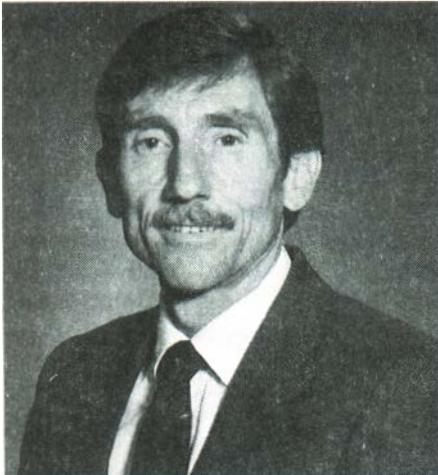


Article

Public Employee Strikes in Colorado: The Supreme Court Adopts a New Rule

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In *Martin v. Montezuma-Cortez School District*, announced October 26, 1992, the Colorado Supreme Court held that public employees in this state have a right to strike under statutory law.¹ The legislation on which the Court based its decision (the Industrial Relations Act) was adopted by the Twentieth General Assembly in 1915.² The Court's ruling has important consequences for public sector labor relations in Colorado. First, it authorizes concerted activities by all state and local employees, subject only to limited regulation. Second, the decision invalidates ordinances providing for collective bargaining by designated municipal employees in several home rule cities. Third, *Martin* presents important public policy issues of substantial concern to Colorado citizens.

This article analyzes the *Martin* case and its implications for public sector employment. The article begins by examining the Court's opinion and the rationale used to justify legalizing public employee strikes. The article then explores the shortcomings of *Martin* from a labor relations perspective and considers some of the legal problems that the case raises for public sector employers and workers. Collective bargaining procedures in other states and principles developed under federal labor law offer some practical guidance in dealing with *Martin*. Finally, the article suggests that the General Assembly should address the *Martin* opinion and either clarify or overturn its new legal rule permitting strikes by public employees. This case could result in levels of labor relations conflict that may be detrimental to our governmental system.

BACKGROUND OF THE CASE

In January 1981, a group of teachers in the Montezuma-Cortez School District struck to force the district to recognize and deal

with their union, the Montezuma-Cortez Education Association ("MCEA"). The school district refused MCEA's recognition demand, and the teachers subsequently contacted the director of the Division of Labor in the Colorado Department of Labor and Employment to request his intervention in the dispute. When the director declined to assume jurisdiction over the matter, the school district informed the striking teachers that if they failed to return to work, they would be deemed to have abandoned their employment. A number of teachers were eventually discharged.

The school district filed an action in state district court seeking injunctive relief and tort damages against the strikers. In response, the teachers brought suit against the school district claiming that the discharges violated their rights under the teacher tenure laws. In late 1984, the trial court ruled that the strike was legal under Colorado statutory law and granted summary judgment against the school district on its tort claim. Following a trial on the wrongful discharge issue, the jury found for the school district. Both parties appealed to the Colorado Court of Appeals.

The Colorado Court of Appeals held that the teachers' strike was unlawful.³ Reviewing precedent from other states, the court concluded that "under the common law, strikes by public employees are illegal." The court declined to adopt the contrary rule of the California Supreme Court upholding a common law right to strike.⁴ Further, according to the appellate court, the trial court incorrectly determined that existing Colorado statutes protected the strike. The appellate opinion states, "Even if we assume that this statute [§ 8-1-126] applies to public employees it is undisputed that the notice provisions of § 8-1-125 ... were not complied with by the teachers." Despite the strike's illegality, the Court of Appeals ruled that no tort liability attached to the teachers' work stoppage. The court explained that imposing tort liability against workers who unlawfully strike "may be counterproductive to resolving labor disputes."⁵

Reversing in part, the Supreme Court viewed the threshold question presented in the case to be whether public employees have a right to strike under Colorado statutes. That question, the Court said, "has not been expressly presented to a Colorado appellate court." Answering in the affirmative, the Court stated that the right of Colorado's public workers to strike is conferred under the Industrial Relations Act of 1915 ("1915 Act" or "Act"). That law also qualifies and conditions the right to strike.

