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Public Employee Bargaining in North Carolina: From Paternalism to Confusion

Public employee collective bargaining and negotiation has received increasing attention in North Carolina, as in other states, in recent years.¹ Unlike the majority of states, however, North Carolina has passed no legislation establishing formal procedures for communication between governmental units and their employees.² In North Carolina public sector labor relations are currently regulated by a single statute, hurriedly enacted in 1959 and never revised. One commentator has called the state's attitude, as reflected by this statute, section 95-98, "without question . . . the most adamant in its opposition to public sector unionism."³ The section provides that:

Any agreement, or contract, between the governing authority of any city, town, county, or other municipality, or between any agency, unit, or instrumentality thereof, or between any agency, instrumentality, or institution of the State of North Carolina, and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or agency or instrumentality of government, is hereby declared to be against the public policy of the state, illegal, unlawful, void and of no effect.⁴

Section 95-98 has created considerable confusion and has been the subject of much misinterpretation since its enactment.⁵ As increasing numbers of public employees in North Carolina seek to meet, negotiate or bargain with their employers through a chosen representative,⁶ accurate interpretation of

1. While increased demands for collective bargaining rights and a few publicized public employee union campaigns have prompted much of the recent awareness in North Carolina, a number of less obvious factors are also responsible. These include the rapid growth in the number of public employees in the modern American workforce, *see* text accompanying notes 7-12 *infra*; the equally rapid increase of membership in public employee unions and associations, *see* text accompanying notes 13-23 *infra*; the federal government's institution of collective bargaining for many of its employees, *see* text accompanying notes 28-29 *infra*; and the relatively recent enactment of statutes authorizing some form of collective bargaining in the majority of states, *see* text accompanying notes 30-34 *infra*. *See generally*, R. SMITH, H. EDWARDS & R. CLARK, *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* (1974); McCann & Smiley, *The National Labor Relations Act and the Regulation of Public Employee Collective Bargaining*, 13 HARV. J. LEGIS. 479 (1976).

2. *See* text accompanying notes 30-34 *infra*.

3. Nolan, *Public Employee Unionism in the Southeast: The Legal Parameters*, 29 S.C. L. REV. 235, 287 (1978).

4. N.C. GEN. STAT. § 95-98 (1975).

5. *See* N.C. STUDY COMM'N. ON EMPLOYER-EMPLOYEE RELATIONS, REPORT OF THE GOVERNOR'S STUDY ON EMPLOYER-EMPLOYEE RELATIONS, 3-4 (1970) [hereinafter cited as N.C. STUDY COMM'N.]; Brooks, *Another Look at Labor Laws*, N.C. PROFESSIONAL FIREFIGHTER 9 (Spring 1980); Haemmel, *Impasse in N.C.: The Need for a Viable Public Employees Labor Relations Act*, 5 N.C. CENT. L.J. 190 (1973); Pfefferkorn, *Professional Negotiations in North Carolina: An Alternative to Formal Collective Bargaining for Public Employees*, 7 WAKE FOREST L. REV. 189 (1971); Note, *North Carolina General Statute Section 95-98—Voiding Contracts Between State Governmental Units and Public Employee Labor Organizations—Is Constitutional*, 11 WAKE FOREST L. REV. 729, 732-33 (1975).

6. Mercer & Thompson, *Public Employee Collective Bargaining in North Carolina*, N.C. COUNTY LINES 5, Oct. 31, 1979, at 5.

the statute becomes a pressing concern. This Comment, after looking briefly at the recent growth of public sector employment and unionism and at public sector collective bargaining legislation in other jurisdictions, discusses the history of section 95-98 of the North Carolina General Statutes, the confusion concerning its proper meaning, and the differing degrees of interaction between public sector employers and unions that exist as a result of that confusion.

I. THE RECENT INCREASE IN STATE AND LOCAL GOVERNMENT EMPLOYEE ORGANIZATIONS

Primarily because of the growth of the general population and an increased demand for government programs and services, the public sector has grown dramatically in recent decades—faster than any other segment of the economy.⁷ Public employees now number nearly twenty percent of the American work force, the largest growth occurring in state and local, rather than federal, government employment.⁸ The number of state and local government employees has increased fourfold since 1945,⁹ and, because one in every four new jobs is created in the public sector, growth is expected to continue.¹⁰ The growth rate of state and local government employees in North Carolina for the same thirty year period has matched the national increase.¹¹ Over a quarter of a million of the state's citizens are now so employed.¹²

The recent growth of public employee union and association membership across the nation has been equally dramatic. Despite legal barriers restraining the effectiveness of public employee labor organizations, impediments not faced in the private sector, public employee membership in unions and employee associations has been growing at a rate many times that of the private sector¹³ and is expected to continue to grow in the future.¹⁴ Almost every major union that organizes state and local government employees has exper-

7. Usery, *Bargaining in the Public Sector: Problems, Progress, and Prospects*, 1 OKLA. CITY L. REV. 1, 3 (1976).

8. See generally 2 GOV'T. EMPL. REL. REP. (BNA Reference File) 71:2001.

9. Comment, *Constitutional Implications of a Federal Collective Bargaining Law for State and Local Government Employees*, 11 CREIGHTON L. REV. 863, 865 n.16 (1978).

10. 2 GOV'T EMPL. REL. REP. (BNA Reference File) 71:2001.

11. In 1946, state and local government employees in North Carolina numbered approximately 73,000. In 1975 there were approximately 288,000. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES—1977 at 307 (1977); U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES 710-11 (1960).

12. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES—1977 at 307 (1977).

13. Nationwide, membership in unions among employees of state and local governments rose from 556,000 in 1964 to 1,710,000 in 1976, an increase of 307.6%. Union membership among nongovernmental employees increased only 9.3% during the same period. Nolan, *supra* note 3, at 236 n.1 (citing U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS—REFERENCE EDITION, Table 155, at 384 (1975); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, DIRECTORS OF NAT'L UNIONS AND EMPLOYEE ASS'NS 177).

14. PUB. AD. SURVEY 1 (Bureau of Governmental Research, U. of Miss. 1977).

enced this growth,¹⁵ and one such union, the American Federation of State, County and Municipal Employees, is among the fastest growing in the nation.¹⁶ Nearly one-half the full-time or equivalent employees of state and local governments have joined unions.¹⁷ By comparison, less than one-fourth of the total United States work force is unionized.¹⁸

Public employee organization in North Carolina and in neighboring southeastern states is not as widespread as in most of the nation.¹⁹ Nevertheless, over thirty percent of North Carolina's full-time state and local government employees are organized into unions or employee associations.²⁰ Almost all of the major municipalities in the state have at least one public employee union representing some portion of its workforce.²¹ Furthermore, efforts to organize public employees in states such as North Carolina are expected to increase substantially in the years ahead.²²

II. COLLECTIVE BARGAINING LEGISLATION IN OTHER JURISDICTIONS

Private sector labor relations are regulated primarily by the National Labor Relations Act.²³ The Act, passed in 1935,²⁴ committed the nation to collective bargaining as the primary means of ensuring industrial peace and preventing economic disruption.²⁵ The Act, however, does not regulate public employee labor relations.²⁶ As a result, regulation of federal, state, and local

15. Usery, *supra* note 7, at 3.

16. O. STAHL, PUBLIC PERSONNEL ADMINISTRATION 327 (7th ed. 1976). See Usery, *supra* note 7, at 94.

17. [1977] 94 LAB. REL. REP. (BNA) 199.

