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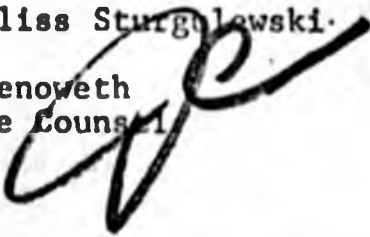
MEMORANDUM

March 25, 1981

SUBJECT: Oversight responsibility for educational services in the unorganized borough

TO: Senator Arliss Sturgulewski.

FROM: John B. Chenoweth  
Legislative Council



As preliminary information for consideration of legislation, you have asked for a brief review of laws applicable to oversight responsibility for educational programs in the state's unorganized borough.

I

Until July of this year, state support for the costs of operating the state's regional educational attendance areas is provided under AS 14.08.121, a version of the general foundation program support formula supplemented by an additional amount representing a state contribution in lieu of local tax effort. In July, as the requirement that a city or borough contribute a "local effort" is deleted, money for the support of operational costs of the state's regional educational attendance areas shifts to program support payable directly under the foundation program support formula, without significant difference from the formula's application to city and borough districts.

In the course of this calendar year, program support for the rural schools will begin more closely to approximate program support payable to municipal districts. Accordingly, provisions of law by which the legislative and executive branches monitor the calculation, payment and use of the funds payable to municipal school districts will come to apply to regional educational attendance areas.

The following three provisions of law generally serve as the basis of the Department of Education's authority with respect to determination and review of use of public school foundation program receipts:

"Sec. 14.17.080. COMPUTATION BY DISTRICT. By October 30 of the prefiscal year each district shall submit to the commissioner a preliminary report of computations for the following fiscal year of the district's basic need as defined in AS 14.17.021; the amount which it expects to match under the provisions of AS 14.17.071; and the amount for supplemental programs which has been approved for funding consideration by the commissioner. Each district shall make the computations in the manner prescribed by AS 14.17.080 - 14.17.150. The computations are the basis for requesting legislative appropriations and for making preliminary payments under the public school foundation program.

"Sec. 14.17.150. DUTY OF COMMISSIONER TO EXAMINE AND TABULATE COMPUTATIONS. (a) The commissioner shall examine the preliminary reports submitted by each district to determine that they are correctly computed. If the allotments are incorrectly computed, the commissioner shall either (1) obtain a correct computation from the district, or (2) make a correct computation based on information available to him, and give notice of the corrected computation to the district. The commissioner shall review supplemental program applications and notify the district whether its supplemental program is approved for inclusion in its foundation program computations.

"Sec. 14.17.190. RESTRICTIONS GOVERNING RECEIPT AND EXPENDITURE OF MONEY FROM PUBLIC SCHOOL FOUNDATION ACCOUNT. (a) The public school foundation money distributed to a district during a year shall be received, held, and expended by the district subject to the provisions of law and regulations promulgated by the department.

"(b) Each district shall maintain financial records of the receipt and disbursement of public school foundation money and money acquired from local effort. The records must be in the form required by the commissioner and are subject to audit by the commissioner or the board at any time." (Emphasis added)

In additional, some few substantive requirements have been established and imposed on school districts by law:

"Sec. 14.17.081. MINIMUM EXPENDITURE FOR INSTRUCTION.  
(a) Each district shall budget for and spend a minimum of 55 percent of its school operating expenditures in each fiscal year on the instructional component of the district budget.

"(b) The commissioner shall reject a district budget which does not comply with (a) of this section and, unless a waiver has been granted by the state Board of Education under (d) of this section, shall withhold payments of state aid from that district, beginning with the payment for the second full month after rejection and continuing until the school board of the district revises the district budget to comply with (a) of this section.

"(c) The commissioner shall review the annual audit of each district for compliance with the expenditure requirements of (a) of this section. If he determines that a district does not meet those requirements, the commissioner shall advise the district of his determination and calculate the percentage of deficiency in required expenditure and deduct that percentage from state aid paid to the district for the current fiscal year, beginning with the payment for the second full month after his determination, unless a waiver has been granted by the state Board of Education under (d) of this section.

"(d) A district which has been determined by the commissioner to be out of compliance with the requirements of this section may, within 20 days of the commissioner's determination, request a waiver by the state Board of Education of the imposition by the commissioner of any reduction in state aid payments under (b) or (c) of this section. The request must be submitted to the Legislative Budget and Audit Committee and must be in writing and include an analysis of the reasons and causes for the district's inability to comply with the requirements of this section. The Legislative Budget and Audit Committee shall review the district's request and forward it, along with the committee's recommendations

on it, to the state Board of Education which shall either grant or deny the waiver.

"(e) The commissioner shall submit an annual report on actions taken by him or the state Board of Education under this section to the Legislative Budget and Audit Committee by April 15 of each year.

"Sec. 14.17.082. FUND BALANCE CHANGES IN SCHOOL OPERATING FUND. (a) Each district having at least 400 instructional units under AS 14.17.031(a) may accumulate a fund balance in the school operating fund of seven percent of its expenditures. Each district having less than 400 instructional units may accumulate a fund balance of 10 percent of its expenditures.

"(b) The commissioner shall review the annual audit of each district to ascertain changes in the year-end operating fund balance of the districts, and notify districts and the state Board of Education, through a written report, of any fund balance accumulation greater than that permitted under (a) of this section.

"(c) The state Board of Education shall review the reports submitted to it under (b) of this section and submit a report making recommendations with respect to the legislative treatment of the fund balances of those districts to the Legislative Budget and Audit Committee by April 15 of each year."

These are almost the only substantive program requirements imposed on school district operations by law. Other oversight is provided by regulation of the Department of Education. See, generally, 4 AAC 05 and 4 AAC 06. The regulations relating to school district operation review are adopted for the most part on the very general statutory authority defining the powers and duties of the department. Specific provision may be found for accounting and auditing functions in 4 AAC 06.120.

From this brief review, it is readily apparent that, with the sole exception of the specific requirements set out in AS 14.17.081 and 14.17.082 relating to minimum expenditures, review of school district functions by the department is left to the discretion of officials of the department. As a

statutory matter, the degree of legislative involvement has been even more removed: the legislature has generally provided financial support as determined by application of public school foundation program formulas, added to programs by authorizing supplementary programs (or by direct appropriation), and delegated to the Legislative Budget and Audit Committee the opportunity to review and consider any reports which are provided that discuss compliance with minimum instruction under AS 14.17.081 and 14.17.082. Except for particular audits that may have been directed by the Legislative Budget and Audit Committee, there appears very little that suggests that the legislature has concerned itself with the daily operation of school districts in the provision of educational services.

## II

The exercise of "oversight" by the executive and legislature with respect to school improvements is equally as cogent. Historically, city and borough school districts have generally be responsible for planning, design and construction of school facilities, with guidance and limitations imposed by local voters through the device of approval or rejection of general obligation bonds. The state reimburses the municipal districts for their debt service costs incurred under a rather elaborate payment program (AS 43.18.100). Moreover, the state has come to the aid of these municipal districts by a number of ad hoc devices including (1) bond guarantee funds (AS 29.58.320 - 29.85.345), (2) construction advance accounts (AS 43.18.105 - 43.18.135), and (3) direct cash appropriation. More recently, a larger role in school construction oversight has been assumed by the Department of Education. A rather imposing set of regulations has been adopted (4 AAC 31, copy enclosed) by which the approval of the commissioner is prerequisite for the payment of available school support.

However, rural school construction -- is virtually excluded from the department's purview. The applicable regional educational attendance area construction statutes tie actual school construction in rural areas to the Department of Transportation and Public Facilities:

"Sec. 14.08.101. POWERS. A regional school board may

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"(7) recommend to the commissioner [of education] a school construction and rehabilitation program based on an evaluation of the condition of existing school facilities and a determination of the requirements for new school construction, rehabilitation or other upgrading of school facilities, and provide for the construction and rehabilitation or other upgrading of school facilities when grants are made to it by the Department of Public Works under AS 14.08.161; and

\* \* \*

"(9) by resolution adopted by a majority of all the members of the board and provided to the commissioner of the department, assume ownership of all land and buildings used in relation to the schools in the regional educational attendance area.

"Sec. 14.08.151. LAND AND BUILDINGS. (a) Except as provided in (b) of this section and AS 14.08.161(g), the ownership of land and buildings used in relation to regional educational attendance area schools shall remain vested in the state, and use permits shall be given to the regional school boards.

"(b) A regional school board may, by resolution, request, and the commissioner of the department having responsibility shall convey, title to land and buildings used in relation to regional educational attendance area schools. If the state holds less than fee title to the land, the commissioner of the department having responsibility shall convey the entire interest of the state in the land to the regional school board.

"Sec. 14.08.161. SCHOOL CONSTRUCTION, REPAIR, AND IMPROVEMENT. (a) The department [of education] shall

"(1) based on requests for funding of projects made by the regional school boards to the Department of Education under AS 14.08.101(7), select necessary projects for the construction, repair, or improvement of schools;

"(2) recommend to the governor an appropriation of funds for the designated projects on the basis of its determination of funds necessary for each project and the priorities established by it among the projects and include a report of the project requests made by the regional school boards; and

"(3) submit to the legislature within the first 10 days of session a report of the project requests made by the regional school boards.

"(b) In establishing its recommended priorities among projects requested by the regional school boards, the Department of Education shall evaluate, among others, the following factors:

"(1) priorities assigned by the regional school boards to the projects requested by them;

"(2) emergency requirements;

"(3) number of unhoused students;

"(4) new local elementary or secondary programs;

"(5) existing community and school facilities and their condition;

"(6) economic and social stability of the community; and

"(7) public facilities procurement policies developed by the Department of Public Works under AS 35.10.160 - 35.10.200.

"(c) School construction, repair, and improvement projects shall be carried out by the Department of Public Works unless funds for a project are granted to a regional school board under (d) of this section.

"(d) Regional school boards may apply to the Department of Transportation and Public Facilities for a grant of all or part of the funds allocated for their school construction, repair, and improvement projects. When a regional school board applies for a grant of funds, the

department shall grant funds to a regional school board for a school construction, repair, or improvement project, and, if the request is for all funds allocated, shall provide for the assumption by the regional school board of all of the department's responsibilities relating to the planning, design and construction of an educational facility. Thereafter, the board shall

"(1) select the appropriate professional personnel to develop the designs;

"(2) approve or disapprove the appropriate designs or revised designs; and

"(3) undertake construction, repair or improvement of the educational facility.

"(e) To carry out the purpose of this section, the Department of Transportation and Public Facilities shall adopt regulations relating to the application for and the making and the manner of administration of grants wherein the responsibility for school construction, repair and improvement is assumed by regional school boards under (d) of this section. The department shall include in grant contracts terms and conditions requiring a regional school board and its contractors to adhere to the provisions of AS 36.05.010 with respect to the payment of wage rates on construction projects, and AS 36.10.010 with respect to employment preference and may require different terms in grant contracts for different projects to meet local conditions and unique requirements and to assure compliance with the public facilities procurement policies developed by the department under AS 35.10.160 - 35.10.200.