Industrial Relations Act

The Industrial Relations Act, as mentioned, was passed by the Twentieth General Assembly, and it has a precise historical context which is essential to its meaning. It was adopted on April 10, 1915, slightly less than one year from the date of the infamous Ludlow Massacre in the coal fields of southern Color-

do. Ludlow was the site of a tent colony occupied by mine workers engaged in a strike against the Colorado Fuel & Iron Company and other coal mining concerns in the state. The strike began in September 1913 and continued through early 1914 with sporadic episodes of violence. On April 20, 1914, Colorado militia attacked the Ludlow encampment, burning the miners' tents. Eleven children and two women died of suffocation after taking shelter in a hole beneath one of the tents.⁶

Reaction to the deaths at Ludlow was immediate. On April 21, the Colorado State Federation of Labor issued a "Call to Arms," which exhorted volunteers "to protect the workers of Colorado against the murder and cremation of men, women and children by armed assassins in the employ of coal corporations, serving under the guise of state militiamen." Armed conflict erupted throughout the state, effectively destroying the civil authority of the Colorado government. Within days, irate citizens forced Governor Ammons to request the assistance of federal troops in restoring order, and Ammons telegraphed President Woodrow Wilson on April 25 to inquire, "if we cannot control situation in Southern fields, can we have federal troops?" The federal militia was sent to Colorado and duly reinstated the power of state and local officials.⁷

The 1915 Act was designed to give the state legal authority to regulate industrial conflict such as the one precipitating the Ludlow Massacre. Its focus was on private sector employment, which, at that time, was subject to state rather than federal control. Toward the end of ensuring labor peace, the 1915 Act afforded the Industrial Commission of Colorado broad powers over industrial disputes. The Commission was directed to investigate the "general condition of labor in the principal industries in the State of Colorado, and especially in those which are carried on in corporate forms...." Also falling within the Commission's scope were other delineated matters; it inquired into

the effect of industrial conditions on public welfare and into the rights and powers of the community to deal therewith; ... into the growth of associations of employers and of wage earners and the effect of such associations upon the relations between employers and employees; into the extent and results of methods of collective bargaining; into any methods which have been tried in any state or in foreign countries for maintaining mutually satisfactory relations between employees and employers; into methods of avoiding or adjusting labor disputes through peaceable and conciliatory mediation and negotiations; into the scope, methods, and resources of existing bureaus of labor and into possible ways of increasing their efficiency and usefulness.⁸

Pertaining to labor-management relations, the statute aimed at a scheme of state regulation encompassing, but not limited to, collective negotiations and industrial dispute resolution.

THE SUPREME COURT'S ANALYSIS

After describing the Act's historical setting, the Colorado Supreme Court in the *Martin* case proceeded with the observation that from the Act's inception, the term "employer" has included the state, local governments, and all public institutions. The meaning of "employee" likewise was broad and included all persons "in the service of the state or of any county, city, town, irrigation, or school district." Under the statutory scheme, employees were required to give notice to the Industrial Commission before engaging in a strike or lockout. The Commission had jurisdiction to investigate disputes and to engage in arbitration of disagreements. Following various amendments, the Act was codified in Article I, Title 8 of the 1986 Colorado Revised Statutes.

According to the *Martin* Court, under the revised statutes, most of the provisions of the original 1915 Act are continued in force. Specifically, the definitions of "employer" and "employee" still include public sector employment. One important change was the substitution of the director of the Colorado Division of Labor for the Industrial Commission and the transfer of the Commission's regulatory functions to the director. Other provisions of the Act establish certain labor relations principles which are still in effect.

The Court determined that the director of the Division of Labor has jurisdiction over employment in the state. CRS § 8-1-125 provides that he or she can inquire into labor relations matters and adjust labor disputes "through peaceable and conciliatory mediation and negotiation" or promote voluntary arbitration. CRS § 8-1-125 also gives the director jurisdiction over "every dispute between employer and employee affecting conditions of employment," which included the 1981 teachers' strike against the Montezuma-Cortez School District. As noted by the Court, that section was subsequently modified in 1990 to confer jurisdiction over disputes "only when the employer and the employee request such intervention or when the dispute as determined by the executive director, affects the public interest."⁹ The Act, in CRS § 8-1-125, states that both parties have the obligation to maintain relations without altering terms and conditions of employment until the director makes a "final determination," nor may the parties "do or be concerned in doing directly or indirectly anything in the nature of a lockout or strike or suspension or discontinuance of work or employment." The director is required to proceed "with reasonable diligence" in hearing all disputes and "shall render a final award or decision therein without unnecessary delay."

Regarding the rights of labor and management to utilize economic weapons, CRS § 8-1-126 states that nothing in the Act prohibits the employer from declaring a lockout, or employees from going on strike, after the dispute has been investigated and heard or arbitrated. CRS § 8-1-129 specifies penalties for employees and employers who undertake strikes or lockouts contrary to the Act's terms. For employees, any violation is a misdemeanor punishable by a fine of not more than \$50 or by imprisonment in the county jail for not more than six months, or both. Employers are subject to fines of not more than \$1,000,

imprisonment of not more than six months in county jail, or both. Each day of a strike or lockout is a separate offense.

