

Operation Self-Help: Washington State's New Merit System Law

Paul L. Beckett

When the legislature failed to act, the employees, through their unions, went out to the people. Result: merit system by referendum.

TWENTY-NINE of the 50 state governments, according to the latest edition of *The Book of the States*, now have comprehensive merit systems for their employees. That of the state of Washington may well be the only one, however, with a scheme of personnel administration drawn up and "sold" directly to the voting public by an employee union and thus a direct implementation of that organization's preferences regarding such matters as the "blanketing-in" of incumbent employees, the weight to be given seniority in certain personnel actions, and appeals from disciplinary decisions.

The state's new personnel law was prepared and sponsored by the AFL-CIO-affiliated Washington Federation of State Employees (WFSE), filed as initiative to the people No. 207 in January, 1960, and approved by the voters at the general election of that year. It would in any case be of some interest as one of the newest state "civil service" laws of general scope; it is made the more interesting and significant by its heterodox origin and mode of adoption and a few special characteristics attributable to its source.

• Paul L. Beckett, Washington State University faculty member since 1947, has been personnel science department chairman since 1956. He was founding chairman of a public administration department at the American University of Beirut from 1951 to 1953, and served as public administration consultant to the Pakistan Planning Board in 1957. His publications concern public administration, state and local government, and technical assistance administration. He holds degrees from Monmouth College, the University of Illinois, and UCLA. The author gratefully acknowledges support by the Washington State University Committee on Research of this and other studies dealing with Washington's state government.

Employees' Resort to Self-Help Justified

Before any further comment on how the law came into being, let it be noted that the Washington legislature could not and cannot justly complain about being by-passed in its enactment. At session after session from the 1930's onward, the lawmakers had had before them bills to provide the state government with a general merit system, but they could not bring themselves to pass one.

Particularly golden had been the opportunities of the 1950's. In 1951 it had been a professionally drafted measure introduced at the request of Republican Governor Arthur B. Langlie as Senate Bill 141. The bill passed the senate but died in committee in the lower house.

Later in the same year the governor and the bipartisan legislative council collaborated in the creation of the state's "little Hoover Commission" (also popularly referred to as the "Shefelman Committee" and officially entitled the Committee on State Government Organization). One of this committee's major proposals to the 1953 legislature was a well-drawn personnel bill (introduced as Senate Bill 252) designed to consolidate four existing state merit systems and to extend the merit principle to several thousand state employees outside any established system.

The bill passed the senate at both the regular legislative session and (as SB 17) an extra session that followed immediately, but failed in the lower house. In the extra session one more affirmative vote in the house of representatives would have made it law. The vote on the question of its final passage was 49 to 46 in its favor; however, under the Washington constitution it

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takes an absolute majority in both legislative chambers to enact legislation, and the house membership is 99.

In 1955 the Shefelman Committee bill, modified in a few particulars in the hope of gaining additional support, was again before the legislature as SB 108. Once more it passed the senate but was bottled up in the house of representatives by a refractory committee chairman. An effort on the 58th day of the 60-day session to discharge the bill from the committee on state government and to bring it out for floor consideration failed by the margin of the committee chairman's vote (the tally was 50 to 49 against considering the discharge motion).

The story in 1957 and 1959 was similar if less dramatic. At each of these sessions slightly amended but substantially undamaged versions of the Shefelman Committee personnel bills were introduced, only to fall victim to legislative "politicking." The 1957 proposal (SB 402) was introduced at the request of Democratic Governor Albert D. Rosellini, who had been an active member of the Shefelman Committee. It passed the senate and died in the same house committee which had prevented action on the 1955 bill under the same committee chairman. The 1959 edition of the Shefelman Committee bills (HB 45), sponsored by the legislative council, got no further than the house committee on state government.