"(f) Ownership of supplies and equipment purchased with funds appropriated for school construction, repair, or improvement vests in the regional school board receiving them.

"(g) Title or sufficient interest determined acceptable by the department to an approved site for a school building to be constructed, repaired or improved by a regional school board shall be vested in the state or in the respective regional school board."

The locus of responsibility for initiating and sustaining a public school construction project in the unorganized borough rests with the regional educational attendance area school board. While the Department of Transportation and Public Facilities shall, under AS 14.08.161(e), adopt regulations "relating to the application for and the making and the manner of administration of grants wherein the responsibility for school construction, repair and improvement is assumed by the regional school boards", in a quick review of the state's Administrative Code, I was unable to locate those regulations. (The school construction regulations of the Department of Education (4 AAC 31) apply, by their terms, to "new school construction, additions or rehabilitation with funds granted to them under AS 14.08.161(d)." But those regulations are part of a plan by which the commissioner of education shall monitor money provided to his department for allocation for school construction and it is clear that rural school construction money is appropriated to the Department of Transportation and Public Facilities.) Were the regulations in effect -- and I cannot say that they are not -- presumably that body of regulations might serve as some authority by which to control the manner of contracting for and disbursing money appropriated for construction of particular rural schools.

The legislature's oversight role with reference to planned rural school construction is no greater, in effect, than the role presently played by the legislature in receiving, reviewing, and appropriating for construction of designated rural school facilities, whether plans for construction are brought forward within the public facility procurement program of the Department of Transportation and Public Facilities (AS 35.10.180) or submitted by individual legislators on behalf of constituents. As to completed rural school construction projects, or projects in completion, there is no systematic review process outlined for the legislature (except for specific audits which may be requested by one or another legislator).

### III

In an earlier opinion request, you asked

- (1) whether service areas of the unorganized borough are agencies of the state;

- (2) whether the executive or the legislative branch has a fiscal oversight responsibility for the service areas in the unorganized borough;
- (3) whether this oversight responsibility should be defined by statute; and
- (4) what mechanism should be employed by the legislature if it is to retain principal responsibility for oversight of services areas of the unorganized borough.

#### IV

There is no clear answer as to whether a regional educational attendance area is a state agency. In a preliminary draft response to your earlier questions, Valerie Tehan provided a little of the background by which "service areas" were first considered for use within the state's "unorganized borough":

"The rationale for the establishment of service areas in the unorganized borough was derived from Article X, sections 4 through 6 of the Alaska Constitution. Section 4 established the assembly as the governing body of the organized borough. Section 5 gave the assembly the power to establish 'service areas' to provide special services within the organized borough. Section 6 gave the state legislature the authority to provide for the performance of services in the unorganized borough that it deems 'necessary or advisable'. It also granted the legislature the authority to exercise any power or function in the unorganized borough that the assembly may exercise in the organized borough. Consequently, in 1972, the legislature enacted AS 29.-03.020 authorizing the legislature to establish 'service areas' within the unorganized borough to provide special services.

"There does not appear to be any indication that the delegates intended to create state 'agencies' when they provided for the creation of 'service areas'. Victor Fischer referred to a discussion on the creation of an agency in Alaska's Constitutional Convention. According to Fischer, the delegates believed that 'no agency, department or commission' should be created by the constitution unless 'a grave need existed'. In

light of the fact that other 'agencies' were created in the constitution, but the term 'service areas' was used for the purposes of Article X, section 5, it could not have been the intention of the convention to create an 'agency'."

To the contrary is the decision of the Alaska Supreme Court in Alaska State-Operated School System v. Mueller, 536 P.2d 99 (1975):

"Article VII, section 1 of the Alaska Constitution provides in part:

'PUBLIC EDUCATION. The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions.'

"Pursuant to this constitutional mandate, the legislature enacted a general and comprehensive body of laws providing for the establishment and maintenance of public schools throughout the state. Subject to statutes relating to public schools and the supervisory authority of the state Department of Education, the management and control of schools in organized boroughs and home rule and first class cities outside boroughs is vested in the borough or city school district. The area outside organized boroughs and cities is referred to as the 'state-operated school district,' and this district is under the management of the Board of Directors of state-operated schools. The purpose of the latter school system, as established by statute, is to provide public education in the unorganized borough. It is these schools, referred to as the Alaska State-Operated School System, with which we are here concerned.

"A. S enjoys a certain amount of autonomy and independence. The legislature has established it as a 'state corporation.' In its corporate name it has the power to sue and to be sued, to receive and hold real and personal property, to contract and be contracted with, to adopt by-laws and administrative rules for the management and operation of state-operated schools, and to accept grants or loans from and contract with the federal government, the state, or its political subdivisions. The Board of Directors

of ASOS, consisting of nine members, has extensive powers in the management and control of state-operated schools.

"On the other hand, ASOS is subject to considerable legislative and executive control. ASOS is entirely a creature of the legislature and derives all of its powers from that branch of our state government. Members of the Board of Directors of ASOS, appointed by the Governor, are subject to confirmation by the legislature. The legislature provides the state funds necessary to operate and maintain the state-operated schools.

"The nine members of the Board of Directors of ASOS are appointed by the Governor and serve at his pleasure, notwithstanding the terms for which they are appointed. The 'exclusive' authority of the Board to manage and control all state-operated school matters is 'subject to the state laws and the regulations promulgated by the state Board of Education'. The salary of the director of ASOS is subject to the approval of the Governor. The noncertificated employees of ASOS are subject to the provisions of the State Personnel Act. The Board of Directors must cause the school accounts to be audited each year and must file a certified copy of the audit report with the Commissioner of Education. The Board must submit to the Department of Education for approval all plans relating to the establishment, discontinuance, or combining of its schools, and may not execute such plans until they are approved. Finally, the law provides that the ownership of real property used in relation to state-operated schools 'shall remain vested in the state,' with use permits to be given to ASOS, and that any construction required by ASOS is to be performed by the Department of Public Works.

"In balancing the autonomy of ASOS against its functional and organizational connections with the legislative and executive branches of government, we believe the scales weigh heavily in favor of the conclusion that for the purposes of the applicability of Civil Rule 4(d)(7) and (8) ASOS is an instrumentality or agency of the state, as opposed to being an entity which is 'independent' of it. In the exercise of the powers conferred upon it by the legislature, ASOS is

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performing the clearly governmental function of furnishing education to the children of Alaska in the unorganized borough (for which the legislature is required to provide by article VII, section 1 of the constitution). Moreover, unlike local public school systems, ASOS operates directly on behalf of and under the auspices of the state; its services act to the benefit of the state and the public generally as it performs those educational functions which, in organized boroughs and cities, have been assumed by political subdivisions of the state. In view of these considerations, ASOS' role as an arm of the state seems manifest. The fact that it was constituted as a body corporate with the power to sue and be sued does not militate against this conclusion."

536 P.2d 99, 100 - 102.

Since 1975, however, the method of delivery of education services in the unorganized borough changed dramatically. Some, though not all, of the characteristics found by the court in Alaska State-Operated School System v. Mueller as evidence of the status of ASOS as a state agency have been carried forward to the present system of regional educational attendance areas. Regional educational attendance areas remain dependent on the legislature not only for school operating expenses but also for construction and major improvement projects. Amendments to AS 14.08 approved by the legislature since the initial enactment of the regional educational attendance area decentralization legislation have eliminated distinctions between municipal school districts and their country cousins, to the point that regional educational attendance areas will have, at least as of July 1, 1981, virtually all of the responsibilities of municipal school districts.

A more recent pronouncement of the state Supreme Court suggests that regional educational attendance areas are not state agencies but rather the equivalents of municipal school districts. In Northwest Arctic Regional Educational Attendance Area v. Alaska Public Service Employees, Local 71, 591 P.2d 1292 (Alaska 1979), a case examining the responsibility and duty of a regional educational attendance area to negotiate with its noncertificated employees under then current collective bargaining laws, the following appears:

"Local 71 contends that the State Operated School System (ASOS), the REAAs' predecessor, could have asserted that it had no duty to bargain with its noncertificated employees under AS 23.40.250(5). It further argues that ASOS, however, elected to enter into the March, 1974, collective bargaining agreement with these employees. Because the ASOS elected to bargain when not required to do so under the PERA, Local 71 concludes that the REAAs have waived their right to assert the exemption.

"The first problem with Local 71's argument is that it is not clear whether ASOS could have claimed the exemption. ASOS may not have been a 'school district' under AS 23.40.-250(5). If ASOS was not a school district, the noncertificated employees would have been public employees covered by PERA.

"In Begich v. Jefferson, 441 P.2d 27 (Alaska 1968), we held that employees of the state operated school district were employees of the State of Alaska. At that time the school system for the unorganized borough was run by the Department of Education; the ASOS took over as the governing body two years later. Thereafter, in Alaska State-Operated Schools System v. Mueller, 536 P.2d 99 (Alaska 1975), we held that the ASOS was an agency of the state within the meaning of the Civil Rules governing service of process and pleadings. Although neither of these cases determines the status of the ASOS under the PERA, they imply that the ASOS was a state agency for purposes other than the Civil Rules, and that its employees were still employees of the state despite the transfer of authority from the Department of Education to the ASOS. From this it follows that the ASOS was a state agency subject to the PERA and not a 'school district' whose noncertificated employees are exempt under AS 23.40.250(5).

\* \* \*

"The doctrine of waiver is also inappropriate in the present situation. In the first place, it seems highly doubtful that the concept of waiver of conditions or rights found in private contract cases could or should be applied in a case involving important public questions.

Moreover, even if ASOS had waived its right to claim exemption under the PERA, it does not follow that the REAAs also have waived their right to assert the statutory exemption. The REAAs are not simply successors to the ASOS; they are independent entities which have been given broad powers to run their individual school districts as they see fit. AS 14.08.021; 14.08.101. (Emphasis added)

591 P.2d 1292, 1297 - 1298.

Implicit in the statement is the suggestion that, as regional educational attendance areas assume responsibilities equivalent to those assigned or authorized to city and borough school districts, these unorganized borough school districts cannot and should not be regarded as state agencies, but should be accorded the legal status of entities responsible to the public for the decisions which the school board members and school district officials make.

The suggestion in Northwest Arctic REAA v. PSE Local 71 may well ignore a critical constitutional distinction. The one provision of the constitution by which the legislature is directed to provide services in the unorganized borough specifically retains responsibility for the performance of services to the state government rather than recognizing a delegation:

UNORGANIZED BOROUGHS. The legislature shall provide for the performance of services it deems necessary or advisable in unorganized boroughs, allowing for maximum local participation and responsibility. It may exercise any power or function in an unorganized borough which the assembly may exercise in an organized borough.  
(Emphasis added)

Article X, section 6, Alaska Constitution. While the regional educational attendance areas have been granted a greater measure of authority and autonomy as to management of the affairs of district schools than was ever contemplated for State-Operated Schools, the entities still do not share all of the characteristics of city and borough governments, and may not now be regarded as the latter's equivalents.