18. [1978] 97 LAB. REL. REP. (BNA) 73.

19. Nolan, *supra* note 3, at 236. See Jedel & Rutherford, *Public Labor Relations in the Southeast: Review, Synthesis and Prognosis*, 25 LAB. L.J. 483, 488 (1974).

20. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1977 CENSUS OF GOVERNMENTS (1979), reprinted in 2 GOV'T EMPL. REL. REP. (BNA Reference File) 71:4091, 71:4107. This figure includes membership in state employee associations. Although in many states today the distinction between a state employees' association and a union may be insignificant for practical purposes, this is not yet the case in most of the southeastern states. See Jedel & Rutherford, *supra* note 20, at 488. The number of actual public employee "union" members in North Carolina is considerably less. *Id.*

21. NORTH CAROLINA LEAGUE OF MUNICIPALITIES, N.C. MUNICIPAL EMPLOYMENT, FRINGE BENEFITS AND PERSONNEL PRACTICES FOR CITIES ABOVE 5,000 POPULATION AS OF JULY, 1979, at 15 (1979).

22. McGriff, *supra* note 15, at 2. See text accompanying notes 119-121 *infra*.

23. 29 U.S.C. §§ 151-168 (1976).

24. National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449.

25. See generally McCann & Smiley, *supra* note 1, at 484.

26. Section 2(2) of the Act defines "employer" to include: "[A]ny person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof. . . ." 29 U.S.C. § 152(2) (1976). Section 2(3) of the NLRA similarly excludes from the definition of "employee" the employees of any person not within the definition of "employer." *Id.* § 152(3). Because the protections and prohibitions of the NLRA are, with few exceptions, applicable only to "employers" and "employees," the effect of § 2(2) is to exclude governments and public employees from the coverage of the Act.

When the original NLRA was passed in 1935, there seemed to be little serious consideration

government employer-employee labor relations, including collective bargaining rights, was left to the respective employing governments.

In 1962 the federal government granted collective bargaining rights to most of its employees.²⁷ Subsequently both the executive and legislative branches have expanded these rights.²⁸ State legislatures have also recognized the importance of collective bargaining to public employees in the past twenty years. Beginning with Wisconsin in 1959,²⁹ thirty-eight states have enacted legislation allowing collective bargaining or meet-and-confer communications for all or some groups of their public employees.³⁰ Other states have achieved the same result through constitutional amendments, court decisions, attorney generals' opinions, or a combination of these.³¹ Relatively few states have refused to afford any collective bargaining rights, and only one, North Carolina, statutorily prohibits collectively bargained contracts for *all* public employees.³² The different state statutes vary widely in content and scope. Some are so comprehensive as to almost duplicate private sector law, while others

whether public employees should be included under the Act. For a discussion of this issue, see McCann & Smiley, *supra* note 1, at 485.

27. Exec. Order No. 10,988, 3 C.F.R. 521 (1959-1963 Compilation).

28. Exec. Order No. 11,491, 3 C.F.R. 861 (1966-1970 Comp.), promulgated by President Nixon in October 1968, provided the basic framework for federal employee collective bargaining until 1978. With the enactment of the Civil Service Reform Act of 1978, Pub. L. 95-454, — Stat. — (codified in relevant part at 5 U.S.C. §§ 7101-7135 (1980)), Congress codified collective bargaining procedures for federal employees and provided, in addition, apparatus for prevention of unfair labor practices and regulation of union conduct in the federal sector. Part of the Act, 5 U.S.C. § 7301 (1980), reserves to the President the power to promulgate regulations for the conduct of federal employees.

Chapter 12 of the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719 (codified at 39 U.S.C. §§ 101-5605 (1976)), governs labor-management relations in the Postal Service and in general makes the Postal Service subject to the NLRA. The Urban Mass Transportation Act of 1964 provides the authority for federal grants to local transportation authorities to acquire, improve, and operate regional transportation facilities. 49 U.S.C. §§ 1601-1643 (1976). As a condition of assistance, recipients must assure the Secretary of Labor that arrangements have been made to protect the rights of employees affected by the assistance, with the right to continue engaging in collective bargaining with the employer authority through an employee representative. 49 U.S.C. § 1609(c) (1976). When private companies have been taken over by governmental authorities with federal assistance, public employees are guaranteed collective bargaining rights regardless of the applicable state law concerning public employee bargaining. This is true even where state law, as in North Carolina, prohibits public employee collective bargaining contracts. In many such states, public agencies are created to receive federal grants, but the construction and operation of the transportation facilities are contracted out to private companies. The private companies must bargain with the representatives of their employees. McCann & Smiley, *supra* note 1, at 494-95. See generally Barnum, *National Public Labor Relations Legislation: The Case of Urban Mass Transit*, 27 LAB. L.J. 168 (1976); see also note 83 *infra*.

29. Act of Sept. 22, 1959, 1959 Wis. Laws 623 (current version at WIS. STAT. ANN. §§ 111.70-.97 (1974)).

30. 2 GOV'T. EMPL. REL. REP. (BNA Reference File) 71:2004-05. The term "meet and confer" is popularly used to describe several different types of negotiation. The pure meet and confer approach implies discussions leading to a unilateral adoption of policy by a legislative body rather than a written contract and occurs with multiple employee representatives rather than with exclusive bargaining agents. R. SMITH, H. EDWARDS, & R. CLARK, *supra* note 1, at 346. As used in this Comment, the term refers to a permissive model: public employers may discuss working conditions with unions and may in some cases memorialize in writing understandings reached, but may not enter into a binding collective bargaining contract. See Nolan, *supra* note 3, at 275.

31. 2 GOV'T. EMPL. REL. REP. (BNA Reference File) 71:2004-05.

32. *Id.*

are far less inclusive.³³ In sum, bargaining by many public employees through selected representatives has become a fact of life in the large majority of states.

