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THE IMPACT OF THE NEW NATIONAL LABOR POLICY ON PUBLIC SECTOR BARGAINING: THE UNFINISHED AGENDA

Arvid Anderson*

INTRODUCTION

This Conference poses the rhetorical question: A New National Labor Policy? Yes, there is a new national labor policy. This paper will chart both the shape of this new policy and its impact on public sector bargaining. Further, it will analyze some of the problems emanating from this trend and make a number of recommendations for a different national labor policy.

THE REAGAN ADMINISTRATION AND PATCO

Our analysis of the new national labor policy in the public sector must begin with an examination of the Reagan Administration’s handling of the PATCO strike. At an early stage in the Reagan Administration, organized labor, through Tom Donahue, Secretary-Treasurer of the AFL-CIO, had voiced the hope that, at best, labor would be benignly neglected. One year later, Donahue charged that the Administration’s policy towards public employees was exemplified by “its intemperate and vindictive response” to the PATCO strike which has “established a climate of fear and resentment that puts unreasonable strains on public employees at every level.”

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1. The Professional Air Traffic Controllers Organization had been the recognized exclusive bargaining representative for Federal Aviation Administration controllers since the early 1970’s. Faced with the expiration of an existing collective bargaining agreement, PATCO and the FAA began negotiations for a new contract in early 1981. A tentative agreement was reached in June but was overwhelmingly rejected by PATCO’s rank and file. Negotiations began anew in late July with PATCO announcing a strike deadline of Monday, August 3, 1981.

After failing to reach an agreement, PATCO struck the FAA on the morning of August 3 with more than 70% of the federally employed controllers walking off the job. The Administration, in response, obtained restraining orders against the strike. Civil and criminal contempt citations followed as the strike continued.

On the morning of the first day of the strike, President Reagan gave the striking controllers 48 hours to return to work or face dismissal. Some 11,000 controllers who did not return to work on their first scheduled shift were terminated on August 5, 1981.

For a full discussion see, Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority, 685 F.2d. 547 (1983).

2. 13 LABOR-MANAGEMENT REL. SERV. NEWSLETTER 2 (Feb. 1982) at 4.
Certainly, the most dramatic illustration of the Reagan Administration's hard line policy toward organized labor was its handling of the PATCO strike. The decision of the Administration to fire all of the striking air traffic controllers and its refusal to consider their reemployment has few, if any, parallels in labor history. On the contrary, history demonstrates that, in both the public and private sectors, employers who have successfully endured or beaten a strike, even an illegal strike, are usually more than willing to rehire most of their striking employees. The employers conclude that the dispute was with the union, not with their employees and thus, for economic if not for compassionate reasons, employers want to reemploy their trained and experienced employees, except, of course, in those instances where strikers may have committed acts of violence or engaged in other egregious conduct.

The Reagan Administration, on the other hand, has not been willing to reemploy the striking controllers. The Administration has demonstrated its ability to maintain air travel, despite the strike, through the assistance of military and supervisory personnel; but, it is quite another matter for state and local governments to replace a large number of striking police officers, firefighters, transit employees, prison guards, or highly trained hospital workers on a permanent basis. New York State, for example, attempted a similar approach toward striking civil servants in the mid-1960's with the passage of the Condon-Wadlin Act. That statute was essentially a public employee anti-strike law providing for heavy penalties, including loss of employment and frozen wages for three years, for employees who engaged in a strike. After enacting Condon-Wadlin, however, the New York State Legislature was forced, on five separate occasions, to pass amnesty bills permitting the reemployment of strikers because they were needed to get the subways running, to man the ferry boats, and to issue welfare checks.