In interpreting the Act, the Court cites several principles of construction. Initially, it says, the history of the legislation should be considered in discovering the legislative intent. All portions of a law must be construed together consistently with the statutory scheme. Where the language of a statute is clear and unambiguous, that language must be followed. Also, “[a]bsent constitutional infirmity, it is not within the judicial power to exclude from a statute that which the legislature expressly includes.” By its plain terms, the Act “grants the right to strike to all employees, private and public, and concurrently places conditions on the exercise of that right.” In so providing, the Colorado legislature “clearly departed from the general practice in other jurisdictions of dealing with the two spheres of labor relations differently.” The legislature, nevertheless, had the power to make a choice at variance with prevailing patterns of labor relations; and the Court reiterates that “public employees have a qualified or conditional right to strike, as do private employees. Disputes in the public sector, particularly those leading to strikes, are subject to the authority of the director of the division of labor.”¹⁰

Chief Justice Rovira and Justice Erickson each wrote dissenting opinions in *Martin*. Justice Lohr joined both dissents. The major points of those opinions are incorporated into the next section of this article, which discusses the Court’s reasoning and explores some of the more important implications of the case.

SCOPE AND CONSEQUENCES OF MARTIN

Several objections can be made to the Court’s interpretation of the Act; those objections, in turn, are linked to an assessment of the decision’s potential impact on Colorado’s public employers. In the author’s opinion, contrary to the Court’s view, the circumstances of the law’s enactment show that the Twentieth General Assembly never contemplated nor condoned public sector bargaining; the inclusion of public employers and employees in the definitional section is attributable mainly to the Act’s central purpose of establishing workers’ compensation and secondarily to careless drafting. Legislation since 1915 at both the federal and state levels has nullified the provisions of the Act dealing with strikes. Finally, and related to the first two points, public policy does not warrant granting public employees a right to strike without clear legislative standards to protect civic interests.

Historical Background

In 1915—and indeed, until the middle of this century—collective bargaining by public workers was neither protected nor encouraged. As one authority notes,

There was a time—spanning several decades before World War II—when even the act of joining or attempting to form a union for the purpose of self protection was viewed with grave misgivings in many parts of the public sector.¹¹

There were no laws authorizing collective negotiations by public sector unions, and statutes and common law in some states went so far as to prohibit labor agreements between workers and their governmental employers.¹² Even where the existence of employee organizations was tolerated, formal labor contracts between public employers and public workers were condemned as antithetical to the foundations of our political system. According to the leading case of *Mugford v. Mayor and City Council of Baltimore*, decided in 1944:

There is an abundance of authority, too numerous for citation, which condemns labor union contracts in the public service. The theory of these decisions is that the giving of a preference [to unions] is against public policy. It is declared that such preferences, in whatever form, involve an illegal delegation of disciplinary authority, or legislative power, or of the discretion of public officers; that such a contract disables them from performing their duty; that it involves a divided allegiance; that it encourages monopoly; that it defeats competition; that it is detrimental to the public welfare; that it is subversive of the public service; and that it impairs the freedom of the individual to contract for his own services.¹³

Until very recently, then, workers’ organizations in the public sector always were differentiated for labor relations purposes from those of private sector workers. Consequently, the notion that the Colorado legislature envisioned in 1915 a set of procedures for bargaining by public employees, as well as private ones, is an extraordinary conclusion that conflicts with the existing common law rules and labor relations practices of the time.

To be sure, as the *Martin* opinion repeatedly emphasizes, the Act covers public employers and public employees in its definitions. To find that the 1915 law continues to operate in 1992 as a positive grant of rights for public employees, however, the Court ignores five decades of labor relations law. In 1935, the U.S. Congress enacted the National Labor Relations Act (“Wagner Act”), which protected collective bargaining activities of private sector workers. Section 2(2) of the Wagner Act specifically excluded public sector employers from coverage under the law; as a consequence, states remained free to regulate labor relations for state and local workers.¹⁴ In an effort to undermine the Wagner Act, the Colorado legislature in 1943 enacted the Colorado Labor Peace Act (“Peace Act”). That statute imposed important restrictions on unions and workers, but, by its terms, it excluded state and local employees from its coverage.¹⁵

In 1947, the federal Taft-Hartley amendments pre-empted the Peace Act in its entirety, with the exception of the Peace Act’s provisions relating to union security. Since § 14(b) of the Taft-Hartley amendments authorized state legislation in this area, existing Colorado law on that point was not displaced.¹⁶ The *Martin* opinion proceeds as if neither federal law nor the Peace Act has any bearing on the 1915 statute. In fact, the combined effect of those two laws is that the Industrial Relations Act can apply neither to public nor to private employees.