III. THE HISTORY OF SECTION 95-98³⁴

A. Enactment

Section 95-98 is the direct result of a highly publicized effort in 1958 by the International Brotherhood of Teamsters, headed nationally by Jimmy Hoffa, to organize members of the Charlotte Police Department.³⁵ In early January 1959 the Charlotte city manager wrote to the state Attorney General expressing concern about "labor unions among municipal personnel, with particular reference to our Police Department."³⁶ He "urgently requested" an opinion whether the city council had the legal right to prohibit police officers and other city employees from joining unions.³⁷ The Attorney General replied that the city did indeed have such a right, and that any employee who insisted on joining a union could be discharged.³⁸ The Attorney General further stated that neither the city nor its individual departments had the right to enter into any collective bargaining agreement concerning wages, hours, and working conditions.³⁹ He also determined that the state's "right-to-work" law,⁴⁰ which proscribes the conditioning of employment on nonunion status, did not apply to the City of Charlotte as an employer.⁴¹

City officials, acting on this opinion, ordered the police union disbanded and forbade membership by its policemen in the union.⁴² A few weeks later a representative from Mecklenburg County introduced a bill in the legislature which, as subsequently amended and enacted, is now sections 95-97 to -100, constituting article 12, "Public Employees Prohibited from Becoming Members of Trade Unions or Labor Unions."⁴³ Originally, the first section of the

33. *Id.* Comparison of these various statutes is beyond the scope of this study, but has been treated thoroughly by others. See, e.g., Brown, *Public Sector Collective Bargaining: Perspective and Legislative Opportunities*, 15 WM. & MARY L. REV. 57, 62-78 (1973); Howlett, *Overview of State Public Employment Legislation: Its History and Present Development*, 1 OKLA. CITY L. REV. 15 (1976); Comment, *supra* note 9, at 856-67.

34. N.C. GEN. STAT. § 95-98 (1975).

35. Raleigh News & Observer, May 20, 1959, at 2. No official legislative history concerning § 95-98 exists. The history discussed in the text was gathered primarily from newspaper accounts.

36. Letter from H.A. Yancey, Charlotte City Manager, to Malcolm B. Seawell, N.C. Attorney General (Jan. 5, 1959).

37. *Id.*

38. Letter from Malcolm B. Seawell, N.C. Attorney General, to H.A. Yancey, Charlotte City Manager, at 10 (Jan. 8, 1959).

39. *Id.*

40. N.C. GEN. STAT. §§ 95-78 to -84 (1975). Section 95-81 provides that "[n]o person shall be required by any employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment."

41. Letter from Malcolm B. Seawell, N.C. Attorney General, to H.A. Yancey, Charlotte City Manager, at 11 (Jan. 8, 1959).

42. Raleigh News & Observer, Jan. 9, 1959, at 30, col. 6.

43. ARTICLE 12

Public Employees Prohibited from Becoming Members of Trade Unions or Labor Unions

bill, now section 95-97, may have been meant to apply to all public employees, but was limited in committee to preclude only police officers and firefighters from joining any union affiliated in any way with a national or international union organized for collective bargaining.⁴⁴ The section further prohibited firefighters and policemen from assisting or promoting the organization of such a union.⁴⁵ This bar on union membership by policemen and firefighters generated most of the headlines and coverage of the bill at the time.⁴⁶

The second section of the bill, section 95-98, now simply declares any "agreement, or contract" between a governing agency and any labor union as bargaining agent for any public employees to be against "the public policy of the State, illegal, unlawful, void, and of no effect."⁴⁷ A rejected version of this section also would have made unlawful any combination or "understanding," as well as any contract and agreement, whether oral or written, between a

G.S. 95-97. *Employees of units of government prohibited from becoming members of trade unions or labor unions.*—No employee of the State of North Carolina, or of any agency, office, institution or instrumentality thereof, or any employee of a city, town, county, or other municipality or agency thereof, or any public employee or employees of an entity or instrumentality of government shall be, become, or remain a member of any trade union, labor union, or labor organization which is, or may become, a part of or affiliated in any way with any national or international labor union, federation, or organization, and which has as its purpose or one of its purposes, collective bargaining with any employer mentioned in this Article with respect to grievances, labor disputes, wages or salary, rates of pay, hours of employment, or the conditions of work of such employees. Nor shall such an employee organize or aid, assist or promote the organization of any such trade union, labor union, or labor organization, or affiliate with any such organization in any capacity whatsoever.

The terms 'employee,' 'public employee' or 'employees' whenever used in this section shall mean any regular and full-time employee engaged exclusively in law enforcement or fire prevention activity.

G.S. 95-98. *Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.*—Any agreement, or contract, between the governing authority of any city, town, county, or other municipality, or between any agency, unit, or instrumentality, or institution of the State of North Carolina, and any labor union, trade union, or labor organization, as bargaining agent for any public employees of such city, town, county or other municipality, or agency or instrumentality of government, is hereby declared to be against the public policy of the State, illegal, unlawful, void and of no effect.

G.S. 95-99. *Penalty for violation of Article.* Any violation of the provisions of this Article is hereby declared to be a misdemeanor, and upon conviction, plea of guilty or plea of nolo contendere shall be punishable in the discretion of the court.

G.S. 95-100. *No provisions of Article 10 of Chapter 95 applicable to units of government or their employees.*—The provisions of Article 10 of Chapter 95 of the General Statutes shall not apply to the State of North Carolina or any agency, institution, or instrumentality thereof or the employees of same nor shall the provisions of Article 10 of Chapter 95 of the General Statutes apply to any public employees or any employees of any town, city, county or other municipality or the agencies or instrumentalities thereof, nor shall said Article apply to employees of the State or any agencies, instrumentalities or institutions thereof or to any public employees whatsoever.

N.C. GEN. STAT. §§ 95-97 to -100 (1975).

44. Raleigh News & Observer, May 9, 1959, at 5, col. 3; *id.*, May 20, 1959, at 1, col. 1.

45. N.C. GEN. STAT. § 95-97 (1975).

46. See, e.g., *Bill Barring Policemen, Firemen from Unions is Passed by House*, Raleigh News & Observer, May 21, 1959, at 1, col. 6; *Union Ban Bill Voted*, Charlotte Observer, May 21, 1959, at 1, col. 4; *Don't Single Out Firemen*, Raleigh News & Observer, May 22, 1959, at 4, col. 2; *Bill Barring Unions for Firemen, Policemen Passed by Assembly*, Raleigh News & Observer, June 4, 1959, at 1, col. 6; *N.C. Outlaws Police Unions*, Charlotte Observer, June 4, 1959, at 1, col. 1.