For that reason, I am persuaded that a court could find, with respect to a regional educational attendance area, that each is an "instrumentality or agency of the state, as opposed to being an entity which is independent of it". Indeed, it would be difficult for the Court to formally recognize the regional educational attendance areas as the legal equivalent of municipal school districts for a variety of functions and services. To do so would raise the collateral issue of whether powers which attend operation of a school district arising out of authority granted to municipalities, if extended by court decision to rural service areas, violates Article X, section 2, limiting the exercise of local government powers to cities and boroughs. Nothing in the one sentence underscored in Northwest Arctic suggests that the Court intended to dispose of the matter of the status of regional educational attendance areas. Until a final decision is entered, I am satisfied that the legislature may continue to treat with the rural school districts as agencies of the state for the provision of educational services.

V

The legislature enjoys principal responsibility for the audit of state programs and other programs for which money is provided by the state. By Article IX, section 14,

LEGISLATIVE POST-AUDIT. The legislature shall appoint an auditor to serve at its pleasure. He shall be a certified public accountant. The auditor shall conduct post-audits as prescribed by law and shall report to the legislature and to the governor.

The particular statutory provision by which the auditor accomplishes his work are set out, as you know, in AS 24.-20.241 - 24.20.311.

By law, the Department of Administration is responsible for the examination and audit of all claims, refunds, and demands on funds in the state treasury arising from activities carried on by state agencies before payment of the claim, refund or demand. AS 37.05.190. Audit functions are also assigned by statute for particular purposes or particular programs within departments. No financial audit specifically identified and assigned is as extensive as the audit requirements specially imposed under AS 14.14.050 on the state's school districts:

"Sec. 14.14.050. ANNUAL AUDIT. (a) The school board in each school district shall, before October 1, of each year, provide for an audit of all school accounts for the school year ending the preceding June 30. To make the audit the school board shall contract with a public accountant who has no personal interest, direct or indirect, in the fiscal affairs of the district. One certified copy of the audit shall be filed with the commissioner and one certified copy shall be posted in a public place at the principal administrative office of the district.

"(b) The audit shall conform in form to requirements established by the commissioner. The commissioner shall withhold all payments of state funds after November 15 to a school district which fails to file a certified copy of the audit with the department.

"(c) The commissioner may provide for a reaudit or an audit check in a school district if in his judgment it is necessary to substantiate the reported expenditures.

"(d) The school board shall not make the audit if an audit which satisfies the requirements of this section and which is filed and posted as required by this section, is made according to AS 29.48.220."

And, as noted earlier, the significance of the annual school district audit has increased, for the legislature has directed school districts to assure that not less than 55 percent of school district operating expenditures be directed at school instruction, and seems to be relying on the annual audit to provide that information. Thus, the legislature has identified the operations of school districts as so important as to impose by law an audit requirement. After June 30th of this year it is clear that the district audit requirement falls equally on both municipal school districts and regional educational attendance areas. The commissioner of education has responded by adopting regulations applicable to the conduct of audits and presentation of information. Ironically, with the potential for securing more information about educational operating expenditures through audits of educational programs, the legislature appears not to have followed through with any requirement that the information be systematically reviewed and presented for the guidance of the legislature.

Except as required by AS 14.17.081 with respect to minimum expenditures for instruction by school districts, no statutory mechanism requires or expedites the transmittal of audit information from the Department of Education to the legislature. For all the legislature's efforts to assure the audit of the affairs of school districts, nothing assures that the information of the programs and finances which are audited are brought to the attention of even those legislators who are interested. It is, as I perceive, "business as usual" for the legislators who desire the information -- a request must be forthcoming through the Budget and Audit Committee for assistance in securing analyzing and presenting the information secured through the audit process to which all school districts are subject.

Program audits are, as noted, a matter of concern to the legislative branch. Especially when those program audits are directed to educational service areas of the state's unorganized borough, I see no overriding policy reason(s) by which the responsibility for program audits cannot be retained by the legislative branch. Yet it is also clear that, by AS 14.14.050, the legislature expects the Department of Education to perform a significant oversight and review role with respect to financial audits. The assignment of responsibility, then, is less a legal concern than one of policy.

## VI

The legislature is not barred from asserting its authority with respect to the review of the educational programs supported with public funds, but the legislature must understand the limits on the manner of exercise of the responsibility if it opts to assert a larger role. However, established, it is virtually certain that the legislature may not retain a "day-to-day" oversight with respect to the development of regional educational attendance areas of budgets and programs in a manner that would interfere with the executive's budget responsibility set out in Article IX, section 12 of the state constitution and in AS 37.07, or with the executive's responsibility for implementing the law. Where one of your colleagues had suggested, for example, that a legislative committee review and approve in advance specific requests from regional educational attendance areas for certain discretionary funding, I noted:

In my opinion, the bill is flawed by an error of constitutional magnitude in that you require a legislative committee to approve payments from the fund on an application basis before payment is made by the commissioner of education. The applicability of separation of powers arguments has been upheld, generally in Bradner v. Hammond, 553 P.2d 1 (1976), and other cases, and the legislature's ability to provide for prior approval of disbursement of grants by the executive was set aside by the Superior Court in Egan v. Special Legislative Oil - Development Impact Review Committee, motion for summary judgment granted, Superior Court, First Judicial District (November 30, 1975), appeal dismissed (November 7, 1975). The legislature has tried before to do what you suggest, and failed, and the precedents since the 1974 effort are even more clearly against another legislative effort.

"Oversight", then, is not a matter of the legislature's making discretionary grants.

Whether "oversight" should approximate the suggestions embodied in SB 55 is a matter which the legislature itself must decide. I see no real legal or constitutional impediments, though I am a little troubled by AS 24.20.615(a)(4) only insofar as I wonder whether the standard there set out ("to assure that amounts appropriated for regional educational attendance areas are equitable and consistent with amounts appropriated for city and borough school districts") is either meaningful, in light of the shift towards accommodating school operation support and school construction financial support on the basis of formulas which apply to both municipal and unorganized borough school districts, or so definite as to provide a standard by which the committee's members may attempt to assure that amounts available are equitably allocated among all districts. As drafted, it is also not clear to me whether the committee that is established may expect to have access to budget and appropriation requests in the fall or early winter each year (as the school district appropriation requests are being prepared by the department and submitted to the governor for his attention) or during the late winter and spring of each year (when, presumably, the committee would be working in

close association with the standing legislative committees on education and finance during a regular legislative session).

## VII

There remains for consideration one related matter. One or more regional educational attendance areas, acting under authority granted in AS 14.08.161(d), has requested and received the right to assume responsibility for school construction projects within the service area. Disputes concerning amounts payable to contractors, followed based, I am advised, on cost overruns. The degree of liability of the state for the errors of the regional educational attendance area has been questioned. In a recent opinion, this office suggested:

"Since resolution in a specific incident would depend on a careful analysis of the facts, no definitive answer that would apply to a specific case can be given in general terms.

"In my opinion the general rule would be that the state does not have liability for an amount over the amount of the grant of allotted funds where the regional school board has assumed a construction project under AS 14.-08.161(d).

"Regional educational attendance areas are created as educational service areas under AS 14.08.031. They are operated under the management and control of a regional school board (AS 14.08.041). Although the REAA is denominated 'an educational service area', the board is given extensive powers in AS 14.08.101 normally appropriate to a separate legal entity including the right to sue and be sued. The funding for operations is specified in AS 14.08.021 and the state does not retain control over the spending of these funds.

"Assumption of construction projects is authorized under AS 14.08.161(d) which provides:

"(d) Regional school boards may apply to the Department of Transportation and Public Facilities for a grant of all or part of the funds allocated

for their school construction, repair, and improvement projects. When a regional school board applies for a grant of funds, the department shall grant funds to a regional school board for a school construction, repair, or improvement project, and, if the request is for all funds allocated, shall provide for the assumption by the regional school board of all of the department's responsibilities relating to the planning, design and construction of an educational facility. Thereafter, the board shall

"(1) select the appropriate professional personnel to develop the designs;

"(2) approve or disapprove the appropriate designs or revised designs; and

"(3) undertake construction, repair or improvement of the educational facility.

"Certainly one of the responsibilities encompassed in the phrase 'the assumption of all the department's responsibility' where the funds have been granted to the regional school board is the responsibility for payment of construction costs. The REAA has in my opinion sufficient attributes of an independent entity that the state would not be liable for costs of a project which are in excess of the grant."

The conclusion generally follows the line of reasoning followed by the Court in considering a related question in Kenai Peninsula Borough v. State, 532 P.2d 1019 (Alaska 1975). The case there concerned responsibility for pupil transportation, and the question was one of whether the borough acted as an agent of the state in furnishing transportation services:

"The Alaska Constitution provides that '(t)he legislature shall by general law establish and maintain a system of public schools open to all children of the State.' The legislature has specified that '(e)ach borough constitutes a borough school district and establishes, maintains, and operates a system of public schools on an areawide basis . . .'. The borough .

admits that in the general operation of the school system, it is exercising a delegated authority from the legislature, so that in the absence of facts not here involved, the state would not incur liability for personal injuries. With reference to the transportation function, however, it is the borough's contention that it was acting as a compelled agent of the state so as to entitle the borough to indemnity for any liability incurred.

\* \* \*

"[T]he borough rests its appeal on an attempt to draw a distinction between the delegation of the legislative function of furnishing school transportation and the creation of a relationship whereby the borough acts on behalf of the state as its agent in furnishing the service. The use of the words 'may provide' is said to indicate that the transportation power is in the state, and the words 'may require' are claimed to show that the state can compel the local school districts to act as state agents in exercising the pupil transportation function. However, admitting that the transportation power is in the state and that the state has compelled the school district to handle that function is not tantamount to agreeing that the district is acting as the state's agent in providing school transportation so as to impose liability on the state.

"It is thus on the slippery distinction between a power delegated to a political subdivision and an agency relationship that the case turns. The borough points to the case of Pantess v. Saratoga Springs Authority [225 App. Div. 426, 8 N.Y.S.2d 103, 105 (1938)] which discusses aspects of the distinction as follows:

'Where the State assumes to act directly in the carrying out of its governmental function, even though it create and use a corporation for that purpose, it assumes responsibility for the conduct of its agent. Thus the State may choose to create and maintain a state system of parks, and thereby subject itself to liability for the negligence of its officers and employees . . . or, with like liability, it may provide for the imprisonment of

young delinquents, and commit their custody to an authorized institution for the purpose . . . But when the State delegates the governmental power for the performance of a state function, the agency exercises its independent authority as delegated, as does a city, and its responsibility for its acts must be determined by the general law which has to do with that class of agent and corporate activity, apart from liability on the part of the State. That is the case where the State delegates its state function of education to a school board, its public health function to a local board of health, when it delegates broader governmental functions to a county, city or village. In such instances, there is no authority for making claim against the State, but the agency exercising the delegated authority must respond for its own actionable conduct.'