While the Administration has shown no willingness to grant amnesty to the air controllers, it declined to confront its postal employees in a similar manner and agreed to a stipulation of settlement which allowed former striking postal employees conditionally to apply for reemployment with the postal service. These striking employees were given the opportunity to re-enter government service at locations other than those at which they struck

5. 1966 N.Y. Laws Ch. 6, § 2 (transit workers); 1966 N.Y. Laws Ch. 807, § 1 (ferry boat officers); 1966 N.Y. Laws Ch. 808, § 1 (welfare workers); 1967 N.Y. Laws Ch. 394, § 1 (welfare workers).
or in other units of the federal government. This is not to endorse in any way PATCO’s conduct or its objectives in an illegal strike. Whatever it was possible for a labor organization to do wrong in the conduct of negotiations and an illegal strike, PATCO did. Still, the Administration’s hard line concerning reemployment is a particularly harsh and vindictive policy when contrasted with the treatment afforded other federal employees who have violated anti-strike statutes. While it must be conceded that a penalty should be imposed for the violation of an anti-strike statute, it is axiomatic that the penalty should fit the offense. It seems fair to assume that one of the intended effects of the Administration's PATCO policy was to chill public employee union militancy and to instill fear in the minds of union members as to the consequences of an illegal strike. Enforcing reasonable penalties for illegal strikes is a necessary policy. On the other hand, the availability of an equitable means of impasse resolution is all the more necessary where the right to strike is denied.

THE ADMINISTRATION'S FISCAL POLICIES: THE NEW FEDERALISM AND ITS IMPACT ON PUBLIC EMPLOYEES

The Administration's attitude toward public sector labor also is evidenced by the reductions in force which have resulted from federal budget cuts and by the related policies of reducing the work week and earnings of federal employees. Although the Director of the Office of Personnel Management has described reductions in force (RIFs) as a non-problem, RIFs have induced considerable bargaining with the federal unions as to the impact of such decisions on the employees.6

Furthermore, the fiscal policies of the federal government, specifically the reductions in federal spending already effectuated and those proposed, including the elimination of the CETA programs; the reduction in aid for mass transit, education, law enforcement and health care, and revenue sharing,7 have impacted severely on the budgets of state and local governments. A recent survey by the Bureau of National Affairs reports that layoffs of state workers occurred in 43 of the 50 states in fiscal year 1981, and in 44 states in fiscal year 1982.8 In the two-year period, 46 states attributed layoffs, in part, to the reduced federal funding of various programs. The BNA study also indicated that a higher percentage of women and minorities

have been laid off as a result of federal cutbacks. The Public
Employment Department of the AFL-CIO estimated that some
700,000 public sector workers will be laid off as a result of the federal
government budget cuts in fiscal years 1982 and 1983.9

A less dramatic, but no less significant, example of the new
national labor policy can be found in the sharp budgetary cutbacks of
the federal regulatory agencies which are responsible for carrying out
the Administration’s labor policies. The Labor Department, the
Federal Services Impasse Panel, the Merit Systems Protection
Board, the National Labor Relations Board and the Federal Labor
Relations Authority all have had their budgets reduced so sharply that
serious questions are raised as to their ability to assist in resolving
employee grievances and contract disputes.10

The hoped for expansion of the Bureau of Labor Statistics’
data-gathering capabilities in the public sector is another casualty of
the budget cuts. The Bureau has even announced that it will be
discontinuing its important Municipal Wage Survey of major cities.
These curtailments have raised doubts as to the Bureau’s ability to
carry out its current responsibilities in a timely and effective
manner.11

Other examples of the new federal labor policy include the
abandonment of wage guidelines, the abolishment of the Council on
Wage and Price Stability, and the abandonment of the National
Accord, the broad charter adopted by the Carter Administration
providing for consultation with organized labor on economic policy. It
is now likely that the Administration will again recommend a wage
scale for federal employees which will be far below the figure called
for by the statutory comparability guidelines.12

On a more positive note, the Administration should be credited
with having resolved the major postal contracts in a manner
satisfactory to all parties, including cooperating in the submission to
interest arbitration of impasses for some of the smaller postal
contracts.13 Also, despite endorsing the “new federalism,” which
means less federal involvement in state problems, the Administration
appeared on the side of federal preemption as amicus curiae on behalf

11. BUREAU OF LABOR STATISTICS, U.S. DEP’T. OF LABOR, REGIONAL REPORT NO. 7,
WAGES AND BENEFITS OF NEW YORK CITY’S MUNICIPAL GOVERNMENT WORKERS MAY 1980
at iii (June 1981).
13. Mail Handlers Division of Laborers International Union and United States Postal
Service (Arbitrators: Donald P. Goodman, Stephen E. Tallent, and Denis F. Gordon, Jan. 18,
of the railroad unions in a case decided by the United States Supreme Court this year.  