Genesis and Adoption of Initiative 207

Such was the matrix out of which Initiative 207 grew. By the spring of 1959, when the legislature adjourned without even considering HB 45, at least three organizations especially interested in a comprehensive merit system for state employees had had enough of legislative obstruction and delay and were ready to attempt an end run around the legislature by resort to the initiative. These were: the WFSE, already mentioned; the more recently organized independent Washington State Employees Association (WSEA); and the state League of Women Voters.

Unfortunately, relations between the two employee organizations were such that they could not be brought to agree on a measure they could sponsor jointly. Instead, when

the time arrived to file initiatives aimed at the 1960 general election ballot, each came forth with its own version of a merit system statute as a proposed initiative to the people. The WSEA proposal was filed first with the secretary of state, on January 8, 1960, and was given the number 204. The WFSE measure came in on January 13 and was numbered 207.

The next necessary step, under Washington's constitutional provisions governing the use of the initiative, would be for each organization to secure the signatures of at least 90,319 registered voters supporting its proposal (since 1956 the signature requirement has been 8 per cent of the number of votes for the office of governor at the last preceding gubernatorial election). Obviously placed in a delicate position by the conflict between the employee groups, the leadership of the League of Women Voters, which had tried to mediate it, announced that that organization would support and help obtain signatures for both initiatives.

Inevitably the ensuing competition for signatures for two initiatives having the same aim, sponsored by rival state employee organizations, was confusing and in some measure annoying to voters. Thus, an inherently difficult task was made more complicated. There was also speculation as to what the effect would be should both proposals win a place on the ballot and then both be approved. However, this last potential problem was aborted by the failure of the proponents of Initiative 204 to garner the required number of signatures. Initiative 207 did qualify to be voted upon, but by an uncomfortably narrow margin.

By the July 8 deadline for filing initiative petitions with the secretary of state, its sponsors had accumulated 110,144 signatures. However, 15,569 of these were rejected as duplicates or not the signatures of registered voters, leaving 94,575 to place the initiative on the ballot.

Most of the burden of collecting this many signatures is reported to have been carried by the WFSE membership.¹ The stultifying situation in which the League of Women Voters found itself has already been

¹ Interview with Mr. Norm Schut, Executive Secretary, Washington Federation of State Employees, Olympia, August 29, 1962.

noted. Various segments of the AFL-CIO aided the WFSE, but apparently not so much in helping to circulate petitions as in providing publicity and lending mailing and other facilities. The direct monetary cost of the petition-circulating campaign—about \$47,500, according to the Executive Secretary of the WFSE—was mainly defrayed out of the proceeds of a special 25-cent monthly assessment added to the dues of WFSE members. This was collected for a full two years (September, 1959 to September, 1961).

Once Initiative 207 had qualified for the ballot, events demonstrated how unrepresentative the Washington house of representatives had been in so long blocking all efforts to achieve a general state merit system through the ordinary legislative process. No open, organized opposition to the initiative materialized. Indeed, in the voters' pamphlet, required by law to be published by the secretary of state, which contained the texts of all referred measures and arguments for and against, it was specifically noted regarding Initiative 207 that "at the time of going to press, no group had publicly voiced opposition," and that, "for this reason," Mr. Neal V. Chaney, a Bellevue newspaper publisher, had submitted an opposition argument "as a public service."³

Relieved of the pressures engendered by the competition between Initiatives 207 and 204, the League of Women Voters now pitched in and gave No. 207 vigorous support. And in the last weeks before the election, even the WSEA caved in, though grudgingly and with reservations, and recommended voting for the ballot measure. Its position, in essence, was that it would be better for the state's employees to have this merit system law, the objectionable features of which could be corrected by amendment, than to return to the legislative

stalemate of the preceding decade. When election day came on November 8, the vote on No. 207 was: for, 606,511 (56.25% of those voting on the measure); against, 471,730.³ Thirty days later, as provided by the Washington constitution with respect to referred legislation approved by the people, the governor proclaimed the initiative effective law, and it subsequently went into the statute books as Chapter 1, Laws of Washington 1961.