"The Pantess case, however, deals only with the results flowing from a determination of an agency relationship or a delegated function, not the distinction between them. We find great difficulty with elucidation of the distinction between a function delegated to a political subdivision so as to insulate the state from liability and the exercising of a function by a political subdivision of the state. The basis of action by any agent is the authority delegated by his principal, so that a delegation is involved in both relationships. The distinction would appear to be one of degree of control. If a political subdivision acts with a substantial degree of independence under authority delegated by the state as a result of such activity. If, on the other hand, an executive department specifically makes a political subdivision its control, it may be subjected to liability based on acts of the subdivision.

"Our examination of the sparse authority on this subject indicates that authorized activities of such subdivisions are municipalities and school districts are almost universally considered to be independent actions not subjecting the state to liability, whereas when a state functions through use of some other type of agency or a private corporation, liability is more likely to ensue. . .

"We have had no case cited to us where liability was imposed upon the state for actions of a political subdivision such as a municipality or a school district. Political subdivisions of a state are creatures of the legislature which prescribes and curtails their authority. They may be subjected to detailed requirements in the exercise of their statutory functions. Yet such legislative regulation has not been held to make the subdivision an agent of the state so as to impose liability. Nevertheless, we can envision situations which might arise where it is clear that the subdivision is acting on behalf of the state as its agent and under its control to such an extent as to impose liability. Where political subdivisions are involved, however, we shall apply a much stricter test than when other forms of entities are utilized as to the type of control required to create liability on the part of the state."

532 P.2d 1019, 1021 - 1023.

The Court concluded that the Borough was not acting as an agent of the state in providing pupil transportation services, for it found ample evidence that

While the state did supervise the transportation service insofar as it related to the funding provided by it and also had certain regulations in effect pertaining to the over-all safety of the transportation system, the actual control of the transportation services was undertaken by the borough which, on its own behalf, entered into the contract.

532 P.2d 1019, at 1024.

AS 14.08.161(d), the manner of handling of money appropriated for construction of specific regional educational attendance area schools, and the absence of direct state control on use or expenditure of construction money by the rural school district combine to suggest that, when a regional educational attendance area opts to assume responsibility for school construction, it acts with a substantial degree of independence such that the liability of the district may not be imputed to the state.

Again, however, two notes of caution must be struck. Kenai Peninsula Borough is a case involving liability in tort; it is likely, though not certain, that the test suggested by the Court in the case would be applied to a contract situation, where claims and damages arise out of an agreement for construction of a school. Moreover, regional educational attendance areas are unable to levy and collect taxes or secure revenues except as those revenues are provided by the state. As a practical matter, then, only the state is in a position to extend assistance for contract cost overruns or, for that matter, damages whether arising out of contract or tort. The rural school board's only apparent alternative, diversion of money from other projects or from operating budgets, is politically unacceptable and, to the extent a diversion reduces the opportunities of students to secure minimal educational skills, the diversion may conflict with the duty of the state to "maintain a system of public schools open to all children of the State."

#### VI. I

If the legislature is, in the absence of any other entity, de facto an assembly for the unorganized borough, and if it is the desire of the legislature to reduce the likelihood of subsequent major cost overruns with respect to school construction or school operations, the legislature needs to develop a better means of reviewing the operation of school districts as they set out to construct or operate educational facilities and programs. The means to do this have been mentioned earlier in this paper; they include, most certainly in some combination,

- (1) better standards -- couched in statutes rather than regulations -- against which a state agency and a school district may measure proposed construction or operations plans;
- (2) regular review and reporting between the agency selected to monitor and the legislature or one of its committees; and
- (3) a better definition of the responsibility assumed by school officials who opt to undertake responsibility for school construction.

To the extent these or any other suggestions require legislation, please contact me if you require assistance.

JBC:ljb

Enclosure

**CHAPTER 31.  
SCHOOL FACILITY PLANNING  
AND CONSTRUCTION**

**Section**

- 10. Educational specifications
- 20. Guides for planning educational facilities
- 30. Review of school construction plans
- 40. Approval of school construction plans
- 50. Approval of purchase of nonschool facilities
- 60. State aid for school construction
- 90. Definitions

**4 AAC 31.010. EDUCATIONAL SPECIFICATIONS.** The chief school administrator, under the direction of the school board, is responsible for the preparation of educational specifications for all new public elementary and secondary schools, additions, and major rehabilitation of existing facilities. These educational specifications must include, as a minimum, the following:

(1) the current and four-year projected elementary and secondary enrollments to be served by the attendance center;

(2) a statement of educational philosophy and goals for the proposed facility;

(3) the curriculum to be housed by the facility;

(4) the activities that will be conducted in the facility;

(5) the anticipated community uses of the facility;

(6) the specific architectural characteristics desired;

(7) the spaces needed, their equipment requirements, and their space relationship to other facility elements; and

(8) the size, use, and condition of existing school spaces in the attendance center. (Eff. 3/1/78, Reg. 65)

Authority: AS 14.07.020(1) and (7)  
AS 14.07.060  
AS 43.18.100(b)

**4 AAC 31.020. GUIDES FOR PLANNING EDUCATIONAL FACILITIES.** The following are the basic guides for state educational facility planning:

(1) *The Guide for Planning Educational Facilities* as published by the Council of Educational Facilities Planners, International, 1977 Edition;

(2) *A Guide to the Development of Program Statements and Educational Specifications for Small Secondary Schools* as published by the Alaska State Department of Education, 1977 Edition;

(3) *Alaska Small High School Program and Space Guidelines* as published by the Alaska State Department of Education, 1977 Edition;

(4) *Alaska Small Elementary School Program and Space Guidelines* as published by the Alaska State Department of Education, 1977 Edition;

(5) *Department of Education Guidelines for School Equipment Purchases* as published by the Alaska Department of Education, 1977 Edition; and

(6) *Alaska's Program Planning and Facilities Procurement Process: Educational Facilities* as published by the Alaska Department of Transportation and Public Facilities, 1977 Edition. (Eff. 3/1/78, Reg. 65)

Authority: AS 14.07.020(1) and (7)  
AS 14.07.060  
AS 43.18.100(b)

**4 AAC 31.030. REVIEW OF SCHOOL CONSTRUCTION PLANS.** (a) The elements of a plan for new school construction, additions, or rehabilitation to be undertaken by a school district must be submitted to the commissioner for his review and recommendations as they are developed and before any construction activity is initiated.

(b) The commissioner shall waive, upon prior request, submission of those elements of a plan which are not applicable, as determined by him, to a proposed addition or rehabilitation project.

(c) For purposes of this section, "plan" includes the following:

- (1) educational specifications;
- (2) schematic design documents;
- (3) final construction contract documents;
- (4) estimated cost and proposed means of financing the project;
- (5) proposed method of construction; and
- (6) estimated completion date of the project. (Eff. 3/1/78, Reg. 65)

Authority: AS 14.07.020(1) and (7)  
AS 14.07.060  
AS 14.08.101(6) and (7)  
AS 43.18.100(b)

**4 AAC 31.040. APPROVAL OF SCHOOL CONSTRUCTION PLANS.** (a) Before they may commence construction activity, regional educational attendance areas undertaking new school construction, additions, or rehabilitation with funds granted to them under AS 14.08.161(d) and cities or boroughs which are school districts undertaking such construction projects for which state aid will be sought under AS 43.18.100 must secure the approval of the commissioner of the final working documents for the project as follows:

(1) if construction contract bids are to be invited for the project, the final working documents must be submitted to the commissioner at least 15 working days before the bid invitation is made; and

(2) if the project will not be advertised for bids, the final working documents must be submitted to the commissioner no later than 10 working days after the final working documents for each construction phase are available.

(b) The commissioner's approval under (a) of this section is void after two years unless construction on the project has been initiated within that time. (Eff. 3/1/78, Reg. 65)

Authority: AS 14.07.020(1) and (7)  
AS 14.07.060  
AS 14.08.101(6) and (7)  
AS 43.18.100(b)

**4 AAC 31.050. APPROVAL OF PURCHASE OF NONSCHOOL FACILITIES.** Regional

educational attendance areas proposing to purchase an existing facility for use as an elementary or secondary school with funds granted to them under AS 14.08.161 and cities and boroughs which are school districts proposing to make such a purchase for which state aid under AS 43.18.100 will be sought must secure the approval of the commissioner before acquisition of the facility. (Eff. 3/1/78, Reg. 65)

Authority: AS 14.07.020(1) and (7)  
AS 14.07.060  
AS 14.08.101(6) and (7)  
AS 43.18.100(b)

**4 AAC 31.060. STATE AID FOR SCHOOL CONSTRUCTION.** (a) This section applies to claims by cities and boroughs which are school districts for state aid for school construction costs under AS 43.18.100.

(b) Claims must be made on forms prescribed by the commissioner and, with respect to construction projects commenced or existing facilities purchased after July 1, 1978, must have been approved by the commissioner under sec. 40 or sec. 50 of this chapter, respectively.

(c) All claims for expenditures must be supported by a certified audit report of the school district prepared in accordance with the requirements of 4 AAC 06.120 and by a certified audit report of all school construction accounts or funds used by the city or borough. If the audit reports are not prepared in sufficient detail to clearly identify school construction costs as opposed to other construction and maintenance costs, or debt service costs of school construction as opposed to other debt service costs, detailed expenditure schedules that reconcile to audit report figures must be prepared and submitted with the claims.

(d) Only actual disbursements may be included as expenditures. Transfers into bond redemption funds or capital project funds are not eligible for reimbursement under AS 43.18.100.

(e) Only cash disbursements from locally generated revenues are eligible for reimbursement under AS 43.18.100(a)(1) and (3).