47. N.C. GEN. STAT. § 95-98 (1975).

governing authority and a union, relating to grievances, labor disputes, wages or salary, hours of employment, or conditions of work.⁴⁸ The rejected section further prohibited any public officer from negotiating, or attempting to negotiate such a contract, either directly or indirectly.⁴⁹

The third section of the measure, now section 95-99, made any violation of the provisions of article 12 a misdemeanor, punishable by imprisonment⁵⁰ of up to two years.⁵¹ The final section, now section 95-100, made the "right-to-work" law inapplicable to public employees.⁵²

Debate over the measure in both the House and the Senate centered primarily around "boogie man Jimmy Hoffa"⁵³—the bill's sponsor indicating that its purpose was to keep the "ill-famed Jimmy Hoffa and the Teamsters union [from coming] into North Carolina."⁵⁴ Those opposing the article called the bill both unconstitutional⁵⁵ and a "hate bill . . . filled with hate for organized labor."⁵⁶ Despite the emotional tenor of the debate, the measure

48. Committee Substitute for H.B. 118, 1959 Session read:

G.S. 95-86. *Labor contracts between units of state government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.—Any agreement, combination, understanding or contract, whether the same shall be oral or written, between the governing authority of any city, town, county or other municipality or between any agency, unit or instrumentality thereof or between any agency, instrumentality or institution of the State of North Carolina and any labor union, trade union or labor organization, relating to the grievances, labor disputes, wages or salary, rates of pay, hours of employment, maintenance of membership or conditions of work of any public employees of such city, town, county or other municipality, or agencies or instrumentalities of government, are hereby declared to be against the public policy of the State, illegal, unlawful, void and of no effect. No public officer of the State or of any subdivision of government of the State or of any agency or instrumentality of the State or of any city, town, county or other municipality or of any agency or instrumentality thereof, whether acting singly or as a member of any board, commission or committee, shall negotiate, aid, abet or assist in or attempt to negotiate, either directly or indirectly, any contract, agreement or understanding, with or between any such agency, instrumentality or unit of government and any labor union, trade union or labor organization concerning grievances, labor disputes, wages or salary, rates of pay, hours of employment, maintenance of membership or conditions of work of any public employees, employees of the State of North Carolina, or employees of any city, town, county or other municipality or employees of any agency or instrumentality thereof.*

(emphasis added to illustrate the language from the rejected proposal that was actually enacted as N.C. GEN. STAT. § 95-98 (1975)). The phrase "relating to the grievances, labor disputes, wages or salary, rates of pay, hours of employment, maintenance of membership or conditions of work of . . ." was replaced with "as bargaining agent for . . ."

49. *Id.*

50. N.C. GEN. STAT. § 95-99 (1975).

51. *See State v. Adams*, 266 N.C. 406, 146 S.E.2d 505 (1965); N.C. GEN. STAT. § 14-3(a) (1969).

52. N.C. GEN. STAT. § 95-100 (1975). This section's careful exclusion of public employees was presumably to avoid conflict between the "right-to-work" provisions protecting union membership as well as nonmembership and other state and local prohibitions on union membership by public employees. *Compare id.* §§ 95-78, -81 with *id.* § 95-97. *Cf.* Op. N.C. Att'y Gen. (Jan. 8, 1959) (municipality may prohibit employees from joining unions); *see also* Raleigh News & Observer, May 20, 1959, at 2, col. 2.

53. Raleigh News & Observer, May 20, 1959, at 1, col. 1; *id.* May 21, 1959, at 1, col. 6.

54. *Id.* June 3, 1959, at 3, col. 2.

55. *Id.* May 9, 1959, at 5, col. 3; *id.* June 3, 1959, at 3, col. 2.

56. *Id.* June 4, 1959, at 7, col. 6.

eventually passed both houses by wide margins,⁵⁷ although the section of greatest significance today, that voiding collectively-bargained contracts, received little attention on the floor. As enacted the new statute forbade policemen and firemen from joining nationally-affiliated unions, authorized governmental units to employ only non-union labor and declared invalid any contracts or agreements reached between those units permitting union membership and the unions representing their employees.⁵⁸

B. Constitutional Challenges

Section 95-98 has been attacked twice on constitutional grounds. Ten years after the enactment of article 12, Charlotte firefighters challenged section 95-98 and its companion provisions on first amendment grounds in *Atkins v. City of Charlotte*.⁵⁹ For many years prior to the enactment of article 12, members of the Fire Department had belonged to a local affiliate of the International Association of Firefighters (IAF), which engaged in bargaining with the city.⁶⁰ After the statutes were passed the local group terminated its affiliation with the IAF, but continued its activities, including negotiations with the city.⁶¹ In 1962 the city council, on the recommendation of the city manager, established nonmembership in the union as a requirement of continued employment. For the next few years all union activities were terminated.⁶² Members of the fire department, however, organized a new association several years later. Members of the association, aided by the IAF, petitioned the United States District Court for the Western District of North Carolina to declare section 95-97 in violation of freedom of association rights guaranteed by the first and fourteenth amendments.⁶³

Judge Craven, writing for a three-judge panel, held section 95-97 unconstitutional on its face as an abridgement of freedom of association.⁶⁴ Citing *NAACP v. Alabama ex rel. Patterson*,⁶⁵ the court stated that freedom of association is an aspect of liberty protected by the due process clause of the fourteenth amendment and by the rights of free speech and free assembly of the first amendment.⁶⁶ The court found section 95-97 overbroad because it indiscriminately prohibited the right of association in a labor union.⁶⁷ Legitimate state interests such as prevention of strikes by firefighters could be prevented by other, less restrictive, legislation.⁶⁸ The court also found section 95-99 un-

57. *Id.*

58. N.C. GEN. STAT. §§ 95-97 to -100 (1975).

59. 296 F. Supp. 1068 (W.D.N.C. 1969).

60. *Id.* at 1072.

61. *Id.*

62. *Id.*

63. *Id.* at 1073.

64. *Id.* at 1075. Section 95-97 prohibited policemen or firefighters from joining any national labor union.

65. 357 U.S. 449 (1958).

66. 296 F. Supp. at 1075.

67. *Id.* at 1076.

68. *Id.* at 1077.

constitutional on the ground that it provided "an in terrorem provision intended to make certain that no employee of the State or its subordinate municipal corporations should so much as lift a finger to form or join a labor union."⁶⁹

The court did, however, declare section 95-98 constitutional, stating:

We find nothing unconstitutional in G.S. § 95-98. It simply voids contracts between units of government within North Carolina and labor unions and expresses the public policy of North Carolina to be against such collective bargaining contracts. There is nothing in the United States Constitution which entitles one to have a contract with another who does not want it. It is but a step further to hold that the state may lawfully forbid such contracts with its instrumentalities. The solution, if there be one, from the viewpoint of the firemen, is that labor unions may someday persuade state government of the asserted value of collective bargaining agreements, but this is a political matter and does not yield to judicial solution. The right to a collective bargaining agreement, so firmly entrenched in American labor-management relations, rests upon national legislation and not upon the federal Constitution. The State is within the powers reserved to it to refuse to enter into such agreements and so to declare by statute.⁷⁰