Major Characteristics of the New Law

Taken as a whole, there were more similarities than differences between the personnel bills put together in 1959 by the Federation of State Employees and the State Employees Association. As would be expected, both were essentially exercises in eclecticism. Avowedly, the WSEA measure that failed to reach the ballot had drawn more inspiration than its competitor from the Model State Civil Service Law long sponsored by the National Civil Service and Municipal Leagues. In fact, WSEA used this as one of its major talking points in seeking citizen support for its initiative.⁴

Both measures had unquestionably been influenced by the Shefelman Committee bills that had so many times been introduced in the Washington legislature since 1953, by the civil service laws of other states, and, in the case of No. 207, by the ideas of organized labor on what a civil service law should contain. The entire text of No. 207 was submitted to and approved by the AFL-CIO Washington State Labor Council before being filed with the secretary of state.

In general, the patterns of personnel organization and policy provided for by the initiative adopted are not unconventional; a few unusual features of the law will be

³ This represented 85.72% of the 1,257,952 votes cast in the election, a good showing on a ballot measure. A simple majority of the votes cast on it suffices to enact an initiative in Washington, provided at least one third of those voting at the election have voted on the measure (Constitution, Art. II, sec. 1).

⁴ One of the questions asked by Mr. Chaney in his voters' pamphlet attack on the WFSE initiative was: "Why did the National Civil Service League refuse to approve Initiative Measure No. 207?" Looked at overall, Mr. Chaney's argument against 207 seems to me to have been rather perfunctory.

² In other words, for lack of any organized opposition, it had not been possible to put together a committee to frame an official opposing argument, as provided for by Washington's recently revised law on voters' pamphlets (Laws 1959, Ch. 329). The committee selected to compose the official argument for Initiative 207 consisted of the chairman of the merit system committee of the state League of Women Voters, Mrs. Robert T. Garen of Tacoma; Mr. Leonard Nord, personnel officer, state department of institutions; and Mr. Schut.

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made the subject of a separate section below.

Coverage and Exemptions

The basic principle of the act regarding coverage is that it shall apply to every agency, employee, and position in the state government not specifically exempted (Section 4). However, as is always true to some extent, the exemptions provided for (Section 7) are numerous. They include: all employees of the legislature and the courts; academic personnel in the five state institutions of higher learning; elective state officers; the chief executive officer of each agency; members of boards, commissions, and committees; assistant attorneys general; commissioned and enlisted personnel in the military service of the state; the officers of the Washington state patrol; inmate, student, part-time or temporary employees and part-time professional consultants as defined by the state personnel board; and all employees in the state printing plant. Also excluded from the merit system are statutory assistant directors of most state departments; the secretaries of boards, commissions, and committees; and a defined number of confidential secretaries to major executives.

For practical political reasons the WFSE also felt it necessary to accord special, organizationally autonomous status to the personnel systems existing in the state highway department and with regard to non-academic personnel in the institutions of higher learning. In effect, therefore, the law provides, initially at least, for seven personnel systems, each under the management of a separate board (and left untouched the system existing for officers of the state patrol).

It stipulates, however (Section 9), that sometime prior to January 1, 1963, the highway department and the state patrol shall make a study in conjunction with the central personnel board "to determine if it is feasible to integrate completely" their personnel systems with that of the new state department of personnel. "Such study" is to "be presented in writing with recommendations" to the 1963 legislature on the day of its convening.

The law further provides (Section 8) that, on request, the department of personnel may make its services available on a reimbursable basis to: "either the legislative or the judicial branch of the state government"; any county or municipal subdivision of the state; the institutions of higher learning; or the highway department.

Personnel Organization

The act establishes "as a separate agency within the state government" a department of personnel, to be "governed by a State Personnel Board and administered by a Director of Personnel" (Section 3). The board is to be composed of three members appointed by the governor, subject to senate confirmation, for staggered terms of six years. The term of one member expires in each odd-numbered year (Section 11). Persons appointed "shall have clearly demonstrated an interest and belief in the merit principle," cannot hold any other employment with the state, cannot have been an officer of a political party within one year of their appointment, "and shall not be or become a candidate for partisan elective public office during the term to which they are appointed."