(f) Unless a claim is supported by financial schedules and prior year audit reports identifying the original source of revenue, only disbursements from revenues generated in the year for which the claim is made are eligible for reimbursement. (Eff. 3/1/78, Reg. 65)

Authority: AS 14.07.020(1) and (7)  
AS 14.07.060  
AS 43.18.100(b)

**4 AAC 31.090. DEFINITIONS.** As used in this chapter and AS 43.18.100, unless the context requires otherwise

(1) "additions" means providing space for expanded educational programs, new program spaces or replacement of substandard or destroyed spaces by connection to an existing school facility and includes capital equipment;

(2) "capital equipment" means built-in and movable equipment used to furnish a newly constructed or rehabilitated space; it includes first-time purchase of library books, reference material and media to furnish a new or renovated library; it does not include supply items such as textbooks and expendable commodities; the term is further defined in the *Department of Education Guidelines for School Equipment Purchases*, 1977 Edition;

(3) "commissioner" means the commissioner of the department of education;

(4) "elementary and secondary schools" means buildings which have been built or converted predominantly for instruction of elementary and secondary students as defined in *Alaska Small Elementary Program and Space Guidelines*, 1977 Edition, and *Alaska Small High School Program and Space Guidelines*, 1977 Edition, or, for schools designed to house in excess of 100 students, not more than 100 gross square feet per student in kindergarten through the eighth grade and not more than 150 gross square feet per student in the ninth through twelfth grade, and buildings for the support of that instruction;

(5) "locally generated revenues" means revenue derived from sales or property taxes levied by the city or borough, revenue in-lieu-of taxes received by the school district under PL 81-874 and AS 14.17.215, and funds

received under AS 43.18.100 and AS 43.50.140;

(6) "new school construction" means providing space for educational programs which have not been previously offered, replacing a substandard or destroyed school building or providing space for an expanded enrollment in the attendance center by construction or reconstruction of a detached school facility of any size, with related capital equipment;

(7) "rehabilitation" means adapting an existing facility to improve the opportunity to provide a contemporary educational program. It includes major remodeling, repair, renovation and modernization, with related capital equipment; these projects generally exceed 25 percent of the current cost of replacement of the facility or \$100,000, whichever is less;

(8) "school construction costs" means the costs of construction, as well as consultant services relating to planning, design, administration, review, cost control, construction inspection, and legal services, along with the direct costs of site acquisition, capital equipment purchase, and related expenses of district employees whose main function is to work on the construction project; projects eligible for state aid under AS 43.18.100 include public elementary and secondary school new construction, additions, and rehabilitation, and may include other site improvements and facilities as approved by the commissioner, but do not include employee or student housing; municipal and state offices, health clinics, community libraries, and other spaces may be built jointly with a school if approved by the commissioner as to compatibility and separation of funds; the commissioner has final authority to determine the proration of space and costs between school space and other space in such a jointly built project. (Eff. 3/1/78, Reg. 65)

Authority: AS 14.07.020(1) and (7)  
AS 14.07.060  
AS 43.18.100(b)

THE PRECEDING PAGES WERE TREATED AS  
A UNIT IN THE ORIGINAL FILE.



## **PRIBILOF ISLANDS SCHOOL DISTRICT**

**ST. GEORGE SCHOOL • ST. PAUL SCHOOL**  
ST. PAUL, ALASKA 99660 • TELEPHONE: (907) 546-2222

**DR. STANLEY L. BIPPUS**  
SUPERINTENDENT

**JOHN R. MERCULIEF**  
BOARD PRESIDENT

April 15, 1981

The Honorable Don Gillman  
Alaska Senate  
Pouch V  
State Capitol  
Juneau, Alaska 99811

Dear Senator Gillman:

I would like to share a couple thoughts on SB 126 - Binding Arbitration. It's very easy to become very emotional over this issue. We are talking about power and who should have it.

We are all being naive if we think for a minute that NEA is doing what is best for kids. They are doing what's best for their membership and power. Management is accused by labor of being insensitive to their needs. Binding Arbitration is supposed to facilitate communications and negotiations. Hogwash!!!

The single most destructive force to affect public education today is collective bargaining. Bills like SB 126 only verify the fact that money and power prevail over common sense. The teachers union is motivated by less time with children for more money. School board members, as a whole, are motivated by serving the public by providing improved educational opportunities to children. SB 126 wants to give more power and control to the union. The whole situation just doesn't make sense.

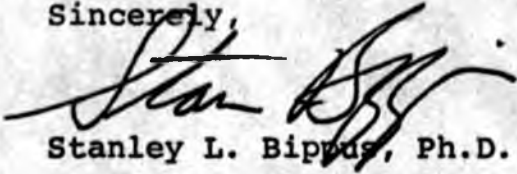
Binding Arbitration is another item that our society can look upon as a human failure. It's telling the world we are unable to cooperate and communicate. Why must we always look for solutions to deal with an evil instead of ways to correct a problem. SB 126 merely perpetuates and

Senator Don Gillman  
April 15, 1981

page 2

encourages conflict. If SB 126 passes we should all hang our heads in shame for we have admitted we are not capable of resolving our own problems.

Sincerely,



Stanley L. Bippus, Ph.D.

SLB:ek

cc: Senator Don Gillman  
Senator Mike Colletta  
Senator Frank Ferguson  
Senator Bob Ziegler  
Senator Arliss Sturgulewski  
Senator Jay Kerttula



# Delta/Greeley School District REAA #15

*Glen Chowning, Superintendent  
P.O. Box 527  
Delta Junction, Alaska 99737*

*907-895-4658  
895-4659*

April 14, 1981

The Honorable Don Gillman  
The Alaska State Senate  
Pouch V  
Juneau, AK 99811

Dear Senator Gillman:

I am writing in opposition to Senate Bill 126, Binding Arbitration. Of course, my major point is that the Bill would usurp the authority granted to elected local officials, and would transfer this decision making authority from elected officials to a third party. I sincerely believe that Boards should have the legal authority to prioritize expenditures within a School District. Boards have many concerns other than just salaries of employees in the operation of a School District. They must provide a sufficient amount of supplies, equipment, facilities, and many other items within the school budget. This budget must reflect the desire of the local community regarding the prioritization of expenditures. If Boards do not reflect the desires of the local community, then it is conceivable that these Board Members would not be re-elected to the School Board. I believe that the necessity of reflecting local desires when allocating school funds is enough to insure that employees are treated fairly by elected School Boards.

One major question that concerns me, especially, in the REAA's, is that REAA's are funded by a finite amount of money. It's the Board's job to determine how to divide these funds in the best interest of educational programs. The question is, what is the Board's option when the third party awards an amount that would cause the District to have to cut programs? It would seem to me that if the Legislature passed a Binding Arbitration Bill, there should be an option for School Districts to request supplemental funds from the Legislature.


Another major concern that I have is that, to my knowledge, the Legislature has not as yet proposed any legislation for advanced funding of the Foundation Program. The implication is that no advanced funding would be extremely serious for School Districts. The lack of knowledge of advanced funding

Senator Don Gillman  
Page 2  
April 14, 1981

will impact negotiations, budget planning, and so forth. School Districts would be negotiating with teachers next year without the knowledge of the funding level for the following year.

I urge you to vote no on Senate Bill 126, Binding Arbitration, and to pass legislation this year providing for a one year forward funding of the Foundation Program. Your thorough consideration of the major items affecting the education of students in the state of Alaska would be appreciated.

Sincerely,

  
Glen Chowning  
Superintendent

GC:11a

cc: Robert Greene, Executive Secretary  
Association of Alaska School Boards

DARROLL HARGRAVES  
Superintendent



April 10, 1981

APR 14 A.M.

Senator Mike Colletta  
Pouch V  
Juneau  
Alaska 99811

Dear Senator Colletta:

I am sorry that more compromise couldn't take place regarding the binding arbitration issue. In the final analysis, it appears necessary that school boards and administrators remain opposed to binding arbitration. There must be other ways to reach finality without giving up the legal rights and responsibilities of elected school boards.

Perhaps if there were time for new minds and personalities to examine the issue some acceptable solutions could be found. I have been on both sides of this issue, first as a teacher and NEA member, then as an administrator. I have observed that the union is in the enviable position of being the receiver, with the boards being the giver. Any form of binding arbitration simply dilutes further the powers and prerogatives of locally elected school boards.

Obviously, the NEA has considerable support in this Legislature. A binding arbitration bill may be inevitable; however, boards and school administrators who know the implications of this legislation must remain opposed and must let everyone affected know that we have that concern.

Certainly I understand your position. I want to thank you for your efforts in this matter. Please be assured that I will convey to administrators that you fought a very hard battle against tremendous odds in behalf of our position.

Although I can't support binding arbitration, I would recommend some points for your consideration. These points, if you could get them into the bill, would help soften the adverse impact a great deal.

1. A delayed effective date would be extremely helpful in allowing additional consideration to this matter. An effective date of July 1982 is recommended.
2. A sunset provision of three years, which could cause everyone to become more serious about examining the issue further.

3. Local boards should have the right to opt out of binding arbitration. It is understood that to gain such position it might be necessary to give the right to strike.
4. There should be some limitation on what is arbitrable. I would suggest that only salary schedules and money related items affecting the individual teacher would be arbitrable.
5. There should be a statement of management rights. Management should have the right to assign, dismiss, hire, transfer, etc.
6. There should be some provision to pay for arbitration awards. It is easy to conceive that an arbitration award could be detrimental to the total educational program provided to students in a particular school district. It would be unfortunate for students to suffer the loss of programs, courses, or other student related services, because of an unreasonable arbitration award.
7. There should be some provision to make illegal strikes costly to the individual and to the union. I would suggest a \$200 per day fine per teacher, a \$5000 per day fine to the NEA, and a loss of tenure for all participants in illegal strikes.

Again, please be assured that I appreciate your concern and efforts regarding this issue. If I can be of further help to you in explaining the position of the Association, please give me a call.

Sincerely,

  
Darroll Hargraves

/skb

# TELEGRAM

ALFSCOM, INC.  
PHONE: 586-6442  
JUNEAU, AK 99802

2311 M. TDA SITKA ALASKA 156 04-20 235P AST

PMS SENATOR DON GILMAN, CHAIRMAN COMMUNITY AND REGIONAL

AFFAIRS COMMITTEE POUCH V

JUNEAU AK

1800

'81 APR 20

PLEASE DO NOT PASS SENATE BILL 126 OUT OF COMMITTEE. WE BELIEVE  
THE BILL IS IN SUCH BAD FORM THAT IT SHOULD NOT BE PASSED. OUR  
REASONS ARE AS FOLLOWS: 11137

1. THERE ARE NO LIMITS IN THE BILL REGARDING WHAT IS NEGOTIABLE.  
THE SCHOOL BOARDS MANAGEMENT RIGHTS ARE LEFT COMPLETELY  
UNPROTECTED.
2. WHAT IS ARBITRABLE IS NOT LIMITED. NOTHING SHOULD BE SUBJECT  
TO BINDING ARBITRATION, AND CERTAINLY ARBITRATORS SHOULD NOT  
DECIDE POLICY QUESTIONS.
3. IF SOME VERSION OF BINDING ARBITRATION HAS TO BE PASSED OUT OF  
COMMITTEE, AT LEAST INCLUDE PENALTIES FOR ILLEGAL STRIKING  
SUCH AS LOSS OF TENURE AND IMMEDIATE DISMISSAL.
4. THE IDEA OF LAST BEST OFFER QUOTE ITEM BY ITEM UNQUOTE PLACES  
SCHOOL BOARDS AT A TERRIBLE DISADVANTAGE. THE ITEMS NEGOTIATED  
ARE ALMOST ALWAYS ADVANTAGEOUS TO TEACHERS AT SCHOOL BOARDS.  
WE ARE AMAZED THAT YOU WOULD CONSIDER BINDING ARBITRATION BUT  
NOT SERIOUSLY CONSIDER FORWARD FUNDING FOR THE FOUNDATION  
PROGRAM FOR FY-83. THIS TOPIC IS OF MUCH MORE IMPORTANCE  
SINCE WITHOUT ACCESS TO FINANCIAL SUPPORT BINDING ARBITRATION  
COULD NOT WORK ANYWAY. NO ARBITRATOR CAN MAKE AN INTELLIGENT  
DECISION WITHOUT KNOWING THE EXTENT OF AVAILABLE RESOURCES.