Section 95-98, the only section still valid after *Atkins*,⁷¹ was challenged a few years later in *Winston-Salem/Forsyth County Unit, N.C. Ass'n of Educators v. Phillips*.⁷² Through the use of negotiations and "sanctions",⁷³ the Winston-Salem/Forsyth County Unit of the North Carolina Association of Educators had successfully campaigned in 1967 for a school tax plan providing annual increases in the local teachers' supplement.⁷⁴ The discontinuation of this plan by the Forsyth County Commissioners in 1972 prompted the teacher's union to challenge the statute. The union alleged that one reason for the termination of the supplement plan had been the discovery by government officials of section 95-98. Furthermore, the school board's refusal to enter into any contract or meaningful discussion allegedly was based on section 95-98.⁷⁵ The union argued, therefore, section 95-98 was unconstitutional because of its detrimen-

69. *Id.* at 1077-78. The court did not believe that the legislature had believed the criminal sanction of § 95-99 would assure compliance with § 95-98. The court noted that the only possible punishment for a labor union or a city, town, county or other municipal corporation that violates § 95-98 is a fine. Even though § 95-99 authorizes up to two years' imprisonment, the court inferred that it would be against legislative intent to authorize even a fine against North Carolina municipal corporations. *Id.*

70. *Id.* at 1077.

71. Although the constitutionality of § 95-100 was not challenged in *Atkins*, that statute's intended effect—to make clear that a municipality may require union nonmembership as a condition of employment—is clearly unconstitutional under the *Atkins* rationale.

72. 381 F. Supp. 644 (M.D.N.C. 1974). See generally Note, *supra* note 5.

73. The sanctions consisted of "notice to members and prospective members of the teaching profession that they were advised not to seek employment in the Winston-Salem/Forsyth County school system because of unsatisfactory conditions detrimental to the profession and the children of the community." Pfefferkorn, *supra* note 5, at 199; see Note, *supra* note 5, at 733.

74. Pfefferkorn, *supra* note 5, at 197-200.

75. 381 F. Supp. at 645-46.

tal effect on the teachers' ability to associate in a labor union.⁷⁶ The union complained that individual teachers would become disenchanted and leave the organization because the school board refused to work with the union.⁷⁷

The court stated, however, that even accepting the alleged consequences as true, it would not accept the proposition that the right of association requires state governmental units to negotiate and to enter into contracts with unions.⁷⁸ Relying on *Atkins*, the court said "[t]he Constitution does not mandate that anyone, either the government or private parties, be compelled to talk to or contract with an organization."⁷⁹ The court noted that "the decision whether to permit public employees to engage in collective bargaining with the government involves far greater interests than the mere right to association."⁸⁰

IV. SECTION 95-98 AND CURRENT ACTIVITIES IN NORTH CAROLINA

After *Atkins* and *Phillips*, it is well-settled that North Carolina may not prohibit public employees from joining or organizing a union without violating first amendment freedom of association rights,⁸¹ but the state may constitutionally prohibit collective bargaining contracts with public employee unions.⁸² Left unsettled is precisely what types of interaction, if any, between

76. *Id.* at 646.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 647. The court cited selected portions of two antithetical authorities to support its holding: Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974) (favoring public sector unionism); Petro, *Sovereignty and Compulsory Public Sector Bargaining*, 10 WAKE FOREST L. REV. 25 (1974) (opposing public sector unionism).

81. See also *Lontine v. Van Cleave*, 483 F.2d 966 (10th Cir. 1973); *Hanover Township Fed'n of Teachers, Local 1954 v. Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972); *AFSCME v. Woodward*, 406 F.2d 137 (8th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Bateman v. South Carolina State Ports Auth.*, 298 F. Supp. 999 (D.S.C. 1969).

Supervisors of public organizations, however, may be prohibited from joining the same union as other employees, but only if such officers have real supervisory authority. *Fire Fighters Local 2498 v. York County*, 589 F.2d 775, 778 (4th Cir. 1978).

82. See also *Hanover Township Fed'n of Teachers, Local 1954 v. Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972); *Newport News F.F.A., Local 794 v. City of Newport News*, 339 F. Supp. 13 (E.D. Va. 1972).

The provision of the North Carolina statutes authorizing the state's board of transportation "to do all things required under applicable federal legislation to administer properly the federal mass transportation programs" arguably would include entering into collectively bargained contracts pursuant to § 13(c) of the Urban Mass Transportation Act of 1969, 49 U.S.C. § 1609(c) (1976). The issue will probably never be tested in court because the state has made a policy decision not to participate in programs requiring § 13(c) agreements. Nolan, *supra* note 3, at 291. Local governments have applied for such grants but have avoided conflict with § 95-98 by contracting out the management of transit systems to private companies not protected from bargaining duties under the NLRA's exemption for government agencies. *Id.* This "contracting out" of management duties has apparently been used on occasion in areas other than transportation. Haemmal, *Stalemate in North Carolina: The Increasing Need for a Viable Public Employees Labor Relations Act* 29 (Jan. 1979) (unpublished paper).

Additionally, dues checkoff arrangements apparently are not barred by § 95-98 despite some authority to the contrary. In *Local 660, Int'l Ass'n of Firefighters v. City of Charlotte*, 381 F. Supp. 500 (W.D.N.C. 1974), the court held that § 95-98, relied on by the city as prohibiting such an arrangement, was not applicable because no contracts or agreements were contemplated between the city and the union, but rather between the city and individual employees. *Id.* at 503. The United States Court of Appeals for the Fourth Circuit agreed, stating that although § 95-98

a union and a governmental unit are permitted or authorized under section 95-98. The confusion surrounding the statute is illustrated both by the varying interpretations offered by different parties,⁸³ and by the inconsistency of actual practices across the state.⁸⁴

Recent disagreement over section 95-98 has focused on the permissibility of any private discussions or dealings between governmental units and a union of its employees. Several cities and governing agencies have maintained that government employers in North Carolina cannot recognize, meet and discuss with, bargain with or otherwise "deal" with a labor union.⁸⁵ Under normal circumstances⁸⁶ a governmental unit has no legal obligation to meet with

prohibits contracts, it does not require prohibition of dues withholding from the payroll of state employees. *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 518 F.2d 83, 84-85 (4th Cir. 1975). The United States Supreme Court reversed the appellate decision that such checkoffs, if accorded to other organizations, were required to be made for unions on equal protection grounds. *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 289 (1976). For further discussion of *City of Charlotte*, see Livingston, *The Southern Public Employee Unions' Constitutional Card: Utilization of the Equal Protection Clause*, this symposium. The court never reached the question whether § 95-98 prohibited such arrangements. 426 U.S. at 286-87. Such checkoff arrangements have existed and do exist today in a number of municipalities. Haemmal, *supra*, at 29; Pfefferkorn, *supra* note 5, at 195. The North Carolina Attorney General's office suggested, in an opinion issued prior to *Local 660*, that dues checkoff agreements were prohibited by § 95-98. 40 Op. N.C. Att'y Gen. 591 (1969). See also Nolan, *supra* note 3, at 289.

