion for music, the graphic arts, wilderness hiking and Judaic learning, occasionally are encountered in metaphors, analogies and quotations found in Joe’s writings.
a newcomer’s burdens of preparing for teaching in three demanding areas, he managed to co-author an article describing the general contours of the field of collective representation for government sector workers. The article was primarily directed at a newly adopted Oregon statute and provided what amounted to a guidebook for those operating under the state’s complex public sector bargaining legislation, regulations, and attorney general’s opinions. It also presented suggestions for improving the new law by removing identified statutory ambiguities, gaps, and uncertainties. Additionally, Professor Grodin and his co-author offered a number of broader observations about public sector collective bargaining laws. For example, using Oregon’s experience, they noted how political and institutional rivalries often add complexities and uncertainties to these statutes.

A brief footnote in the Oregon article addressed the potential value of strikes in most public sector bargaining. This was an important issue the future jurist would face a little more than a decade later. In a concurring opinion in El Rancho Unified School Dist. v. National Education Assn., Justice Grodin observed that the common law justification for barring public employee strikes was based on the assumption that it interferes with the legislature’s activity in establishing the terms of government employment through statutory and administrative fiat. However, he noted that by authorizing a procedure for bilateral determination of local government employee wages and benefits through collective bargaining, the legislature had removed the common law’s justification for the work stoppage prohibition. A few years later, in County Sanitation Dist. No. 2 v. Los Angeles County Employees’ Assn., Justice Grodin joined the California Supreme Court’s plurality opinion that took this reasoning a step further and announced that the state common law no longer assumes that a strike by public employees is unlawful “unless or until it is clearly demonstrated

---

4 Typical of Prof. Grodin’s sense of decency, he gave full co-author credit to Mark Hardin, a third year law student, rather than follow the common practice of merely dropping a footnote to acknowledge the efforts of a student assistant.

Mr. Hardin had a distinguished career aiding abused and neglected children and served as Director of Child Welfare at the ABA Center on Children and the Law.


6 51 OR. L. REV. at p. 9.

7 33 Cal. 3d 946, 963 (1983).

8 38 Cal. 3d 564 (1985).
that such a strike creates a substantial and imminent threat to the health or safety of the public." Among other considerations, the opinion examined the economic realities of public sector collective bargaining and found that government entities that had engaged in collective bargaining had demonstrated that they have sufficient negotiating leverage so that work stoppages are a fair counter-balance for generating reasonable settlements.

When he began teaching fulltime at Hastings, Professor Grodin followed up on his Oregon study by preparing a comprehensive survey of California's primary public sector bargaining law that he published as an article in the *Hastings Law Journal.* Noting that California had entered this field earlier than most other jurisdictions, he expressed disappointment that his home state's core legislation in this area, the Meyers–Milias–Brown Act, lacked a comprehensive, intelligible, and forward-looking framework for public sector labor relations. One egregious gap, he observed, was the lack of a structure for resolving questions of a labor organization's representational status — a problem he had encountered while still in law practice. Another major problem was the lack of a precise list of prohibited actions that violate representational rights. These problems persisted until, gradually, over the next four decades, the California Legislature partially mitigated them by adopting amendments, consistent with some of Professor Grodin's recommendations, that a) established an administrative agency with specialized expertise to adjudicate and remedy prohibited employment practices and conduct elections, b) delineated in greater detail the protections afforded the right to representation, and c) provided mechanisms to facilitate bargaining impasse resolution.

The California courts, on the other hand, were much quicker to embrace Professor Grodin's careful analysis of the Meyers–Milias–Brown Act's intent which gave the courts a basis for coping with critical gaps in the statutory language. They similarly were guided by his suggested approaches to

---

9 38 Cal. 3d at 586.
11 Id. at 743–46 and text accompanying footnotes 114–119.
12 Id. at 728–29, 745; Cal. Gov. Code § 3541.
interpreting particular provisions in which the language of the Act was burdened by vagueness. Accordingly, the Hastings article was cited and followed frequently by the California courts.\(^\text{15}\)

In noting the Meyers–Milias–Brown Act’s absence of statutory impasse resolution procedures, Prof. Grodin’s Hastings article observed that many public employee bargaining laws provided for fact-finding with recommendations and impasse arbitration.\(^\text{16}\) Prof. Grodin soon explored the potential value of those approaches in a study he made of a new amendment to the Nevada public employment bargaining law.\(^\text{17}\)