SINCERELY,

KAREN GUYMON, SITKA SCHOOL BOARD PRESIDENT, AND

JOHN S. COPPEE, SITKA SCHOOL SUPERINTENDENT

6

MSG 81-00013277 PRY 1 04/21/81 12:07:53 ORIG: L190 IN= 0002 OUT= 0036  
FROM: DILLINGHAM LIO TO: JUNEAU INFORMATION PAGE 0001  
TARGET: LJH2 SUBJ: PUBLIC OPINION MESSAGE

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TO: SENATE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE MEMBERS  
REPRESENTATIVE JOE CHUCKWUK  
SENATOR GEORGE HOHMAN  
FROM: JUDY NELSON, PRESIDENT, DILLINGHAM CITY SCHOOL DISTRICT

THIS IS TO URGE THAT CS126, AN ACT RELATING TO LABOR RELATIONS INVOLVING  
SCHOOL TEACHERS AND SCHOOL DISTRICTS, BE DEFEATED IN COMMITTEE.

THE DILLINGHAM CITY SCHOOL BOARD FULLY SUPPORTS THE ASSOCIATION OF ALASKA  
SCHOOL BOARDS ON THEIR POSITION THAT THIS BILL AS WRITTEN IS IN SUCH BAD  
FORM THAT IT OUGHT NOT BE PASSED. WE APPRECIATE YOUR TAKING THE  
TIME TO LISTEN TO OUR OPINION ON THE BILL. THANKS.

WAYNE E. TAYLOR  
Superintendent  
832-5484  
832-5625

## NENANA CITY PUBLIC SCHOOLS

P.O. BOX 127  
NENANA, ALASKA 99760

April 17, 1981


Senator Don Gilman  
Pouch V  
Juneau, AK 99811

Dear Senator Gilman:

The Nenana City Public School Board at its meeting of February 19, 1981 passed a motion to oppose SB 126 - Binding Arbitration. The board feels they are the elected representatives of Nenana to guide and direct the schools in Nenana based upon local needs. The Nenana City Public School Board is totally opposed to having an outside third party come into the district and make financial, policy and management decisions, which should be done by the local school board. They feel it is an infringement upon the rights of the local citizens to run their schools within the guidelines established by the State of Alaska.

Thank you for your time.

Sincerely,

  
Wayne E. Taylor  
Superintendent

WET:bjw

# North Slope Borough School District

P. O. Box 169 • BARROW, ALASKA 99723 • 852-5311

April 16, 1981

The Honorable Don Gillman  
United States Senate  
Pouch V  
Juneau, Alaska 99811

Dear Senator Gillman:

Please be advised that the School Board of the North Slope Borough School District is on record opposing binding arbitration. As a superintendent I am committed to the basic premise that school districts must be governed by local boards. To approve legislation which would put final decisions regarding money matters into the hands of outside arbitrators would at the very least violate the principals upon which public education was founded. I urge you to vote against all bills which would transfer authority from the local boards.

Most especially, I urge you to not support Senate Bill 126.

Sincerely yours,



Don Renfroe  
Superintendent

DR:jk

*Chenoweth's  
mark-up*

Chenoweth

Original sponsors: Parr, Fischer, Rodey  
and Stimson

BY THE COMMUNITY AND REGIONAL  
AFFAIRS COMMITTEE

IN THE SENATE

CS FOR SENATE BILL NO. 126 (C&RA)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to labor relations involving teachers  
and school districts; and providing for an effective  
date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

\* Section 1. MEDIATION. (a) Mediation between an employee bargaining  
agency and a school board in accordance with the provisions of this section

(1) shall begin if the parties have failed to negotiate a collec-  
tive bargaining agreement before February 1;

(2) may begin at any time before February 1

(A) if the employee bargaining agency and the school board  
mutually agree; or

(B) if the employee bargaining agency or the school board  
certifies to the other party that, in its opinion, good faith negotia-  
tions between the parties are at an impasse and the services of a  
mediator are necessary to resolve the dispute.

(b) When mediation is required or requested under (a) of this section,  
the employee bargaining agency and the school board shall choose a mediator.  
If the employee bargaining agency and the school board are unable to agree  
upon a mediator within seven days of the date mediation is required or  
requested under (a) of this section, they shall jointly request the United  
States Federal Mediation and Conciliation Service to provide mediation  
services. If the United States Federal Mediation and Conciliation Service  
is unable to provide mediation services, the employee bargaining agency and  
the school board shall jointly request the American Arbitration Association

1 or another recognized arbitration association to name a mediator.

2 (c) A mediator designated under (b) of this section shall

3 (1) chair all meetings between the employee bargaining agency and  
4 the school board; and

5 (2) attempt to resolve the differences between the disputing  
6 parties and reach common acceptance of terms and conditions or other items  
7 in dispute whenever possible.

8 (d) The mediator has 30 days from the first meeting with the disputing  
9 parties to secure agreement between the parties. The employee bargaining  
10 agency and the school board may agree to extend the period during which the  
11 mediator may secure agreement and reduce the agreed terms, conditions, and  
12 other items to a written contract.

13 (e) If, at the end of the period set out in (d) of this section, the  
14 mediator has not secured agreement between the parties, and the mediator  
15 does not serve as the arbitrator as provided by sec. 3 of this Act, the  
16 mediator shall prepare a list of items remaining at impasse.

17 (f) If mediation meetings are held during a school day, teachers who  
18 represent the employee bargaining agency shall be released from classroom or  
19 other assigned duties without penalty or loss of pay.

20 (g) The expenses of mediation, if any, under this section shall be  
21 shared equally by the employee bargaining agency and the school board.

22 \* Sec. 2. ARBITRATION. Items at impasse shall be submitted to an arbi-  
23 trator under this section if an employee bargaining agency and a school  
24 board are unable to reach agreement by the 30th day following the first  
25 meeting between the employee bargaining agency and the school board with a  
26 mediator appointed under sec. 1(b) of this Act, except that, if the parties  
27 mutually agree to extend the period during which the mediator may secure  
28 agreement as provided by sec. 1(d) of this Act, the extension date agreed to  
29 by the parties shall be the date applicable under this section to determine

1 whether arbitration is required.

2 \* Sec. 3. APPOINTMENT OF ARBITRATOR. The mediator appointed under  
3 sec. 1 of this Act shall serve as arbitrator. However, if the mediator is  
4 unable to serve as arbitrator or if one of the parties objects to the  
5 mediator serving as arbitrator, the employee bargaining agency and the  
6 school board shall, within two days of the expiration of the period speci-  
7 fied in sec. 2 of this Act, exclusive of Saturdays, Sundays and holidays,  
8 agree on a person to serve as arbitrator or ask the American Arbitration  
9 Association or other mutually acceptable arbitration association to name an  
10 arbitrator.

11 \* Sec. 4. ARBITRATION AWARD. (a) After accepting items submitted at  
12 impasse by an employee bargaining agency and a school board to determine an  
13 arbitration award, an arbitrator shall make at least one good faith effort  
14 to secure a negotiated agreement between the parties. The arbitrator shall  
15 have at least one meeting jointly with the employee bargaining agency and  
16 the school board. Submission of items to the arbitrator shall be by each  
17 party separately. Each submission shall state the final offer on each of  
18 the items at impasse, and only on those items, and shall be certified by the  
19 authorized representative of the employee bargaining agency or of the school  
20 board.

21 (b) The arbitrator's award <sup>may</sup> include ~~all items~~ submitted to the  
22 arbitrator by the employee bargaining agency, ~~all items~~ submitted to the  
23 arbitrator by the school board, or items submitted by each of the parties.  
24 The arbitrator shall advise each of the parties as to the method he will use  
25 to determine the award after the parties submit their final offers and  
26 before announcing his award, <sup>and shall accept an offer on an item if</sup>

27 (c) As to items at impasse, the arbitrator shall select the more  
28 reasonable and equitable offer, without modification. after considering

29 (1) applicable state and federal laws;

- (2) stipulations of the parties;
- (3) the interest and welfare of the parties and public;
- (4) the school board's financial ability; and
- (5) the submissions of the parties.

(d) The arbitrator shall issue an award incorporating the offers which he selects, shall prepare a written statement of the reasons for the award, and shall submit a copy to the employee bargaining agency and the school board. The award of the arbitrator is final and binding on both parties.

(e) The expenses of arbitration shall be shared equally by both parties.

\* Sec. 5. REVIEW OF ARBITRATOR'S AWARD. (a) The award of an arbitrator under secs. 2 - 4 of this Act may be vacated by a court only on grounds specified in AS 09.43.120(a)(1) - (3), *and 09.43.120(b) & (c).*

(b) The award of the arbitrator may be corrected or modified by a court only on grounds specified in AS 09.43.130.

\* Sec. 6. STRIKES. (a) Except as permitted in (b) of this section, a teacher may not engage in a strike. Upon a showing by a school board that teachers are engaging or about to engage in an illegal strike, an injunction, restraining order, or other order which may be appropriate shall be granted by the superior court in the judicial district in which the strike is occurring or is about to occur.

(b) The certificated employees of a school district in which the school board has rejected the applicability of the provisions of this Act may engage in a strike. A strike is authorized under this subsection only if a majority of the members vote to strike by secret ballot.

\* Sec. 7. LOCKOUTS. A school board may not engage in a lockout of its teachers. Upon a showing by an employee bargaining agency that a school board is engaging or about to engage in a lockout, an injunction, restraining order, or other order which may be appropriate shall be granted by the

1 superior court in the judicial district in which the lockout is occurring o  
2 is about to occur.

3 \* Sec. 8. AS 14.20.570 and 14.20.580 are repealed.

4 \* Sec. 9. APPLICABILITY OF ACT. (a) The provisions of this Act apply  
5 to each school district of the state unless the school board of the school  
6 district, by resolution, rejects the applicability of the provisions of this  
7 Act by October 31, 1981.

8 (b) The provisions of this Act do not apply in a school district for  
9 the duration of <sup>an agreement</sup> ~~an agreement entered into~~ <sup>negotiated in progress July 1, 1981</sup> between the school district and an  
10 employee bargaining agency of the certificated employees of the school  
11 district to replace an agreement which expires by June 30, 1981.

12 \* Sec. 10. This Act terminates July 1, 1985.