The Peace Act is a comprehensive regulation of labor relations in this state. It originally excluded all public employees from its coverage. The law was amended later to provide for collective bargaining by regional transportation workers and employees in metropolitan sewage districts.¹⁷ The rule of construction is that as a law later in time and covering the same subject matter as the Industrial Relations Act, the Peace Act's provisions are controlling in the event of an interpretive conflict. Moreover, it must be assumed that the Colorado legislature considered the question of bargaining rights for public workers, but rejected a broad application of the Peace Act to all public employees, since the inclusion of some employees is an implied exclusion of all others.¹⁸

By the same reasoning, the legislature probably did not believe at the time of the subsequent amendments that the 1915 Act allowed public sector bargaining or the legislature would not have specifically modified the Peace Act to include two groups of public employees. If all public workers already enjoyed those rights, the Peace Act amendments would be redundant. Because the National Labor Relations Act preempts state laws regulating the concerted activities of private sector workers and the Peace Act excludes all but two groups of public sector workers from its coverage, the 1915 Act appears to have no application to collective bargaining and strikes by any class of employees—public or private—in Colorado.

A more convincing explanation for the General Assembly's definition of "employer" in the 1915 Act is found in the bill's origins. By its title, Chapter 179 of the 1915 Session Laws dealt with compensation for injured workers. Protection against lost wages due to industrial injury is appropriate to both private and public sector workers, since the underlying policy consideration of income replacement is the same in either case. Chapter 180, the source of the "Industrial Relations Act," is captioned "Workmen's Compensation Acts," and it repeated the definition of "employer" found in Chapter 179. Because the bills were a revision and consolidation of two identical measures, the General Assembly probably relied on the same coverage in both instances without intending that the state's public employees could by its provisions engage in collective bargaining activities, which were virtually unknown at the time. What is more probable, as the Colorado Supreme Court itself noted in 1921, is that Chapters 179 and 180 began as separate but identical measures which were later combined. In *People v. United Mine Workers of America, District 15*, the Court said:

It would seem that House Bill 177 and Senate Bill 99 were identical—that each was cut in two, that which was cut from one remaining in the other. The latter emerged as chapter 179, providing workmen's compensation, and the former as chapter 180 of the Acts of 1915, establishing an Industrial Commission to administer and enforce the other, each with amendments of more or less importance, but none which altered the original purpose. That was, and continued to be, to provide for workmen's compensation and an industrial commission.¹⁹

Chapters 179 and 189 were patchwork legislation. Moreover, by contemporary accounts, they were produced carelessly and under pressing time constraints. The *Denver Post* repeatedly criticized the Twentieth General Assembly for its incompetence and ineptitude, often referring to that body as the "Silly Twentieth." With specific reference to Chapters 179 and 180, the *Post* said:

The Silly Twentieth general assembly is together on the industrial relations bill and workmen's compensation act. After dickering and dawdling the long session thru, the legislature got together in a final conference yesterday and agreed to give Colorado these highly important laws.²⁰

In fact, the *Post* added that the General Assembly did not attend to the details of the law, but hired an outside consultant named Cyrus W. Phillips to finish the drafting. His task completed, Phillips declared his bills "to be superior to the original measure introduced by the Republicans and stolen by the senate Democrats." In light of the haphazard process that produced the Industrial Relations Act, it is unlikely that the General Assembly presciently inserted definitional provisions in Chapter 180 which were so innovative as to be unheard of in this country for another half-century.

Conflict with Other Laws and Policies

Even if the Twentieth General Assembly wanted to provide for public sector negotiations, further problems arise. The *Martin* Court's observation that the director has authority to engage in "arbitration" and enter a "final award" resolving disputes is inconsistent with labor relations practices and with the Supreme Court's own interpretation of the Colorado Constitution. In addition, the *Martin* opinion effectively invalidates local schemes of labor-management relations and allows public workers to strike without any of the safeguards usually present in bargaining legislation.

CRS § 8-1-123 states that the director shall "promote the voluntary arbitration" of disputes under an existing written agreement, and § 8-1-125 allows the director to retain jurisdiction of a dispute until a "final hearing" and the entry of a "final award." In January 1991, Governor Roy Romer relied on those provisions to intervene in a threatened strike of Denver teachers. Romer and executive director John J. Donlon held a series of hearings, drafted a labor agreement, and ordered that their agreement was to "govern wages, hours, and terms of employment" between the teachers and the district. Romer cited CRS § 8-1-125 as authority for his action.²¹ The *Martin* decision approvingly notes the Governor's intervention, thereby indicating that the Governor correctly followed the procedures of the Industrial Relations Act.