83. This confusion is not new. A governor's special commission, convened in 1970 to study the status of public employee unionism in North Carolina at the local level, stated that "[t]he months since the District Court decision [referring to *Atkins*] have been marked by . . . confusion as to what a governing authority and labor organization can and cannot do under G.S. 95-98." N.C. STUDY COMM'N, *supra* note 5, at 3. See also Note, *supra* note 5, at 732.

One recently suggested interpretation is that § 95-98, like § 95-97, is meant to apply only to policemen and firefighters. Interview with John Brooks, N.C. Commissioner of Labor (Feb. 19, 1980); see *Collective Bargaining for Teachers: Legality Unclear*, Chapel Hill Newspaper, July 9, 1980, at 1, col. 1; Raleigh News & Observer, July 9, 1980, at 1, col. 1; Haemmal, *supra* note 83, at 29. Commissioner Brooks argues that an improper codification of the original house bill carried an error into the bound version. The original bill read, in § 95-95, now § 95-97, "[T]he terms 'employee,' public 'employee,' or 'employees' whenever used in this Section shall mean any regular and full-time employee engaged exclusively in law enforcement or fire protection." H.B. 118, 1959 Sess. (emphasis added). The original bill also began:

The General Assembly of North Carolina do enact:

SECTION 1. Chapter 95, as the same appears in the 1958 Replacement Volume 2C of the General Statutes, Replacement 1958, is hereby amended by adding thereto a new article, which shall be designated as "Article 11", and which shall read as follows: . . .

The four statutes followed. It is his view that the word "Section" in the definition of public employees was meant to refer to all of § 1, or all of what is now article 12, including § 95-98. When the bill was codified into the bound version the capital "S" in "Section" was changed to a small "s" and hence, the argument goes, the misconstruction. The Attorney General's office has specifically rejected Commissioner Brooks' interpretation. Letter from Rufus L. Edmisten, Attorney General, to John McCormick, Attorney for the Chapel Hill-Carrboro City Bd. of Education (July 3, 1980).

84. See text accompanying note 114 *infra*.

85. See, e.g., Plaintiff's Brief in Support of Motion for Partial Summary Judgment, *City of Winston-Salem v. Chauffeurs Local No. 391*, 79 CvS 1464, at 4, 6 (Sup. Ct. Div. 1979). See also, *Misinterpreting Labor Law*, Raleigh News & Observer, Feb. 14, 1980, at 4, col. 1.

86. A public employer who has discussed terms and conditions of employment with agents of unions and other public employee organizations may be violating the equal protection rights of members of other unions if it refuses to engage in similar discussions with agents of these other unions without a justifiable explanation for such disparate treatment. *O'Brien v. Leidinger*, 452 F. Supp. 720 (E.D. Va. 1978). See Livingston, *supra* note 83. But see *Beauboeuf v. Delgado College*, 303 F. Supp. 861 (E.D. La. 1969), *aff'd*, 428 F.2d 470 (5th Cir. 1970).

union representatives to engage in private discussions with them.⁸⁷ The proposition that it *cannot* do so because of section 95-98, however, is quite another matter. Because public employers in North Carolina do refuse to meet with unions on the ground that state law prohibits them from doing so, the distinction is an important one.

The rationale suggested to support the view that section 95-98 prohibits all meetings and discussions is that, although the statutory language refers specifically only to the enforceability of contracts, it implicitly precludes all collective bargaining,⁸⁸ including any meaningful discussions. This proposition is simply a distortion of the statutory language.⁸⁹

Even assuming that section 95-98 forbids collective bargaining, which on its face it does not, a distinction exists between such bargaining and mere meetings to discuss issues relevant to the employer-employee relationship. The concept of collective bargaining as generally understood implies two bargaining entities of coequal status, each with a duty to meet and bargain in good faith, and with the power to enter into binding commitments.⁹⁰ Additionally, collectively bargained contracts, almost without exception, never occur without some form of exclusive representation.⁹¹ None of these elements are present when a governmental unit's representative merely sits with a union representative and discusses issues of concern to both. The courts in several jurisdictions have discussed this distinction in detail;⁹² others have recognized it as an obvious principle. For example, the United States District Court for the Eastern District of Virginia, relying on *Atkins* to find no obligation by a governing unit to enter into a collectively bargained agreement in the absence of a statute, stated; "We hasten to point out that while public employees do not have the right to collectively bargain, they are not precluded from sitting down at a table with representatives of the city and discussing matters concerning

87. *Smith v. Arkansas State Highway Employees, Local 1315*, 99 S. Ct. 1826 (1979) (first amendment, at least in the context of employee grievance procedures, does not impose any affirmative obligation on the government to listen, to respond or to recognize a union and bargain with it).

88. There is some support in dicta for this interpretation in the United States Supreme Court's decision in *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) ("collective bargaining for inmates with respect to pay, hours of employment, and other terms and conditions of incarceration is illegal under N.C. Gen. Stat. § 95-98.")

89. As a practical matter, such an interpretation of § 95-98 is impossible to enforce. See Nolan, *supra* note 3, at 287-92. See also Letter from North Carolina Attorney General's Office to Rep. J. Marvin Johnson, at 2 (April 6, 1970).

90. See *State Bd. of Regents v. United Packinghouse Workers Local 1258*, 175 N.W.2d 110, 113-14 (Iowa 1970).

91. Dole, *State and Local Public Employee Collective Bargaining in the Absence of Explicit Legislative Authorization*, 54 IOWA L. REV. 539, 543 (1969).

92. *E.g.*, *Board of Education v. Scottsdale Educ. Ass'n*, 17 Ariz. App. 504, 498 P.2d 578 (1972); *Natter v. City of Santa Monica*, 74 Cal. App.2d 292, 168 P.2d 741 (1946); *Norwalk Teachers Ass'n v. Board of Educ.*, 138 Conn. 269, 83 A.2d 482 (1951); *State Bd. of Regents v. United Packinghouse Workers Local 1258*, 175 N.W.2d 110 (Iowa 1970); *New Jersey Turnpike Auth. v. American Fed'n of State Employees*, 83 N.J. Super. 389, 200 A.2d 134 (1964); *City of Pawtucket v. Pawtucket Teachers Alliance*, 87 R.I. 364, 141 A.2d 624 (1958). See also Nolan, *supra* note 3, at 255 n.94.

the employment relationship."⁹³

The North Carolina Attorney General apparently agrees. In 1969 the Attorney General advised the Guilford County School System that under the state law the school board had "no authority to recognize professional organizations or their representatives as *bargaining agents for group or collective contracts*,"⁹⁴ but that this did not preclude meetings and discussion. The same opinion noted that "[w]hat we have said does not prohibit representatives of professional organizations from meeting with and talking with school boards as to matters related to teachers just as anyone could talk with such boards about educational matters."⁹⁵ Furthermore, in a subsequent letter approving a Charlotte employee relations plan, the Attorney General's office advised, "nor would it seem harmful for any union agent . . . to talk to the City Council and make suggestions about wages, hours, and working conditions as long as the city does not have to bargain with a labor union *looking toward a collective agreement or contract*."⁹⁶ Most recently, the Attorney General's office has suggested, although not by means of a formal advisory opinion, that only the contract, not the negotiation process itself, is prohibited by section 95-98.⁹⁷