AN ALTERNATIVE NATIONAL LABOR POLICY

Having described the Administration's labor policy and its impact on public employees, I would like to propose an alternative, new national labor policy. This model would better serve the public interest by encouraging, supporting, and protecting collective bargaining rights for all public employees. During the 1960's and 1970's great advances were made in the development of public sector collective bargaining. Public employees, through a series of illegal, but effective strikes, began to change the attitude of state and federal legislators toward public sector collective bargaining. Legislation was enacted to protect the right to organize and to bargain collectively, but most of these laws continued to forbid public employee strikes. 

Interest arbitration developed as a result of the failure of traditional impasse resolution methods to prevent work stoppages, which occurred in spite of statutory prohibitions, by public employees. State and local legislatures recognized the need to design a system which would protect the public against harmful strikes and at the same time preserve the collective bargaining rights of public employees.

The task of extending collective bargaining rights to all public sector employees, comparable to those enjoyed by private sector workers under the National Labor Relations Act, is far from complete. While approximately forty states have some form of public collective bargaining statute, only half of these provide broad coverage for all public employees. Even fewer state statutes provide for interest arbitration or the right to strike.

Interest Arbitration

A new national labor policy should extend to all federal employees the right to bargain collectively and the right to use impasse procedures, including interest arbitration. At the federal level, only postal workers have comprehensive collective bargaining


coverage under the National Labor Relations Act.\textsuperscript{18} They have the right to interest arbitration but they do not have the right to strike.\textsuperscript{19} This has been accomplished under a legal mystery which declares that the Postal Corporation is a private corporation, albeit one entitled to regular congressional subsidies. Other federal employees are provided collective bargaining rights, but only within a limited subject area. They cannot bargain over wages and other economic benefits and lawfully cannot strike. However, federal employees do have impasse procedures for new contract terms which, under some conditions, can be final and binding.\textsuperscript{20}

The enabling legislation necessary for this new national labor policy would have to recognize and resolve the question of the delegation to arbitrators and negotiators of legislative authority over fiscal matters and other bargaining subjects now governed by statute. Thus, the major criticism of interest arbitration as it applies to the public sector employees is its incompatibility with the principles of representative government;\textsuperscript{21} i.e., the policymaking responsibilities of the executive and legislative branches are delegated to an arbitration body which is not elected and is not responsible to any one.

This is a simplistic approach to both arbitration and collective bargaining, however, public sector bargaining is not entirely a political process: it is moderated by economic forces and the requirements of public safety. An arbitration board considers these same factors. This criticism of interest arbitration also fails to recognize that negotiations which result in an impasse have failed to find a political solution. The purely political solution of submitting the issue to the legislature for determination will not be viewed as fair by public employees. They will perceive such a step as giving the employer the final word. Negotiators for the employer (the government) will have little incentive to negotiate fully when they are aware that persistence will enable them to obtain terms from a body over which the employer exercises considerable influence. "Thus, a return to legislative action may itself exert a chilling effect on public employee negotiations."\textsuperscript{22}

\textsuperscript{22} \textit{Id.} at 512–513.
One possible and partial solution to the problem of delegation of legislative authority is to make arbitration awards and collective bargaining agreements conditioned upon a proviso that an award or contract, requiring legislation for its implementation, could not be effective until Congress had enacted such law. The New York City Collective Bargaining Law (NYCCBL) could be used as a model if interest arbitration for impasse resolution of federal employee disputes were substituted for the right to strike. Such provisions would be consistent with our democratic institutions and would recognize, where required, the supremacy of the legislature in the implementation of bargaining and arbitration awards.

The NYCCBL declares that the policy of the City of New York is to favor and encourage the right of municipal employees to organize and bargain collectively, to use impartial and independent tribunals to assist in resolving impasses in contract negotiations, and to have final and binding arbitration to resolve employees' grievances. The NYCCBL was amended in 1972 to provide for binding interest arbitration of contract terms for all employees under the jurisdiction of the Office of Collective Bargaining. New York State's Taylor Law, which forbids the right to strike for public employees under its jurisdiction, was amended in 1976 to provide for final and binding arbitration of contract terms for police and firefighters.