13 \* Sec. 11. This Act takes effect July 1, 1981.

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STATE OF ALASKA  
THE LEGISLATURE

POUCH Y - STATE CAPITOL  
JUNEAU, ALASKA 99811  
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

April 23, 1981

SUBJECT: CSSB 126 (C&RA)

TO: Senator Donald E. Gilman  
Chairman, Senate Community and  
Regional Affairs Committee  
Attn: David Dye

FROM: John B. Chenoweth  
Legislative Counsel

Following a quick review of the cases involving interpretation of federal and state constitutional provisions relating to prohibiting legislatures from acting to impair contracts, one of the externs advises that the decisions suggest that legislatures have latitude to enact laws which effect contracts where public policy considerations outweigh private interests. The principal decisions, Home Building and Loan Association v. Blaisdell, 290 U.S. 398, 78 L.Ed. 413 (1933), City of El Paso v. Simmons, 379 U.S. 497, 13 L.Ed.2d 446 (1965), and Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 57 L.Ed.2d 727 (1978), suggest that a provision comparable to that set out below could be validly enacted with the above-captioned bill:

[\* Sec. 9]

(c) The provisions of this Act apply to the provisions or clauses of an agreement in effect on the effective date of this Act which, by the terms of the agreement, are subject to renegotiation at specified intervals.

As a policy matter (not a legal matter), are you sure you want to include a provision, binding the provisions of this Act to certain clauses within existing agreements, when you exempt not-yet-negotiated contracts (which are the successors to existing agreements) from operation of the Act? It seems somewhat inconsistent to me.

JBC:ljb

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y - STATE CAPITOL  
JUNEAU, ALASKA 99811  
907-465-3800


LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

April 22, 1981

SUBJECT: CSSB 126 (C&RA)

TO: Senator Donald E. Gilman  
Chairman, Senate Community and  
Regional Affairs Committee  
Attn: David Dye

FROM: John B. Chenoweth  
Legislative Counsel 

A draft is enclosed. I have not had an opportunity to review and reach a decision with respect to the constitutional question posed by imposition of the provisions of this legislation on elements of contracts which are "reopened for negotiation" after the effective date of this Act.

Note that the bill is drafted in uncodified form for, by its terms, it is temporary.

In the third line of \* Sec. 2, where you had proposed to insert "after" for "by", I kept "by"; "after" did not make sense to me when used in context.

Please review carefully the provisions of subsection (b) under \* Sec. 4 to ascertain whether this meets the tenor of our discussion by telephone.

In \* Sec. 5(a), I do not understand how AS 09.43.120(b) - (e) are "grounds" for vacating an award. I would have cut it off after the AS 09.43.120(a) references.

Please review carefully both parts of \* Sec. 9 to see if these provisions express the sense of the committee's position. I found the provision which is now encompassed in \* Sec. 9(b) particularly difficult to express.

Senator Donald E. Gilman  
Page 2  
April 22, 1981

Note the effective dates. With this bill, I am of the firm opinion that an immediate effective date would cause more problems than it would resolve. I see little harm in setting a date certain as an effective date that is not so different from the effective date which the bill would carry with an immediate effective date clause.

JBC:ljb

Enclosure

Chenoweth

Original sponsors: Parr, Fischer, Rodey and Stimson

1 IN THE SENATE

BY THE COMMUNITY AND REGIONAL AFFAIRS COMMITTEE

2 CS FOR SENATE BILL NO. 126 (C&RA)

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16 mutually agree; or

17 (B) if the employee bargaining agency or the school board  
18 certifies to the other party that, in its opinion, good faith negotia-  
19 tions between the parties are at an impasse and the services of a  
20 mediator are necessary to resolve the dispute.

21 (b) When mediation is required or requested under (a) of this section,  
22 the employee bargaining agency and the school board shall choose a mediator.

23 If the employee bargaining agency and the school board are unable to agree  
24 upon a mediator within seven days of the date mediation is required or

25 requested under (a) of this section, they shall jointly request the United  
26 States Federal Mediation and Conciliation Service to provide mediation

27 services. If the United States Federal Mediation and Conciliation Service  
28 is unable to provide mediation services, the employee bargaining agency and

29 the school board shall jointly request the American Arbitration Association

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21 shared equally by the employee bargaining agency and the school board.

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29 (1) applicable state and federal laws;

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22 (b) The certificated employees of a school district in which the  
23 school board has rejected the applicability of the provisions of this Act  
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1 superior court in the judicial district in which the lockout is occurring or  
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4 \* Sec. 9. APPLICABILITY OF ACT. (a) The provisions of this Act apply  
5 to each school district of the state unless the school board of the school  
6 district, by resolution, rejects the applicability of the provisions of this  
7 Act by October 31, 1981.

8 (b) The provisions of this Act do not apply in a school district for  
9 the duration of an agreement entered into between the school district and an  
10 employee bargaining agency of the certificated employees of the school  
11 district to replace an agreement which expires by June 30, 1981.

12 \* Sec. 10. This Act terminates July 1, 1985.

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*Final  
Mark-up*

Chenoweth

Original sponsors: Parr, Fischer, Rodey  
and Stimson

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 26 before announcing his award, <sup>and shall adopt an offer or an item</sup>  
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29 (1) applicable state and federal laws;

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April 27, 1981

MEMORANDUM

**TO:** Senator Jay Kerttula  
Senate President

**FROM:** Senator Don Gilman  
Chairman  
Community and Regional Affairs  
Committee

**SUBJECT:** Senate Bill No. 126

Committee Substitute for Senate Bill 126 (C&RA) will be reported out of committee tomorrow, April 28.

As you know, this is a very controversial subject statewide and has received a great deal of press over the last month. The State Board of Education has voted to recommend to the Governor that he veto any bill allowing binding arbitration, and at the same time have directed the Commissioner of Education to introduce legislation which would provide a finality to teacher negotiations.

My head count on SB 126 shows a very close vote and at this point would indicate that the chances of success on the Senate floor are very slim.

We have provided for an option for local school districts to exercise, and if they exercise the opt out provision, then they are giving the local teachers the right to strike.

We have also sunsetted the legislation--this provision to go into effect in 1985.

I am not sure that any of the groups involved like the bill.



Official Business

# Alaska State Legislature

## Senate

### Office of the President

April 23, 1981

Pouch V  
State Capitol  
Juneau, Alaska 99811

#### MEMORANDUM

TO: Senator Dor. Gilman  
Chairman  
Community & Regional Affairs Committee

FROM: Senator Jalmar Kerttula  
Senate President

SUBJECT: Looking toward a late May Adjournment

A handwritten signature in cursive script, appearing to read "Jay".

I have an individual priority request that the following bill, now in the C&RA Committee, be considered for committee action:

SB 126



Official Business

# Alaska State Legislature

## Senate

### Office of the President

Pouch V  
State Capitol  
Juneau, Alaska 99811

April 27, 1981

Ms. Barbara Ann Block  
President  
The Alaska PTA  
P.O. Box 680  
Anchorage, Alaska 99510

Dear Ms. Block:

Thank you for your recent letter and copy of the Resolution approved by the Board of Managers of ACPT.

I appreciate your letting me know the Boards concerns and will review the commission's report.

I will forward a copy of your resolution to all members of the Senate for their review as requested.

Sincerely,

*J. Kerttula*  
Senator Valmar Kerttula  
President of the Senate

JK/srh

*Education*

The Alaska



P.O. Box 680  
Anchorage, Alaska 98510

APR 24 1981

March 21, 1981

President Jalmar M. Kerttula  
State of Alaska Senate  
Pouch V (MS 3100)  
Juneau, Alaska 99811

Dear Mr. President:

The board of managers of the ALASKA PTA approved the attached resolution after hearing the report of Sue Linford, PTA appointed member of Governor Hammond's Blue Ribbon Commission to Find Alternatives to Impasse between Teachers and School Boards.

We are concerned that the members of the legislature thoroughly examine and adhere to the parent/lay member minority report of the commission before taking any action on this issue.

We are also sending a resolution to National PTA recommending that the National Congress support inclusion in all public sector collective bargaining legislation dealing with teachers of elementary and secondary students, a Public Rights Statement which:

- A. defines "public" as:  
Students who are required by law to attend school and the citizens who are required to monetarily support the public schools.
- B. states that the "public" has the right to orderly and uninterrupted operation and functioning of public schools.
- C. to protect this right, work stoppages and lock outs shall be prohibited by law.

Thank you for your help in this matter, I would appreciate it if you would make copies of the resolution available to all members of the senate.

Sincerely,

A handwritten signature in cursive script that reads "Barbara Ann Block". The signature is written in black ink and is positioned above the typed name.

Barbara Ann Block, President

bab/sf  
cc/file

RESOLUTION

APR 27 1981

Pertaining to the Report to Governor Hammond from his Blue Ribbon Commission to Find Alternatives to Impasse between Teachers and School Boards - dated November 1980

Whereas, the Governor of Alaska in 1980 appointed a Blue Ribbon Commission to find alternatives to impasse in Teacher/School Board negotiations, and

Whereas, the make up of this Commission was divided into three general categories of representation - parent/lay, teacher organizations, and school board/school administration, and

Whereas, this Commission after eight months of intensive research and study reached some concensus points, but in its final report to the Governor presented three separate and sometimes, but not always, conflicting reports, and

Whereas, the parent/lay report most closely reflects the concerns and needs especially the Statement on the Public Rights,

Therefore be it resolved by the Board of Managers of the Alaska PTA (ACPT) to inform the Governor and instruct the Legislature of the State of Alaska to thoroughly examine and adhere to the concerns expressed by and in the parent/lay report BEFORE adopting ANY either changes in existing legislation or new legislation dealing with teacher/school board negotiations.

Approved by the Board of Managers of ACPT  
March 27, 1981

# Millett Keller Company

1667 Crescent Street  
Anchorage, Alaska 99504  
(907) 277-8767 or 279-8441

*File.*

May 2, 1981

Honorable Don Gilman  
Alaska State Senate  
Pouch V  
Juneau, Alaska

Dear Don:

Just a short note to say thanks for the time spent talking with me about your stand on binding arbitration. I appreciate your honesty and courage in wanting to deal with this important issue in forthright manner.

I was encouraged to hear that you do not favor the use of binding arbitration in the public sector. Should the issue come before the Senate, I will fully support your stand in opposition. As we discussed, the issue of binding arbitration goes to the central pillar of our representative democracy. The government employees derive their benefits from the consent of the governed through our elected officials.

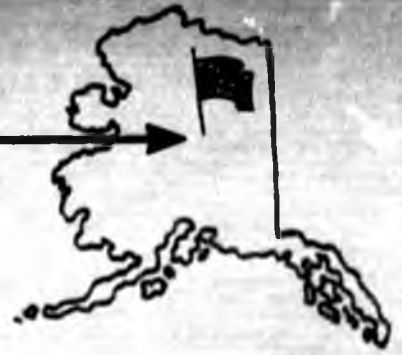
Thanks again for your stand on this issue. I enjoyed seeing you while you were in Anchorage and hope to see you again in the near future.