Although CRS § 8-1-123 does refer to arbitration, the director's legal authority to issue an award binding on the parties to a dispute is highly debatable. A number of states currently rely on binding compulsory arbitration to resolve public employee bargaining impasses, but that procedure certainly was not

adopted in Colorado in 1915. According to one commentator, the Twentieth General Assembly

gave to Colorado a system which provided for the compulsory investigation, not the compulsory adjudication, of industrial disputes. No writs were to run in aid of these declaratory judgments. The public and not the police were to be the officers of the Industrial Commission.²²

The legislature, in other words, believed that “it was wrong for government to impose the award of a government tribunal upon the parties to an industrial dispute.” Therefore, the director’s legal right to undertake a process of arbitration and to make a “final award” determining the wages, hours, and working conditions of Colorado public employees must be regarded with skepticism—despite the Denver teachers’ contract.

Even disregarding industrial relations usages of 1915, the plain language of the Act makes clear that arbitration is simply a preliminary step in the resolution of disputes, and not the final one. The Act specifically states that the director “shall do all in his power to promote *voluntary* arbitration,” and § 8-1-126 provides by its terms:

Nothing in this article shall be held to restrain any employer from declaring a lockout, or any employee from going on strike in respect to any dispute after the same has been duly investigated, heard, or arbitrated, under the provisions of this article.

Logically, if the Act allows the state to assume jurisdiction over public sector impasses, then it also gives employees the right to strike and employers a right to engage in a lockout once the state renders its order. Quite simply, there is no means of preventing public employees from striking if they so desire; the state’s power is limited to delaying the strike while its procedures are in progress.

A further dilemma raised by the *Martin* Court’s interpretation of the arbitration provisions is that arbitration of public employment disputes may violate the state constitution. The Colorado Supreme Court declared binding interest arbitration by a neutral adjudicator to be unconstitutional in *Greeley Police Union v. City of Greeley*.²³ The Colorado Constitution provides:

Every person having authority to exercise or exercising any public or governmental duty, power or function, shall be an elective officer, or one appointed, drawn or designated in accordance with law by an elective officer or officers.²⁴

Relying on that provision, the Court stated that certain basic principles of representative government must be vigorously protected:

Fundamental among [those principles] is the precept that officials engaged in governmental decision-making (*e.g.*, setting budgets, salaries, and other terms and conditions of public employment) must be

accountable to the citizens they represent. Binding arbitration removes these decisions from the aegis of elected representatives, placing them in the hands of an outside person who has no accountability to the public.²⁵

Because the director is an official acting under the direction of the governor, it might be argued that the *Greeley Police Union* rule is inapplicable to public sector disputes and would not preclude the director from issuing a “final award” under the *Martin* case. In this author’s opinion, to the contrary, state intervention in the relationship between, for example, a local school board and its teachers is more constitutionally repugnant than a delegation of authority to a private citizen. The director’s usurpation of a local legislative body’s authority supplants the decisionmaking function of the duly elected body having political accountability and obliterates the distinction between state and local control over labor relations matters. At the least, any attempted issuance of a “final and binding” award offers grounds for protracted litigation to determine the constitutional and statutory validity of the award.

Administrative Issues

Leaving aside all of the objections above, *Martin* poses practical difficulties. Every public sector worker, including police, firefighters, and any other individual employed by state or local government entities, is covered by the Industrial Relations Act and entitled to its protections. Contrary to the statutes in most other states permitting public sector strikes, the Act does not require that workers be represented by a union before striking. During the 1920s, the Industrial Commission typically treated trade union officials as the representative of workers, but union organization was not essential to the rights conferred under the statute; indeed, the Commission

“continuously recognized the right of both employers and employe[e]s to appear by committees so long as said employe[e]s appear to be regularly appointed, whether said employe[e]s or employers are permanently organized for the purpose of appointing said representatives and transacting other business, or only temporarily organized for such purpose.”²⁶

Accordingly, a group of employees only “temporarily organized” are afforded all rights under the Act, even if those employees represent only a small minority of the workforce.

Furthermore, although the *Martin* opinion correctly notes that some states do permit public employee strikes, those strikes are regulated by detailed schemes of public sector employee bargaining. The bargaining laws typically provide for union recognition procedures, specify the steps to be followed in resolving impasses, and contain numerous procedural and substantive safeguards to protect public employers and citizens.²⁷ The Colorado Act contains no limitations as to union certification, mandatory impasse procedures, and exclusion of public safety personnel—such as prison guards, firefighters, police and court employees. Instead, the state may assume jurisdiction, act with “reasonable diligence” to render an award

and, thereafter, employees are authorized to strike; the usual administrative apparatus of collective bargaining is altogether lacking. Although the Peace Act, as noted above, does contain such provisions, it only applies to two groups of public employees. Conceivably, the director could issue regulations covering matters of recognition, bargaining and unfair labor practices. However, the administration of a bona fide system of bargaining would require substantial state resources.