Board members are to be paid \$50 for each day on which they actually attend a board meeting officially held, up to a maximum of \$1,500 in any fiscal year (the limit does not apply to days spent in hearing employee appeals). They are also to be reimbursed for necessary travel and other expenses connected with their official duties on the same basis as other state officers and employees. The board elects its chairman and a vice-chairman from among its members to serve one year; and the personnel director is made ex-officio board secretary.

The director of personnel is to be appointed by the governor from a list submitted to him by the board with its recommendations, such list to consist of the names of the three persons standing highest on a competitive examination administered by a committee of three to be set up by the board solely for this purpose whenever the position of personnel director is vacant. "Only persons with substantial experience in the field of personnel management shall

be eligible to take such examination" (Section 13). The same section vests the board with full discretion to fix the director's salary, and makes him removable for cause, either by the governor with the approval of a majority of the board, or by a majority of the board.

As to the agencies allowed organizational autonomy in carrying out the provisions of the act, Section 5 requires the governing body of each state institution of higher learning to designate three of its members to act as the institution's "permanent Personnel Committee" for its non-academic employees, with powers, duties, and compensation analogous to those of the state personnel board; and a "qualified full-time non-academic employee" to perform duties analogous to those of the state personnel director.

Section 6 contains comparable provisions respecting the state highway department. The highway commission is required to appoint, subject to senate confirmation, a departmental personnel board of three members, "for the same terms, having the same qualifications, subject to the same restrictions, and to be given the same compensation" as members of the state personnel board, and with equivalent responsibilities in applying the act to highway department personnel. The commission is also to appoint (and may remove) a highway department personnel director, on the same principles applicable to the appointment and removal of the state personnel director.

Rigidities

Perhaps not unrelated to its employee-organization origin is a tendency of the new law to spell out policy on matters regarding which the personnel board and its director might well have been given some measure of discretion. In this respect, the law compares unfavorably with the bills prepared by the Shefelman Committee.

For example, Section 15 specifies the subjects on which the new personnel board is to promulgate rules and regulations "consistent with the purposes and provisions of this act and . . . the best standards of personnel administration," but does not stop there. Rather, it makes application of the

"rule of three" mandatory in the certification of names for vacancies; explicitly makes seniority the sole criterion for determining the order of necessary lay-offs and subsequent reemployment; establishes a probationary period of six months, no more, no less; and stipulates as to step pay increments that they are to be "based on length of service for all employees whose standards of performance are such as to permit them to retain job status in the classified service."

The personnel board was given no discretion regarding who should be "blanketed-in" at the time the act became effective (Section 24); and, as will be more fully explained below, the law spells out in extraordinary detail the policies concerning employee appeals from disciplinary actions (Sections 17-22).

Restrictions on Political Activity

The provisions of the law on the subject of political activity by covered employees are as follows (Section 25):

1. Solicitation for or payment to any partisan, political organization or for any partisan, political purpose of any compulsory assessment or involuntary contribution is prohibited. No person shall solicit on state property any contribution to be used for partisan, political purposes.
2. Employees shall have the right to vote and to express their opinion on all political subjects and candidates, but shall not hold any political party office or participate in the management of a partisan, political campaign. Nothing in this section shall prohibit a classified employee from participating fully in campaigns relating to constitutional amendments, referendums, initiatives, and issues of a similar character, and for non-partisan offices.
3. Nothing in this section shall prohibit appointment, nomination or election to part-time public office in a political subdivision of the state when the holding of such office is not incompatible with, nor substantially interferes with, the discharge of official duties in state employment.
4. For persons employed in State Agencies the operation of which is financed in total or in part by Federal grant-in-aid funds political activity will be regulated by the rules and regulations of the United States Civil Service Commission.