The United States District Court for the Western District of North Carolina recently addressed this point in *Hickory Fire Fighters Association Local 2653 v. City of Hickory*.⁹⁸ The Hickory Fire Fighters Association and some of its members alleged, *inter alia*, that the city had violated their first and fourteenth amendment rights by refusing to allow them to speak with the city council while others similarly situated had been granted permission to do so. The City contended that the union was prohibited from speaking by section 95-98 and that the fire fighters should instead express individually any view they might have through established grievance procedures. In an unpublished opinion, the court stated in dictum: "[E]ven though a local government cannot enter into a contract with a labor union [under section 95-98], the statute does not prohibit discussion between the two."⁹⁹

In addition to holding discussions with public employee unions about issues of mutual concern, governmental units should be able, under section 95-98, to meet legally and engage in more thorough consultations and, if desired, reach oral or written "understandings," even though such understandings would not be enforceable. Although North Carolina is not generally consid-

93. *Newport News Fire Fighters Local 794 v. City of Newport News*, 339 F. Supp. 13, 17 (E.D. Va. 1972).

94. 40 Op. N.C. Att'y Gen. 274, 276 (1969) (emphasis added).

95. *Id.*

96. Letter from Attorney General Robert Morgan by Deputy Attorney General Ralph Moody to Representative Arthur H. Jones (April 17, 1966) (emphasis added). See also Pfefferkorn, *supra* note 5, at 191-93.

97. *Collective Bargaining for Teachers: Legality Unclear*, Chapel Hill Newspaper, July 9, 1980, at 8A, col. 2.

98. No. ST-C-79-31 (W.D.N.C. Jan. 3, 1980).

99. *Id.* at 3. See also Memorandum of Decision, *Hickory Firefighters Ass'n Local 2653 v. City of Hickory*, ST-C-79-31, at 5-6 (W.D.N.C. July 23, 1980).

ered a "meet and confer" state,¹⁰⁰ the distinction between permissible activity in states that have been so characterized and North Carolina is so slight as to be almost nonexistent.¹⁰¹ Under one "meet and confer" model of public sector labor relations, public employers may discuss working conditions with unions and may, in some instances, memorialize in writing any understandings reached, but cannot enter into a binding collective bargaining agreement.¹⁰² When enacting section 95-98, the North Carolina Legislature specifically rejected a measure that would have declared "understandings" as well as contracts and agreements void and against public policy.¹⁰³ The *Atkins* and *Phillips* decisions, as well as the attorney general opinions, have treated section 95-98 as only declaring void certain contracts, or at most, prohibiting bargaining with an eye to a collectively bargained contract.¹⁰⁴ Unlike formal contracts, such consultations and nonbinding understandings cannot be viewed as improper delegations of sovereign power, requiring specific legislative authorization.¹⁰⁵ A public employer's general power to carry out its assigned functions, including the setting of wages and working conditions, is sufficiently broad to include authority to consult with all employees affected by those functions. Such consultation actually serves the public interest by permitting more informed governmental action, and does not abridge governmental freedom of action.¹⁰⁶

The uncertainty concerning activity permissible under section 95-98 is reflected in the great variety of interactions that have existed and continue to exist across the state. Although little reliable data on the precise nature of these communications is available,¹⁰⁷ past studies have shown that several governmental units have engaged in fairly extensive discussions and negotiations with public employee unions under varying circumstances, including the use of memoranda of understanding of the type described above.¹⁰⁸

100. See, e.g., Nolan, *supra* note 3, at 255. For a definition of "meet and confer", see note 31 *supra*.

101. Nolan, *supra* note 3, at 287; Brough, *Collective Bargaining for Public Employees: Perspectives and Prospects*, POPULAR GOVERNMENT, Winter 1976, at 25.

102. Nolan, *supra* note 3, at 275. There also exists a mandatory "meet and confer" model, where the public employer is required to confer in good faith with the representatives of its employees. See ADVISORY COMMISSION IN INTERGOVERNMENTAL RELATIONS, LABOR-MANAGEMENT POLICIES FOR STATE AND LOCAL GOVERNMENT (1970), reprinted in 1 GOV'T. EMPL. REL. REP. (BNA Reference File) 51:101.

103. See note 49 *supra*.

104. *Atkins v. City of Charlotte*, 296 F. Supp. at 1077; *Winston-Salem/Forsyth County Unit, N.C. Ass'n of Educators v. Phillips*, 381 F. Supp. at 647; 40 Op. N.C. Att'y Gen. 274, 276 (1969); Letter from Attorney General Robert Morgan by Deputy Attorney General Ralph Moody to Representative Arthur H. Jones, April 17, 1969. See also Machen, *Public Employees—The Critical Labor Relations Problem Affecting All Citizens*, N.C.B.A. LAB. RELS. v-1, v-12 (1971); Raleigh News & Observer, *Misinterpreting Labor Law*, Feb. 14, 1980, at 4, col. 1.

105. See *Board of Educ. v. Scottsdale Educ. Ass'n*, 17 Ariz. App. 504, 498 P.2d 578; *State Bd. of Regents v. United Packinghouse Workers Local 1258*, 175 N.W.2d 110 (Iowa 1970).

106. See, e.g., *Nichols v. Bolding*, 291 Ala. 50, 277 So.2d 868 (1973).

107. See Jedel & Rutherford, *supra* note 20, at 488.

108. For examples of past negotiations between public employee unions and governmental groups in cities such as Raleigh, Greensboro, Wilson, Charlotte, Durham, and Winston-Salem, see Machen, *supra* note 109, at v-12; Pfeifferkorn, *supra* note 5, at 194; N.C. STUDY COMM'N, *supra* note 5, at 4; Note, *supra* note 5, at 739.