This author believes that local governmental authorities are powerless to curtail or limit the effect of the Industrial Relations Act. The Denver firefighters, for example, previously had a right to negotiate collective bargaining contracts with Denver pursuant to city charter amendment.²⁸ Under the *Martin* Court's interpretation of the Act, the Denver provision would be invalid, because local government law is overridden by laws on the same subject enacted at the state level.²⁹ Therefore, the Denver enactment yields to the state law, permitting all public employees to strike, as does the comprehensive ordinance for city employees in Pueblo and arrangements in other municipalities.³⁰ At a stroke, the *Martin* case tends to negate a system of local bargaining developed over a period of years and leaves those cities with no legal authority over labor disputes.

The *Martin* Court's interpretation of the Industrial Relations Act makes legislative action imperative. It is hoped that, in order to regulate possible strikes by public employees, the General Assembly will take steps to minimize the consequences of *Martin*. However, in the meantime, parties involved in a public sector labor dispute have various strategic options available both under the Act's provisions and as a matter of accepted labor relations principles.

PRACTICAL LABOR RELATIONS CONSIDERATIONS

Statutory Procedures

The key event which triggers application of the Act is the director's assumption of jurisdiction. CRS § 8-1-125 authorizes joint employer-employee petitions requesting the director's assumption of jurisdiction over a dispute or the director may unilaterally determine that the dispute affects the public interest and exercise jurisdiction. Thus, if the public employer is confronted with bargaining demands by a group of employees, the employer should ask the employees to join in a petition to the director. If the employees decline to do so, the employer could contact the director, asserting that the dispute affects the public interest. Once the director assumes jurisdiction, that action serves to maintain the existing conditions of employment until investigation, hearing and award. As a cautionary note, if a party uses the Act "for the purpose of unjustly maintaining a given condition of affairs through delay," CRS § 8-1-125(3) provides that such party is guilty of a misdemeanor punishable by a fine of not more than \$100.

To remedy actual or threatened violations of CRS §§ 8-1-125 and 126, the director may petition district courts under § 8-1-128 for injunctive relief. The latter section states that when the director presents a verified petition to the court,

thereupon, without bond and without notice, such district court shall issue its mandatory writ enjoining the alleged violations or attempted or threatened violations of this article....

The affected party may petition for dissolution of the injunction, but the petition must be supported by proof that the party is in full compliance with the provisions of the Act and a showing that the injunction is causing "great and irreparable injury." This section gives the director an important legal means of regulating the parties' actions in a dispute. While the decision to pursue an injunction rests with the director, the plain language of § 8-1-128 requires that district courts must grant the director's petition for relief when made.

CRS § 8-1-129 sets forth penalties against specified unlawful acts by employers and employees. If an employer engages in a lockout contrary to the provisions of the Act, the employer commits a misdemeanor punishable by fines and imprisonment. Each day of the lockout is a separate offense. Employees who unlawfully strike also may be punished by fines and imprisonment, and each day of the strike is a separate offense. Further, the section provides that any person "who incites, encourages, or aides in any manner" unlawful lockouts or strikes can be punished by a fine or imprisonment, or both.

CRS § 8-1-140 is a more general provision dealing with misconduct for which no specific penalty is provided in the Act, and the section is enforced by fines and imprisonment. In the case of a corporation, all officers, agents and representatives of the corporation who aided, encouraged or participated in the violation are individually guilty of the violation and subject to all fines and penalties set forth in the Act. A separate section, § 8-1-141, specifies that every day during which an employer or employee fails to comply with a lawful order of the director is a separate offense under the Act. Section 8-1-142 states that penalties under the Act are collected in civil actions brought in the name of the director, unless the violation "is designated as a misdemeanor or other crime." Section 8-1-143 requires the district attorney of any district to "institute and prosecute the necessary proceedings for the enforcement of any of the provisions" of the Act at the director's request.

The sections summarized above contain significant measures to prevent violations of the Act. In the event one party refuses to comply with the statutory procedures, the director has an array of legal devices available to sanction offending individuals. However, the Act does not address the rights and obligations of the parties if the director declines to assert jurisdiction or the director's jurisdiction is subsequently terminated. Established labor law principles under the National Labor Relations Act and the public sector collective bargaining statutes of other states offer guidance in the matter.