Financing

The new system is to be financed from a revolving fund called the "Department of Personnel Service Fund," into which is to

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be paid out of the operations appropriations of each agency subject to the act (except the highway department and the institutions of higher learning) an amount equaling 1 per cent of its approved salary and wage allotments for positions in the classified service (Section 28).

Some Unusual Provisions

Reference has already been made to some unorthodox features of the new act, such as the exclusive emphasis given seniority in work-force reduction situations and in the award of step pay increases. There are others which may not be unrelated to the law's employee-union origins.

Employee Participation in Policy

It is expressly made the duty of the personnel board "to make rules and regulations providing for employee participation in the development and administration of personnel policies" (Section 14). The same section goes on to provide:

To assure this right, personnel policies, rules, classification and pay plans, and amendments thereto, shall be acted on only after the Board has given twenty (20) days notice to, and considered proposals from, employee representatives and agencies affected.

Prevailing Wages and Periodic Wage Surveys

Similar emphasis is placed on the prevailing wage concept as a guideline to pay policy. Section 15 stipulates that the rules and regulations to be adopted by the personnel board shall provide for the

. . . adoption and revision of a state salary schedule to reflect not less than the prevailing rates in Washington State private industries and other governmental units for positions of a similar nature . . . subject to approval by the State Budget Director in accordance with the provisions of chapter 328, Laws of 1959. . . .

The section that follows requires not only that the board "shall give full consideration to prevailing rates in other public employment and in private employment in this state" in adopting or revising classification and salary schedules, but also that for this purpose it shall have made periodic wage surveys, with one to be conducted in each

year preceding a regular legislative session, the results to be forwarded along with a recommended state salary schedule to the governor and the budget director for use in preparing the state budget for presentation to the legislature.

Collective Bargaining

The act also expressly requires (Section 15) that the board's rules and regulations shall include provision for "agreements between agencies and employee organizations providing for grievance procedures and collective negotiations on personnel matters, including wages, hours and working conditions, which may be peculiar to an agency." A rule to implement this requirement was finally agreed upon and promulgated by the board in May, 1962, and was immediately attacked in the courts by the Washington State Employees Association.⁵

"Blanketing-in" Clauses

It is common, when a new merit system is established, to attempt some distinction between incumbent employees with a reasonable claim to automatic transfer into the new system and recent political appointees for whom some kind of a test of fitness may be desirable. In Washington, both merit system bills authored by the Shefelman Committee undertook to make such a distinction, but Initiative 207 did not. Rather Section 24 of the latter provided:

1. Employees . . . currently serving under the jurisdiction of a state merit system

⁵ *Donaldson v. State Personnel Board, et al.*, No. 34032, Superior Court for Thurston County, Washington. In a superior court decision announced on September 26, 1962, the WSEA lost the first round of its declaratory judgment action to have the new rule (Rule XX of the board's "Merit System Rules") adjudged illegal and unconstitutional. However, it seems quasi-certain that it will take a state supreme court decision to settle the controversy. The WSEA particularly objects to the fact that the rule provides procedures under which an employee organization can win certification as exclusive representative for the employees of a "bargaining unit"; and also to the fact that agreements arrived at by collective bargaining may include union security clauses (though union membership cannot be made a condition of employment) and provision for payroll deduction of employee organization dues subject to authorization by individual employees.

established by law shall automatically retain their permanent or probationary status acquired under such system;

2. All persons who were in the employ of the state government outside the statutory personnel systems immediately prior to the effective date of this act, in positions not exempted from the classified system . . . by this act, shall automatically receive such permanent or probationary status with respect to such positions, and any prior positions, as they would have acquired . . . had they been serving satisfactorily therein under the merit system. . . .

Appeals from Disciplinary Action

The most heterodox (and to me the most questionable) sections of the new law are those regulating employee appeals from disciplinary action. It is hard to imagine a civil service "back door" more tightly closed.