In March of 1982, the New York Legislature passed an experimental statute providing for the arbitration of any impasse existing between the Transport Workers Union and the Transit Authority, who are subject to the Taylor Law, by the Impartial Members of the Board of Collective Bargaining. This legislation, which covers 40,000 employees, was sought jointly by the Metropolitan Transit Authority and the Transport Workers Union and was supported by the Mayor of New York who declared:

The City of New York supports the specific provisions in the hopes that it will avert an illegal strike by the employees of the Transit Authority and Manhattan and Bronx Surface Transit Operating

23. N.Y. ADMIN. CODE tit. 54, § 1173–7.0c (1980).
24. Id. at § 1173–2.0 (1975).
Authority during the upcoming round of bargaining over the successor agreements. As is well known, the transit strike, which occurred in April of 1980, had a crippling effect upon the City, the citizenry, the business community and people visiting the City. The City believes that an experiment of binding arbitration for this round of collective bargaining will be useful in reaching a peaceful resolution of the collective bargaining issues.28

The arbitration procedures were invoked and, in May 1982, the panel awarded a three year contract covering more than twenty issues.29 The award appears to have been satisfactory to both parties. If the transit arbitration process is regarded as successful, demands likely will be made on the legislature for the extension of interest arbitration to other state and local government employees not presently covered by such provisions, e.g., prison guards and state police, as well as for the extension of the transit bill, which is due to expire on December 31, 1982.

Interest Arbitration or the Right to Strike

I should point out that not all public employee unions want to be covered by interest arbitration law. For example, the leaders of the Long Island Railroad recently hailed the Supreme Court's decision retaining their coverage under the Railway Labor Act,30 which permits the right to strike.31 Also, John Sweeney, the President of the Service Employees International Union, in an address early this year, asserted that, if his members had to choose either the right to strike or interest arbitration, his organization would opt for the right to strike as a necessary ingredient of full-scale bargaining rights. Sweeney stated that "the right to strike is a moral right which can't be taken away by law. It is a right which we in the labor movement cannot, and will not surrender . . . in the public or the private sector."32

As Mr. Sweeney knows, the laws of most states, with a few significant exceptions, do not recognize that right and in some

instances provide severe and effective penalties if public workers go out on strike. In New York, public employees who strike are subject to the loss of two days' pay for each day they are on strike. The Transit Workers Union and the Amalgamated Transit Union, which struck for 11 days in 1980, were fined one and a quarter million dollars and the dues checkoff privileges of both Unions were revoked.33 The effectiveness of those fines and penalties was one of the reasons the transit workers joined the Metropolitan Transit Authority this year in seeking legislation providing for interest arbitration in New York City. In the correct political environment, the legislative option is likely to be between a collective bargaining law which forbids strikes and no collective bargaining law at all.

I recognize that many public employers, if forced to choose between the right to strike and interest arbitration as a means of resolving collective bargaining impasses, would also opt for the right to strike.34 I suggest, however, that these employers' commitment to effective collective bargaining is questionable, particularly in a political climate where reality dictates that the strike weapon is most unlikely to be sanctioned by state legislatures. I acknowledge that several states, including Pennsylvania, Hawaii, and Minnesota, permit categories of public employees to strike to resolve impasses,35 but this is usually under conditions where it is clear that the strike will not be effective.

Either the right to strike or interest arbitration is needed to stimulate the bargaining process. A national labor policy for public employees should include the right to bargain collectively with either the right to strike or the right to use arbitration to resolve contract disputes.

While interest arbitration cannot provide an absolute guarantee against strikes in a free society or a panacea for all labor problems, it is by far the better way to solve public sector disputes. Furthermore, I do not suggest that arbitrators have all the wisdom to solve disputes. Yet, they are able to resolve difficult impasses over new contract terms, particularly when they are allowed to act as mediator-arbitrators in the formation of new contracts.