Other Sources of Law

Assuming that employees do undertake a lawful work stoppage as provided in CRS § 8-1-126, the public sector employer might elect to continue operations by hiring temporary or permanent replacements for the striking workers. According to federal labor

law, strikers cannot be discharged from their employment for participating in a strike, but the employer can hire other workers permanently or temporarily to perform strikers' jobs under the terms and conditions rejected by the strikers.³¹ Precedent for permanently replacing public sector workers engaged in a legal strike is less definitive than the federal rule governing private sector employment, but it has some support in legal commentary and is an alternative to be seriously considered by the public employer.³²

Another option for Colorado public employers is a suit for injunctive relief when a strike otherwise lawful under the Act constitutes a clear and present danger or threat to the health, welfare or safety of the public. Collective bargaining statutes in other states often explicitly provide for such relief, and it is a recognized exception to employees' protected strike right.³³ Further, injunctions restraining dangerous strikes might be available as a matter of common law doctrine. For example, the California Supreme Court ruled that while public employees in that state had a common law right to strike, courts would enjoin such strikes if they threatened the welfare of the community.³⁴ Consequently, a strike by police or firefighters in this state might be subject to injunctive restraint, even though the Colorado Act does not by its terms address the matter.

One final option for employers is disciplinary action against employees engaging in strike misconduct. Even though a strike is lawful at its inception, the behavior of strikers may exceed the legitimate bounds of strike activity and provide grounds for a striker's discharge. Federal labor doctrine recognizes many forms of unprotected activity, such as strikes accompanied by violence, sit-down strikes, partial and intermittent strikes and strikes in violation of a no-strike agreement.³⁵ Most probably, Colorado courts would likewise afford the public employer a right to discharge employees in those circumstances and others developed under the National Labor Relations Act.

In summary, the Industrial Relations Act contains important procedures for its enforcement. The remedial measures in most instances are to be initiated by the director of the Division of Labor. In the absence of the director's jurisdiction over a dispute, the Act does not regulate bargaining, strikes and work stoppages. Consequently, it is proposed that as a practical matter, Colorado courts would follow legal principles adopted in other states. One important example is injunctive relief against work stoppages that threaten the welfare of the community. However, that issue, along with many others, can only be resolved through more litigation.

CONCLUSION

Regardless of how the Colorado courts deal with public sector labor relations in the future, this article suggests that the General Assembly needs to address the *Martin* decision to determine if it is the appropriate rule for this state. As noted above, the decision has numerous weaknesses; most fundamentally, the Colorado Supreme Court has authorized a scheme of bargaining and strikes by public employees which has a dubious basis in law, little administrative regulation, and poses substantial risks for citizens of the state who rely on public services. Thus, in this

author's opinion, the General Assembly should correct the situation before labor conflict, litigation and injury to the public occur.

NOTES

1. *Martin v. Montezuma-Cortez School District RE-1*, Docket No. 90SC562 (Oct. 26, 1992).
2. *Laws Passed at the 71ventieth Session of the General Assembly of the State of Colorado* (1915), ch. 180, at 562-596 (*hereafter*, *Session Laws*).
3. *Martin v. Montezuma-Cortez School District RE-1*, 809 P.2d 1010 (Colo.App. 1991). The narrow holding of the Court of Appeals was that even if the Industrial Relations Act legalized public employee strikes in general, the teachers failed to comply with the notice provisions of the Act, and their strike was unlawful for that reason. In finding the strike legal, the Supreme Court ignores the issue of notice provisions.
4. *County Sanitation District No. 2 v. Los Angeles County Employees Assn., Local 660*, 699 P.2d 835 (1985). California is the only state to recognize a common law right to strike for public employees.
5. *Martin, supra*, note 3 at 1013-14.
6. For accounts of the incident, *see generally*, Beshoar, *Out of the Depths: The Story of John R. Lawson, A Labor Leader* (Denver, CO: Colorado Historical Society and Denver Trades and Labor Assembly, 1942); Gitelman, *Legacy of the Ludlow Massacre: A Chapter in American Industrial Relations* (Phila., PA: U. of Pennsylvania, 1988); West, *Report on the Colorado Strike* (Washington, D.C.: Govt. Printing Office, 1915).
7. The quotations and a description of the uprising are found in Beshoar, *supra*, note 6 at 180-205.
8. *Session Laws, supra*, note 2 at 576. For an analysis of the Industrial Commission's decisions and caseload, *see* Fry, "Governmental Adjustment of Colorado's Industrial Disputes, 1915-1930," 3 *Rocky Mtn. L. Rev.* 223 (1931).
9. *Martin, supra*, note 1, slip op. at 17, fn. 11; and *see* CRS § 8-1-125 (1992 Cum. Supp.).
10. *Id.*, quotations at 22-24.
11. Schneider, "Public-Sector Labor Legislation—An Evolutionary Analysis," in eds. Aaron, Najita, and Stern, *Public-Sector Bargaining* (Madison, WS: IRRRA, 2d ed. 1988) at 192.
12. For an authoritative treatment of public sector unionism from its origins into the late 1940s, *see* Spero, *Government as Employer* (New York, N.Y: Remsen Press, 1948). Spero observes, "The proposition that government employees constitute a class apart from other workers is reflected in

their exclusion from the coverage of general labor legislation.” Even states with constitutional provisions guaranteeing employees the right to organize did not extend those protections to public employees. *Id.* at 16.