The matter is dealt with in great detail in Sections 17 through 22. Not only is the personnel board apparently free to order any action it chooses concerning a suspended, demoted, or dismissed employee after hearing his appeal, with no discretion left the employing agency,⁶ but explicit pro-

⁶The act simply stipulates (Section 19) that within 30 days after hearing an employee appeal the board is to "make and fully record in its permanent records findings of fact, conclusions of law when the construction of a rule, regulation or statute is in question, reasons for the action taken and its order based thereon. . . ." As to who may appeal, Section 17 provides that: "Any employee who is reduced, dismissed, suspended or demoted, after completing his probationary period . . . shall have the right to appeal to the Board not later than thirty (30) days after the effective date of such action. The employee shall be furnished with specified charges in writing when the action is taken. Such appeal shall be in writing and shall be heard by the Board within thirty (30) days after its receipt. The Board shall furnish the agency concerned with a copy of the appeal in advance of the hearing." Hearings on employee appeals are to be "open to the public, except for cases in which the Board determines there is substantial reason for not having an open hearing, or in cases where the employee so requests," and "informal with technical rules of evidence not applying . . . except the rules of privileges recognized by law" (Section 18). Both the employee and the employing agency are to be "notified reasonably in advance of the hearing and may select representatives of their choosing, present and cross-examine witnesses and give evidence before the Board." Members of the board may, "and shall at the request of either party," issue subpoenas, and all testimony is to be under oath administered by a board member. An official record of the hearing must be made, "including all testimony."

vision is also made for appeal of personnel board decisions to the superior court.

Such appeal may be on any one or more of the following grounds (Section 20): That the order was (a) founded on or contained error of law, which shall specifically include error in construction or application of any pertinent rules or regulations; (b) contrary to a preponderance of the evidence as disclosed by the entire record with respect to any specified finding or findings of fact; (c) materially affected by unlawful procedure; (d) based on violation of any constitutional provision; or (e) arbitrary or capricious.

It is further specifically provided that (Section 21):

1. The court shall review the hearing without a jury on the basis of the transcript and exhibits, except that in case of alleged irregularities in procedure . . . not shown by the transcript the court may order testimony to be given thereon. The court shall upon request by either party hear oral argument and receive written briefs.
2. The court may affirm the order of the Board, remand the matter for future proceedings before the Board, or reverse or modify the order if it finds that the employee's objection thereto is well taken on any of the grounds stated. Appeal shall be available to the employee to the Supreme Court from the order of the Superior Court as in other civil cases.

Conclusion

The conclusion seems inescapable that, whatever the law's defects in the way of overemphasis on seniority, overspecificity, and oversolicitude for employees subjected to administrative discipline, Washington's state government is better off with its new comprehensive merit system statute than it would be without it. In view of the legislature's sorry record in this area in the years preceding 1960, who can tell how long it might have taken to secure a comparable basis for improving state personnel management had the employees not resorted to self-help?

The defects of the law could be readily cured by amendment. It will be interesting to see what proposed amendments the 1963 session of the legislature brings forth. The 1961 legislature "laid low" on this subject, if only because under the Washington constitution it takes a two-thirds majority of

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all members to amend an approved initiative within two years of its adoption.⁷

One amendment did achieve such a majority in 1961 (Laws 1961, Chapter 179). It added to the agencies expressly exempted from the merit system the state's various agricultural commodity commissions, such as the fruit commission, the apple advertising commission, the dairy products commission, and the new wheat commission.

⁷ Art. II, sec. 41, added by Amendment 26 (1952). Prior to this a law approved by the electorate simply could not be amended or repealed by the legislature for a period of two years.

None of these commissions maintains a staff of significant size. The only other two amendments proposed at this session were both aimed at the section of the statute regulating political activity by covered employees (Section 25). One (HB 275) would have repealed this section outright. The other (SB 216) would merely have emasculated it by deleting from Subsection (2) the language prohibiting the holding of political party office by classified employees and their participation in *partisan* political campaigns. House Bill 275 died in the house committee on state government, SB 216 in the senate rules committee.

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