While I am a firm believer in interest arbitration as an alternative to the strike to resolve impasses, I am even more strongly committed


to the collective bargaining process. Interest arbitration should not take the place of collective bargaining. It should be used as a supplement. "It involves third party intrusion and thus its use should be the exception—not the rule."36

The record of achievement of collective bargaining demonstrates that it is the best method of matching employer needs and employee desires. Recent experience in both the private and public sector also shows that collective bargaining works successfully in adversity as well as in prosperity. The enactment of more comprehensive collective bargaining laws will enable the public sector to deal more effectively with the difficult employment problems of the 1980's, including the impact of the recession and resulting layoffs and reduction in force; the continuing problems of accommodating the affirmative action goals of the Equal Employment Opportunities Commission to traditional concepts of seniority; and the emerging issues of comparable worth and productivity bargaining. The concept of gainsharing has resulted in part from collective bargaining in the New York City Sanitation Department37 and further progress still can be made.

NEW NATIONAL PUBLIC SECTOR LEGISLATION

As part of the new national labor policy, I also advocate a non-preemptive federal bargaining law for state and local employees where state laws have not been enacted. As for the non-preemptive federal law, I would propose the following:

1. Public employees should be granted the right to organize, to join employee organizations, and to bargain with respect to the terms and conditions of their employment.
2. Standards should be provided for resolution of representation disputes, including exclusions for managerial and confidential employees, unit determinations and elections to determine bargaining agents.
3. Definitions of unfair labor practices applicable to both employers and employee organizations should be provided to enforce and protect the right to organize and bargain collectively. A neutral and politically independent administra-

36. Anderson, supra note 21, at 514.
tive agency should be empowered to implement the foregoing standards.

4. A framework for the resolution of impasses should be mandated with wide latitude for experimentation, but ultimately providing the right to interest arbitration if the right to strike is forbidden.

I recognize that the present political climate is not receptive to these proposals. This does not detract from the basic fairness of a proposal that public employees should receive equal treatment under a national labor policy which protects the right of private sector employees to organize and bargain collectively.

Even if the political climate were receptive to these proposals, the decision in *National League of Cities v. Usery*\(^38\) places a limitation on federal legislative power under the Commerce Clause. In that decision, the Court held that the extension of the Fair Labor Standards Act\(^39\) (for minimum wage and maximum hour provisions) to the States' public employees was beyond the scope of congressional power under the Commerce Clause. The analysis considered the increased cost and decreased services that would result from its implementation. The states' ability to structure such employer-employee relationships in such traditional governmental activities as fire prevention and police protection would be significantly altered by the FLSA extension. This would leave little to the states' separate and independent existence and would impair their ability to function effectively within a federal system. Therefore, the law, insofar as it displaced the states' freedom to structure integral operations in areas of traditional governmental functions, was beyond the authority granted by the Commerce Clause.\(^40\)

The seemingly broad holding, that a federal law cannot stand should it interfere with traditional state governmental functions, has been questioned and limited in the years since *National League of Cities*. Subsequent decisions defining what are and are not traditional governmental functions have dealt with a variety of factual settings.\(^41\)

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40. 426 U.S. at 852.
41. See, e.g., Enrique Molina-Estrada v. Puerto Rico Highway Auth., 690 F.2d 841 (1st Cir. 1982) (highway authority is an integral governmental function); Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979) (municipal airport is an integral governmental function); but see Kramer v. New Castle Area Transit Authority, 677 F.2d 308 (3rd Cir. 1982) (mass transit system not traditional governmental function); Williams v. Eastside Mental Health Center, Inc., 669 F.2d 671 (11th Cir. 1982) (mental health institution not an integral state function), and Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) (regulation of mining not strictly a traditional state function).
These potential contradictions were articulated by Justice Stevens in a separate dissent:

The Court holds that the Federal Government may not interfere with a sovereign state's inherent right to pay a substandard wage to the janitor at the state capitol. The principle on which the holding rests is difficult to perceive.