13. Cir. Ct. Baltimore City (April 13, 1944), *aff'd* 44 A.2d 745 (1945), *reprinted in*, Rhyne, *Labor Unions and Municipal Employee Law* 161-172 (Washington, D.C.: Nat'l. Institute of Municipal Law Officers, 1946).
14. *See generally*, Hogler, *Public Sector Strikes: Employee Rights, Union Responsibilities, and Employer Prerogatives* 1-4 (Washington, D.C.: International Personnel Management Association, 1988).
15. For an analysis of the Labor Peace Act, see Hogler, “The Regional Transportation District Strike and the Colorado Labor Peace Act: A Study in Public Sector Collective Bargaining,” 54 *U. Colo. L. Rev.* 203 (1983) at 213-214.
16. In *Communications Workers of America v. Western Electric Co.*, 551 P.2d 1065 (Colo. 1976), *appeal dismissed*, 429 U.S. 1067 (1977), the Colorado Supreme Court ruled that the union security provisions in the Peace Act had not been preempted by subsequent federal labor legislation. Specifically, § 14(b) of the Taft-Hartley Act provides that states are granted the power to regulate union security as a matter of state law. Colorado subsequently enacted legislation dealing with union security which is unique among the states. CRS § 8-3-108(1)(c)(I)-(V); *see also*, Tomlinson, “The Labor Peace Act: Colorado Now is a Modified Right-To-Work State,” 7 *The Colorado Lawyer* 1125 (July 1978) (analyzing 1977 legislation and its context).
17. *See* Hogler, *supra*, note 15 at 204.
18. For the general rules of interpretation, see Sands, 2A Statutes and Statutory Construction (4th ed. 1973), § 51.02 (in the event of conflict in interpretation, new provision controls) and § 47.23 (“where a statute creates and regulates, and prescribes the mode and names of the parties granted a right to invoke its provisions, that mode must be followed and none other, and such parties only may act”).
19. 201 P 54 (Colo. 1921) at 56.
20. *Denver Post* (April 5, 1915) at 5.
21. Order signed by Governor Roy Romer and Executive Director John J. Donlon, March 27, 1991, appended to the contract between the Denver Classroom Teachers Association and School District No. 1, City and County of Denver.
22. Fry, *supra*, note 8 at 225. Fry explained that compulsory arbitration of disputes was proposed to the General Assembly but was not adopted. He comments:

During the elections of November 1914 a system of compulsory industrial arbitration was advocated by

Senator Patterson, the unsuccessful candidate for governor. The workers of Colorado endorsed this proposal. Compulsory industrial arbitration received little support from the legislators of 1915. They believed that the police would be powerless against a defiance of an award by thousands of workers. They were unwilling to recognize trade unions and utilize them for the enforcement of awards upon their members.

- Id.* at fn. 9. Fry’s analysis is persuasive evidence that binding arbitration was never a part of the Industrial Relations Act.
23. 553 P.2d 790 (Colo. 1976). The holding in *Greeley Police Union* was reaffirmed in *City of Denver v. Denver Firefighters Local No. 858*, 663 P.2d 1032 (Colo. 1983).
 24. Colo. Const., Art. XXI, § 4.
 25. *Greeley Police Union*, *supra*, note 23 at 793.
 26. Fry, *supra*, note 8 at 244, *quoting*, *Steam Engineers’ Union v. Denver Employers*, C.I.C. File 1165 (1925).
 27. *See generally*, Hogler, *supra*, note 14 at 31-37.
 28. Denver, Colo. Charter, Art. C5.80-8 (1979).
 29. Colo. Const., Art. XX, § 6; *City of Colorado Springs v. Industrial Commission*, 749 P.2d 412 (Colo. 1988) (in matters of statewide concern, state statutes supersede local ordinances).
 30. Pueblo, Colo., Charter, § 8-14 (1980, as amended); Englewood, Colo., Charter, Art XV, § 137 (1990, as amended).
 31. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938); *Laidlaw Corp.*, 171 NLRB 1336(1968).
 32. For a discussion of the point, see *Hogler*, *supra*, note 14 at 50-53.
 33. *See generally*, *id.* at 47-49.
 34. *County Sanitation District*, *supra*, note 4 at 850.
 35. *See generally*, *Morris*, 2 *The Developing Labor Law* (Wash., D.C.: BNA Books, 2d ed., 1983) at 1015-26.