The Grodin study of the Nevada statute explained that while fact-finding had been part of the state’s public employment collective bargaining law for several years, a significant number of Nevada public employers had been ignoring fact-finding recommendations.\(^\text{18}\) This led the state legislature to adopt an amendment allowing the governor, on the request of either party, to make the fact-finder’s recommendations binding on all sides regarding any or all deadlocked issues in local government collective bargaining. Thus, if requested prior to the commencement of fact-finding, the

---

\(^\text{15}\) Decisions citing and approving the Grodin article’s analysis include \textit{L.A. County Civil Com v. Superior Court}, 23 Cal. 3d 55 (1978) and \textit{Public Employees of Riverside County v. County of Riverside}, 75 Cal. App. 3d 882 (1977) (holding that rules adopted by local entities must be consistent with the purposes of the Meyers–Milias–Brown Act); \textit{Vernon Fire Fighters v. City of Vernon}, 107 Cal. App. 3d 802 (1980) (unilateral changes in terms of employment are a \textit{per se} violation of the duty to meet and confer in good faith); \textit{Solano County Employees’ Assn. v. County of Solano}, 136 Cal. App. 3d 256 (1982) and \textit{International Assa. of Fire Fighters Union v. Pleasanton}, 56 Cal. App. 3d 959 (1976) (injunctive relief should be granted where a local government made changes in the terms of employment without conferring with the employees’ representative).


\(^\text{16}\) \textit{Public Employee Bargaining}, supra note 10, at 759.

As noted below, impasse arbitration is more commonly called “interest arbitration” to distinguish it from grievance arbitration. The award in interest arbitration is an imposed settlement of the unresolved terms of the negotiating parties’ contract. The award in grievance arbitration is a judgment establishing whether one of the disputing parties was wronged, and if so, what remedy should be provided.


\(^\text{18}\) \textit{Id.} at 91.
governor could transform fact-finding into binding impasse arbitration. Prof. Grodin's study observed that while other states had procedures for ascertaining whether to require the parties to submit to final, binding arbitration of a public sector bargaining impasse, Nevada's law was unique in placing this authority in the hands of an elected official.

At the time of the study there was too little data for a statistical analysis of the amendment's impact on Nevada's public sector collective bargaining system. Therefore, Prof. Grodin approached his task by examining the circumstances in which public sector bargaining impasses posed an opportunity to apply the new law, the outcomes, and the parties' own impressions of any changes in the dynamics of collective experiences under the amended statute. He also conducted interviews with neutrals involved in Nevada's arbitrated cases inasmuch as their conduct was bound to influence the parties' subsequent negotiating conduct.

The Grodin study sought to ascertain whether the prospect of binding arbitration had a chilling effect on the efforts of local governments and employee organizations to resolve their differences through bargaining rather than rely on a settlement imposed by an arbitrator. He found that the evidence leaned in the opposite direction and attributed this in part to the Act's efforts to guide both the decision as to whether to require binding arbitration and the guidelines imposed on arbitrators.

The Nevada Act set out criteria to be considered by the governor when electing whether to impose arbitration in seemingly deadlocked negotiations. Although Prof. Grodin contended that those statutory guidelines were too vague to be meaningful, he found that in the first couple of years operating under the amended statute, two considerations were important in the governor's decisions to impose or not impose binding arbitration. One was the governor's impression of whether in the past the parties had given due consideration to fact-finding recommendations. The other was whether their bargaining to date was consistent with what he judged to be a good faith, reasonable effort to resolve differences at the bargaining table.

---

19 Id. at 89–90.
20 Id. at 99–101.
21 A history of ignoring fact-finding recommendations was likely to result in imposing binding arbitration whereas bargaining efforts considered by the governor to
decision left the parties with considerable uncertainty that itself may have propelled them to greater efforts to reach a negotiated settlement.

Additionally, because the Act required the arbitrator to assess the local government's financial ability as well as its obligation to provide facilities and services protecting the community's health, welfare, and safety, Prof. Grodin found that, once a decision was made to require binding arbitration, the parties had further motivation to reach their own settlement. That motivation partly was to avoid the extra costs involved in presenting their case to an arbitrator whose expenses they would have to share equally. In part, too, the motivation was to avoid the costs of preparing for the arbitrator a budget-oriented presentation necessitated by the statute's emphasis on ability to pay.\(^\text{22}\) Additionally, Grodin found that this guidance helped press the parties to do a better job of preparing for bargaining and, thereby, facilitated more productive settlement discussions.\(^\text{23}\)

Prof. Grodin's conclusions found that the success of the amended approach was facilitated by the fact that the then-governor had a labor relations background. Therefore, the study suggested that to ensure that the system continued to function well it would be best to place the responsibility of deciding whether and when to impose binding arbitration in the hands of a person or tribunal with labor relations expertise. The Nevada law has since been amended to give this authority to a panel consisting of an accountant and a lawyer selected by the parties through the procedure of mutually striking names separately provided by the Nevada State Board of Accountancy and the State Bar of Nevada.\(^\text{24}\) The wisdom of Prof. Grodin's suggested change, therefore, is dependent upon whether the appropriate expertise in the labor field is possessed by the persons proposed by the Accountancy Board and the Bar.