The Federal Government may, I believe, require the State to act impartially when it hires or fires the janitor, to withhold taxes from his paycheck, to observe safety regulations when he is performing his job, to forbid him from burning too much soft coal in the capitol furnace, from dumping untreated refuse in an adjacent waterway, from overloading a state-owned garbage truck or from driving either the truck or the governor's limousine over 55 miles an hour. Even though these and many other activities of the capitol janitor are activities of the state qua state, I have no doubt that they are subject to federal regulation.42

One recent example of the limitation on the concept of a traditional governmental function was provided by United Transportation Union v. Long Island R.R. 43 In that case, the railroad workers claimed that their collective bargaining rights were guaranteed by the Railway Labor Act and that the New York State Taylor Law could not apply because it prohibited their right to strike.44 The Supreme Court focused on the definition of a traditional state function. The discussion showed that the L.I.R.R. and railroads generally have been subject to federal regulation. When the state took over the operation of the railroad, it was aware of its regulation as a private entity. This assumption of control, with the knowledge of this history of federal regulation, precluded the railroad service from taking on the character of a 'traditional governmental function.'45 Furthermore, federal control over state-sponsored activities is not unauthorized simply because a federal regulation affects state governmental processes. The interference must be "undue" and that can be determined only by balancing the intrusion against the federal government's interest in enacting the suspect regulation.46

42. 426 U.S. at 880, 881 (Stevens, J., dissenting).
44. Supra at note 14.
45. 102 S. Ct. at 1356; See also, Kramer v. New Castle Area Transit Authority, 677 F.2d 308, 310 (3rd. Cir. 1983) where the court reasoned that a federal grant under the Urban Mass Transportation Act of 1964, 49 U.S.C. § 1601 (1976) precluded the state from claiming "that mass transit is a service which they [states] traditionally provide."
Perhaps the area where the *National League of Cities* decision may prove to be most vulnerable is in the concern for the states' separate and independent existence. Is it possible that a federal collective bargaining law for public employees would not pose a threat to the states' separate and independent existence? In *L.I.R.R.* a federal collective bargaining law for railroad workers was upheld. The court found that given the federal government's continuous and recognized authority to regulate railroads, the states could not say that RLA's application to the state's operation of a railroad impaired its separate and independent existence.\(^{47}\)

This analysis can extend to federal regulation of public employee collective bargaining. The ability of Congress to regulate labor in the private sector long has been recognized as a legitimate application of its spending power.\(^{48}\) The federal government's interest in resolving labor disputes is equally as great as that of the states. For the states to recognize such a law, when the goal of labor peace is common to both, would not be a threat to their "separate and independent existence." Either the spending power or the general welfare clause could be applied to override the intrusion on state sovereignty.\(^{49}\) While this rationale could support a federal bargaining law, I hope that the states will resume the initiative they exercised in the 1960's and 1970's by extending full-scale collective bargaining rights to all their public employees. If they do not, however, this goal can be fostered by the enactment of a non-preemptive minimum standards federal law as described above.\(^{50}\)

**Conclusion**

In summary, it is time to turn away from a national policy of neglect and hostility toward organized labor and to adopt a policy of implementing the rhetoric of our belief in collective bargaining. It is time to complete the unfinished agenda of protecting the rights of all employees to organize and to bargain collectively, to enact laws calling for collective bargaining at the federal and state and local levels, laws which provide either for the right to strike or for arbitration to resolve impasses where the right to strike is forbidden.

Finally, I suggest that it is time for the National Administration to abandon its constant discrediting of the public service by repeated declarations that "government is the problem," which is generally...

\(^{47}\) 677 F.2d. at 311 (Garth, J., concurring citing U.T.U. v. L.I.R.R. 102 S. Ct. at 1354).

\(^{48}\) NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937).


\(^{50}\) See text p. 80-81.
taken and, I believe, intended to mean that public employees are the problem—a convenient scapegoat for our national economic and political ills. That somehow the people who serve the public, whether by teaching school, or fighting fires, or providing police protection, or collecting garbage, or healing the sick or, yes, even collecting taxes, are somehow less worthy or less efficient than those who work in the private sector, in offices, factories, businesses and professions, is a myth which needs to be dispelled.

I was taught, in the classroom and by example, that it was a good thing to be in the public service. I am not referring to the notion that government employment is a sinecure, a concept which itself is fast disappearing. I still think it is a good thing to serve the public. I hope that our political leaders at all levels of government will recognize the importance of saying some good things about the value of public service, rather than contributing to the decline of public employee morale by demeaning the role of government and trampling on the dignity of public service. One means of accomplishing that goal is by the adoption of a national labor policy which encourages the extension and broadening of existing state and federal laws to provide collective bargaining for all public employees.