A brief survey of recent practices discloses that the range of communication between unions and different governmental units or authorities covers a broad spectrum. At one extreme, governmental employers have refused to allow union representatives to speak at open meetings even though other members of the public are allowed to participate. Other units have permitted union representatives to make suggestions at public meetings, but no more. Some employers have entered into discussions with union representatives, but have refused to formally recognize the representatives as such. In some situations informal exchanges between the employer and the union have developed, as have negotiations of a sort, but both parties carefully avoid a discussion of the exact role of the union. In other cases, "meet and confer" activity has occurred regularly. Actual written contracts and agreements have even been made, with neither party challenging their enforceability. In sum, negotiation between public employers and the representatives of their employees has become, in one form or another, an accepted practice in North Carolina.¹⁰⁹

V. CONCLUSION

Public sector collective bargaining is considered by many to be among the most important issues in modern labor relations and public administration.¹¹⁰ In North Carolina, this complicated question is treated by a single, restrictive legislative sentence enacted twenty-one years ago. Some defenders of the statute have suggested that section 95-98 does not reflect an opposition to public employees or public employee unionism per se, but instead a paternalistic view of employer-employee relations in general. As expressed in a letter from a North Carolina assistant attorney general shortly after enactment of the statute:

You see here in this ignorant Southland we are not too well indoctrinated in sociological theories of togetherness and we have the quaint, old-fashioned and archaic notion that public employees are paid from appropriations made by the sovereign, and when the appropriation is enacted the process of bargaining has no place. We always thought that public employees owed allegiance and loyalty to the units of government who paid them and for whom they worked. We never thought that it was necessary for an outside organization to look after public employees. We simply do not have strikes among public employees because the employees know that this would not be tolerated. We think that most of the public employees would say

109. The information gathered on present employer-union activity is the result of conversations with attorneys for both public employers and public employee unions, and with many local union representatives. Confirmation of each of the types of activity described in text was given by John Brooks, Commissioner of the North Carolina Department of Labor, in interviews in June, 1979, and February, 1980. Many union representatives requested that precise circumstances or employers not be made public, fearing that existing relations might be jeopardized or that other repercussions might result.

110. See Machen, *supra* note 109, at v-2; Nolan, *supra* note 3, at 303.

that they are getting along fairly well.¹¹¹

Changing circumstances in the past two decades make this reasoning doubtful today. North Carolina has seen numerous public employee strikes,¹¹² and at least several commentators do not believe that public employees are still "getting along fairly well."¹¹³

Representatives of public employers and public employee unions,¹¹⁴ government officials,¹¹⁵ and most commentators¹¹⁶ generally agree that public sector organizing and unionization will eventually increase substantially in states such as North Carolina, and that demands for collective bargaining will increase rather than decrease. Despite criticisms of section 95-98¹¹⁷ and numerous attempts to modernize it,¹¹⁸ the legislature has as yet refused to grant public employees any rights greater than those guaranteed by the United

111. Letter from an unnamed North Carolina Assistant Attorney General to the Harvard Law Review, quoted in 75 HARV. L. REV. 391, 391 n.2 (1961).

The degree of allegiance sometimes expected of employees is suggested by the statement signed by a candidate for a teaching position in a North Carolina school system early in this century:

I promise to abstain from all dancing, immodest dressing, and other conduct unbecoming a teacher and a lady. I promise not to go out with any young men except insofar as it may be necessary to stimulate Sunday-school work. I promise not to fall in love, to become engaged or secretly married . . .

I promise to sleep at least eight hours a night, to eat carefully, and to take every precaution to keep in the best of health and spirits in order that I may be better able to render efficient service to my pupils . . . I shall consider myself at all times the willing servant of the school board and the townspeople . . .

Preston, *Is America Still a Company Town?*, 4 CIV. LIB. REV. 54, 57 (1978).

112. Haemmel, *supra* note 5, at 206-08 provides a list of public sector work stoppages in North Carolina from 1953 to 1973. An update is provided in the U.S. Dep't of Labor, Bureau of Labor Statistics, Analysis of Work Stoppages Bulletins No. 1813 (1974); No. 1877 (1975); No. 1902 (1976); No. 1940 (1977); and No. 1996 (1978).

113. See, e.g., Haemmel, *supra* note 5, at 212; Haemmel, *supra* note 83; Pfeifferkorn, *supra* note 5, at 209-10.

114. See, e.g., *Negotiating the Future, Labor Relations in the Public Sector 1979-2029*, 1 GOV. EMP. REL. REP. (BNA Reference File) 41:1001 [hereinafter cited as *Negotiating the Future*].

115. See, e.g., Interview with John Brooks, Commissioner of North Carolina Department of Labor (Feb. 19, 1980).

116. See, e.g., *Negotiating the Future*, *supra* note 119; Allen, *Public Employee Relations*, in N.C.B.A., DEALING WITH AND REPRESENTING LOCAL GOVERNMENTS VII-I, 17 (1971); McGriff, *supra* note 15, at 2; Nolan, *supra* note 3, at 237; Stern, *Public Sector Bargaining in 1985*, 28 LAB. L.J. 264, 274 (1977).

117. See Haemmel, *supra* note 5; Pfeifferkorn, *supra* note 5.

118. The last decade has seen the introduction of more than half a dozen bills intended to modify or repeal § 95-98. Included have been bills to simply repeal the statute, H.B. 218, 1977 Sess.; to specifically permit and authorize contracts, H.B. 349, 1977 Sess.; to replace § 95-98 with a statute imposing on the public employer an obligation to bargain in good faith and permitting contracts of one year duration, but specifically prohibiting employee strikes or slowdowns, H.B. 1070, 1973 Sess.; to prohibit contracts but require each governing authority to establish procedures for processing employee grievances concerning terms and conditions of employment, including employee representation by a union representative, S.B. 399, 1971 Sess.; and to require negotiations with firefighters, S.B. 9627, 1971 Sess., and teachers, H.B. 1065, 1975 Sess. See Haemmel, *supra* note 83, at 24. An attempt was made in the 1979 Session to add more restrictive legislation to § 95-98, including a new limitation on the types of unions public employees might join and a provision requiring that striking public employees be dismissed. H.B. 1461, 1979 Sess. Ironically, the bill, eventually killed in the House, was introduced largely as a reaction to renewed effort by the Teamsters to organize police officers in some of the state's larger cities. INSTITUTE OF GOVERNMENT, N.C. LEGISLATION 1979, at 34 (1979).

States Constitution. While a change in attitude of most North Carolina legislators and public employees is unlikely in the immediate future,¹¹⁹ the current, but likely temporary, relatively peaceful period in public sector labor relations should be used to learn from the experiences of other states and to plan for inevitable pressures.¹²⁰ At present North Carolina faces the future with a statute that has placed public employee-employer relations in a state of confusion. Even though a proper interpretation of section 95-98 allows for meaningful interaction between a public employee's union and an employer when the employer finds it necessary or convenient, the statute increases the frustrations of public employees who want some meaningful voice in the management of their workplace. Section 95-98 should be replaced with a clear statute that provides public employees and employers with a formal process for resolution of disputes through representation and negotiation.

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119. Interview with Rep. Ernest Messer (Jan. 22, 1980); Interview with Jim French, North Carolina League of Municipalities (June 6, 1979).

120. See Brown, *Public Sector Collective Bargaining: Perspective and Legislative Opportunities*, 15 WM. & MARY L. REV. 57 (1973); Nolan, *supra* note 3, at 237.