The growth of public employee collective bargaining was accompanied by an increase in work stoppages and work stoppage threats. This resulted in increased scholarly and political attention to the merits or problems of work stoppage substitutes, especially resolution of bargaining impasses by

---

\(^{22}\) Id. at 97–98.

\(^{23}\) Id. at 98–99.

impartial third parties, a procedure most commonly known as interest arbitration. Although he had previously discussed interest arbitration in his writings, in 1976 Professor Grodin published a paper that comprehensively examined the theoretical issue of whether such arbitration violates the democratic principle that "governmental policy is to be determined by persons responsible, directly or indirectly, to the electorate." He explained that the issue is particularly compelling because issues involved in public sector collective bargaining "can involve significant elements of social planning."

Prof. Grodin observed that, due to the complexity of modern government and the need to insulate some decisions from political intrusions, courts have been reluctant to place rigid constitutional constraints on legislative discretion to delegate legislative-type decisions. Accordingly, he focused not on what restrictions might be required by constitutional doctrine but rather on what, as a matter of sound policy, legislatures ought to do in delegating authority to interest arbitrators.

At the outset of his analysis Prof. Grodin confronted what may be the politically most delicate issue respecting legislative delegation of authority for arbitrators to decide collective bargaining impasses in the public sector: How can the legislature justify authorizing non-elected persons to resolve public employment pay disputes? His succinct but compelling answer stated that the arbitration system should "presuppose a policy determination that employees should be paid whatever they are 'worth,' in the same way that public agencies purchase goods at whatever price the market dictates." To help discipline the decisional process, he suggested a variety of guideposts such as the increase in the cost of living or private sector collectively bargained wages for employees doing similar work. Grodin labeled this approach "the proper wage model" and argued that in applying it an arbitrator should not weigh the public’s ability to afford the result; rather, fiscal shortfalls should require the public employer to respond by reducing the affected work force and services, shifting funds from other parts of its budget, raising taxes or borrowing.

26 Id. at 682.
27 Id. at 683.
28 Id. at 684.
Being a realist, Prof. Grodin acknowledged a degree of artificiality in the proper wage model formula inasmuch as private sector wages for similar work often vary; the determination of whether work is “similar” often is subjective; some work is unique to the public sector; and the public sector often is the dominant source of some types of work and, therefore, the dominant influence of wage rates for its private sector counterpart. Additionally, he noted that even the more concrete cost-of-living guidepost poses a problem inasmuch as when those costs go up for employees, they also go up for government operations and, thereby, may impose a fiscal squeeze that limits the government’s ability to meet all of its obligations, including providing cost of living increases for its workers.²⁹

Political pressures, Prof. Grodin noted, give rise to demands that arbitrators not ignore the government’s ability to pay. Thus, that requirement was common in legislation mandating interest arbitration as a work stoppage substitute. However, his survey of existing public sector bargaining laws that used interest arbitration revealed that references to weighing ability to pay were vague as to how that factor is to be taken into account.³⁰ Professor Grodin expressed concern that this vague requirement regarding ability to pay inevitably shifts to the unelected arbitrator the burden of making broad public policy choices.

Of at least equal concern in Prof. Grodin’s analysis of public sector interest arbitration is the observation that many non-wage collective bargaining issues pose even more difficult problems of allowing social policy choices being delegated to the discretion of a non-elected decider. Examples such as school room class size or social worker case loads implicate broad educational or other policy choices while retirement and other employee welfare benefit programs can have long-range fiscal impacts that alter revenue-raising needs. This, argued Prof. Grodin, poses the need to structure the bargaining impasse system so as to preserve as much as possible the responsibility of elected officials to guide such choices, and he posed a number of suggestions toward this end. One is that statutes providing for interest arbitration should more specifically describe the weight

²⁹ Id. at 685. Depending on the government entity’s tax structure, a cost of living increase can, of course, be accompanied by increased government revenue from sources such as sales taxes.
³⁰ Id. at 687.
to be given to the public entity’s ability to pay and identify the various income and expenditure elements that can be considered in weighing ability to pay.\textsuperscript{31} He also advocated consolidating interest arbitration for all employee groups with the same public employer inasmuch as they feed from a common pie.\textsuperscript{32}

The interest arbitration article additionally emphasizes the importance of judicial review to set aside public sector interest awards that violate the statutory constraints placed on the process. However, it also urges that initial review of challenged interest awards should be assigned to a state labor relations board in order to provide a more expeditious procedure enhanced by the benefit of specialized expertise and greater uniformity of results.\textsuperscript{33} Further, the article warns that, because issues can change during the course of the arbitral proceeding, courts should avoid intervening prematurely. Accordingly, as a general rule they should not entertain efforts to enjoin the process on the grounds of non-arbitrability.\textsuperscript{34}

A decision by the Michigan Supreme Court, a few years later, demonstrated the care with which Prof. Grodin had weighed the competing considerations for evaluating public sector interest arbitration arrangements. That decision, which upheld the constitutionality of the state’s interest arbitration system for police and firefighter bargaining impasses, cited the Grodin article as authority for stated arguments in both the majority and dissenting opinions.\textsuperscript{35}

DEVELOPING TEACHING MATERIALS ON PUBLIC SECTOR BARGAINING

Normally, in our country a lawyer’s and jurist’s foundation for understanding law and the legal process begins in law school and for many, perhaps most, that understanding is also primarily shaped by law school studies. Because most law school classes are centered on materials presented in the assigned course book, well-designed, thoughtful course books can

\begin{itemize}
  \item \textsuperscript{31} Id. at 695.
  \item \textsuperscript{32} Id.
  \item \textsuperscript{33} Id. 699–700.
  \item \textsuperscript{34} Id. at 699.
  \item \textsuperscript{35} Detroit v. Detroit Police Officers Asso., 408 Mich. 410 (1980).  
\end{itemize}
be expected to significantly influence what is taught and how it is taught. Therefore, preparing course books can significantly influence developments in the particular area of law.

Within a few years after he joined the Labor Law Group, Joseph Grodin teamed with Donald Wollett to co-author the Group's revised course book on public sector collective bargaining, then a new area of law school study. The team of Wollett and Grodin provided a particularly valuable perspective inasmuch as these two scholars were also seasoned practitioners from both sides of the bargaining table. Don Wollett had been a partner in a major management firm in New York City; Joe Grodin in a major union firm in San Francisco. Joe, Don, and other Group members produced further revisions of the Public Sector Bargaining book into the 1990s and, after Don retired from the task, Joe and others continued its revision and updating into the current century. Joe eventually retired from the project but its successor course book, now expanded to cover non-collective bargaining aspects of public sector employment, continues to be the source for teaching public employment collective bargaining law.

CONCLUDING OBSERVATIONS

Joseph Grodin's studies, discourses, decisions, and teaching in the area of public sector labor law are bound together by several threads that demonstrate his adherence to values and work habits he discussed in his book *In Pursuit of Justice*.37

Both as Prof. Grodin and as Justice Grodin, he has been faithful to the principle that legal rules ultimately are the prerogative of democratically elected representatives. His regard for legislative authority is evident in the care with which he examined the competing interests that gave rise to the compromises reached in adopting the public sector bargaining laws he studied, thereby gaining more accurate understanding of the intent of

---

36 Kaye Scholer Fierman Hays & Handler. Donald Wollett had experienced both perspectives inasmuch as he represented the National Education Association for about a decade. During the course of their team effort, Wollett's understanding of public employment collective bargaining was further enhanced by his serving for several years as the New York State Director of Employee Relations.

those laws. It is also evident in his proposals for improving them through suggested legislative changes rather than creative judicial interpretations.

Additional evidence of Joe Grodin's efforts to preserve the central role of elective government is his examination of public sector interest arbitration. There his focus emphasized how to maximize labor peace and equitable results without unduly delegating to non-elected persons the authority to shape social policies.

Finally, both as a professor and a jurist, Joseph Grodin has also directed his efforts at discovering not only what is theoretically reasonable, but also what is practical. Thus, in determining what improvements have been attempted and what reforms would be beneficial, Prof. Grodin has tried to discover practitioner insights into the effect law has on the parties' conduct. His research and discourses have not been confined to the typical academic analysis of archived decisions and documents or weighing the logic of competing arguments. Rather, his studies have reflected his respect for those who put flesh on the legal skeleton by including interviews to learn about the experiences of the officials, lawyers, and other decision-makers who work within the statutory system.

Accordingly, the integrity with which Joseph Grodin serves California, our nation, and the study of law deserves our admiration and gratitude.

* * *