Sincerely,



Millett Keller

**FAIRBANKS NORTH STAR BOROUGH SCHOOL DISTRICT**  
P. O. Box 1250, Fairbanks, Alaska 99707 (907) 456-7934



**DR. BRYCE STALLARD**  
Superintendent of Schools

**GUS ZADRA**  
Associate Superintendent

**CHARLES A. LOWRY**  
Assistant Superintendent

May 8, 1981

The Honorable Donald Gilman  
Senate  
Pouch V  
Juneau, Alaska 99811

Dear Senator Gilman:

The Fairbanks North Star Borough Board of Education would like to go on record in opposition to the committee substitute for Senate Bill No. 126, (C and RA). We feel the bill is restrictive and we do not support the time provisions in the mediation process. We are opposed to binding arbitration as described.

Thank you for any consideration or assistance you can give us in this.

Sincerely

FAIRBANKS NORTH STAR BOROUGH SCHOOL DISTRICT

*Marguerite Stetson*  
Marguerite Stetson *ph*  
President  
Board of Education

MS/EK/plh

A M E N D M E N T

OFFERED IN THE HOUSE:

By: \_\_\_\_\_

To: \_\_\_\_\_ HOUSE BILL No. CSHB 487 (Judiciary)

SENATE BILL No. \_\_\_\_\_

PAGE: 3

LINE: 21

Insert the following new material:

(e) The provisions of this section apply

(1) in a school district of a home rule or general law municipality only if

(A) the governing body of the municipality approves an ordinance providing for the arbitration of items at impasse between the school board and its certified employees and submits the ordinance to the voters of the municipality at a regular or special election called for the purpose; and

(B) the ordinance is approved by a majority of the voters voting on the ordinance at the election;

(2) in a regional educational attendance area only if

(A) the school board of the regional educational attendance area directs the lieutenant governor to include on the ballot, at the regular election held under AS 14.08.071, a referendum question which asks the voters in the regional educational attendance area whether the provisions of AS 14.20.582 - 14.20.585 shall apply to govern the disposition of items at impasse between the school board and its certified employees; and

(B) the question is approved by a majority of the voters voting on it at the election.

Page 3, line 25:

Delete all material and insert in its place:

• Sec. 2. AS 14.20.580(c) is amended to read:

(c) If , in a city or borough or a regional educational attendance area in which

A M E N D M E N T

OFFERED IN THE HOUSE:

By: \_\_\_\_\_

To: \_\_\_\_\_ HOUSE BILL No. CSHB 487 (Judiciary)

SENATE BILL No. \_\_\_\_\_

PAGE: 3

LINE: 25

. (continued)

the voters have not approved an ordinance providing for arbitration of items at impasse under AS 14.20.582 (e), the final report of the mediator is rejected by either side, the governor may appoint an advisory arbitrator to review the issues and make recommendations for solution.

*Dispute Resolution  
under Fact-finding  
and Arbitration:  
An Empirical Evaluation*

THOMAS A. KOCHAN,  
MORDEHAI MIRONI,  
RONALD G. EHREBERG,  
JEAN BADERSCHNEIDER,  
AND TODD JICK

1979



AMERICAN ARBITRATION ASSOCIATION  
New York, New York

## CHAPTER 7

### THE ROLE OF FACT-FINDING IN AN ARBITRATION STATUTE

The fact-finding process involves the submission of a dispute to one or more neutrals who issue a report containing nonbinding recommendations for settling of the dispute. The arbitration amendment passed in 1974 continued fact-finding as an intermediate step in the impasse procedure. The sequence of steps envisioned by the amendment was mediation followed by fact-finding followed by arbitration.

It is somewhat uncommon to have fact-finding as an intermediary stage between mediation and arbitration. It exists in only 9 of the 19 states that have enacted provisions for interest arbitration in public safety employee disputes.<sup>1</sup> The primary objective of this chapter is therefore to assess the costs and benefits of including fact-finding as a preliminary step to arbitration.

#### Fact-finding as an Impasse Procedure

Although its roots can be traced to legislation that attempted to prevent strikes in essential services in the private sector, i.e., the Railway Labor Act, the National Labor Relations Act, and various states' strike control legislation,<sup>2</sup> fact-finding has gained its widespread popularity in the public sector.<sup>3</sup> This has been so because the services provided by the public sector have, by definition, been deemed essential.<sup>4</sup>

Most of those who write on the subject agree that the term "fact-finding" is actually a misnomer since finding the facts is not the central function of the fact finder. Rather, the central core of the fact-finding process is the issuing of recommendations that the fact finder hopes the parties will voluntarily accept or use as a basis for resolving the dispute.<sup>5</sup>

In addition, fact-finding has also been widely recognized as a valuable face-saving device or as a means of providing a political scapegoat for the parties to blame for an unpleasant, but perhaps inevitable, solution to a dispute. Fact finders may be called upon to write recommendations that the parties have already tacitly agreed to but for political reasons are unable to present to their constituents or superiors without outside endorsement.

#### The Expected Role under the Arbitration Amendment

The 1974 arbitration amendment to the Taylor Law made only one reference to the fact-finding report. Section 209.4(c)(v) of the amended

statute stipulated that: "In arriving at such determination, the panel may, but shall not be bound to adopt any recommendation made by the fact finder."<sup>6</sup>

Since vague statutory construction could not be left in its abstract form, PERB announced its perception of the relationship between the fact-finding and the arbitration proceedings shortly after the enactment of the amended impasse procedure. PERB's thesis was summarized in an article written by its legal counsel.<sup>7</sup> He suggested that the arbitration panels take the following approach.

1. During the arbitration hearing the parties should be required to address themselves to the report and recommendations of the fact finder and to provide additional evidence only with regard to the portion of the report with which they disagreed.
2. The parties should have the burden of persuasion as to why and how the fact-finding report needs to be revised. In other words, a "show-cause," as distinguished from a "de novo" hearing should be held, both with regard to the burden of presentation and the admissibility of evidence.
3. During the decision-making process, the arbitration panel should treat the fact-finding report as the basis for its considerations.<sup>8</sup>

The PERB legal counsel pointed out the utility of such an approach, both for the instant disputants and the overall effectiveness of the impasse procedure, stating that:

- (1) it will save time; (2) it will reduce the labors of the arbitration panel by limiting the number of issues to be considered in depth; (3) it will reinforce the persuasive impact of the fact finder's report; (4) it may encourage the parties to reach agreement based upon the fact finder's report or on mutually agreed modifications thereof; (5) it may discourage use of compulsory arbitration, since the parties will recognize that it will not bring them any significant advantage.<sup>9</sup>

PERB's view regarding the appropriate role of the fact-finding report in the arbitration proceedings was premised on three assumptions: (1) if left to the discretion of the parties, the arbitration panel would be confronted with practically the same evidence and data that were submitted to the fact finder; (2) the legislature intended to give the fact-finding report a status of *primus inter pares*, as compared with the other criteria for decision making<sup>10</sup>; and (3) the fact-finding and arbitration procedures were inherently similar in nature.

#### The Actual Role under the Arbitration Amendment

The remaining parts of this section empirically examine the extent to which the arbitration panels embraced this "show-cause" approach in

both the way they conducted the arbitration hearing and in their decision making. In addition, the three assumptions upon which this approach was constructed are tested.

The data used in this analysis, as well as in the following chapter, were obtained in personal interview with the presiding officers of the first 30 arbitration cases completed under the statute. In addition, interviews were held with the partisan arbitrators in 15 of these cases. The semistructured interview forms used in these interviews are included in the Appendix of the book.

PERB's plea to the arbitration panels to adopt a show-cause posture in the conduct of the arbitration hearing met with little success. Less than a third of the arbitration panels followed this route. Out of 30 cases in the sample, only 8 (27%) conducted a show-cause hearing on the basis of the fact-finding report. Ten panels (33%) administered a strict de novo hearing, and 12 panels (40%) found a middle way. In this latter group, the hearing was de novo; yet the panel advised the parties at the outset of the hearing that regardless of the evidence and arguments that were presented during the hearing, the panel would adopt a show-cause posture during the executive sessions.

When the panel members were asked whether they or the parties had any a priori preference regarding the conduct of the hearing and whether this question was raised as an issue, the majority of panelists answered negatively. In only seven cases did the chairmen suggest and insist upon a show-cause approach, and in four other cases the show-cause/de novo question emerged as an issue between the parties. In the remainder of the cases no point was raised as to the type of hearing.

Members of the arbitration panels and representatives of the parties were asked whether they would prefer to change the statute to require a show-cause approach to the arbitration hearing (assuming both fact-finding and arbitration remained in the statute). The responses (which are shown in Table 7-1) show no clear consensus on this issue. The differences in preference are not, however, clearly divided across union and management lines. Instead, we find that the representatives of the parties—usually those individuals who presented the cases of the parties at the arbitration hearing—were evenly divided on this issue; the presiding officer of the arbitration panels endorsed the show-cause approach by a slight majority and the partisan arbitrators rejected this approach by a two-to-one margin.

The comments that accompanied these responses indicated that those who preferred the show-cause route perceived it as the only way to give meaning, validity, and credibility to the fact-finding procedure and as disincentive from going to arbitration. On the other hand, those who objected to a show-cause approach feared that it would ruin the

TABLE 7-1  
Preferences for Show-Cause Arbitration Hearing

	For a strict show-cause arbitration hearing on the basis of fact-finding report	Against a strict show-cause arbitration hearing on the basis of fact-finding report	Total
Union representative	12	13	25
Employer representative	14	12	26
Public chairman	17	13	30
Union partisan member	6	10	16
Employer partisan member	5	10	15
Total	54	58	112

informal nature of fact-finding and would thereby make it more sterile and legalistic. This group viewed fact-finding as part of the conciliation machinery and, therefore, wanted to keep it completely divorced from the adjudicatory arbitration stage. They thus contended that these two stages have different functions.

The arbitrators' main concern, however, was with their ability to fulfill their responsibility within a show-cause framework. Those who opposed the show-cause approach held that they needed a full evidentiary hearing in order to understand the issues and to make a reasoned judgment based on the statutory criteria. They further argued that fact-finding reports are not written in a way that would enable the arbitrator to grasp the dispute in order to make an independent judgment, as required by law.

The comments that accompanied most of the answers to this question also revealed that show-cause is an elusive concept that may mean different things to different people. It may refer to four different aspects in the arbitration proceedings: (1) admissibility of evidence; (2) burden of persuasion; (3) admissibility of arguments; and (4) the treatment of the fact-finding report during the decision-making process. Hence, it came as no surprise that several respondents who forcefully rejected a strict show-cause concept still suggested that, as in civil litigation, the burden of demonstrating why the report was inadequate be placed on the party who rejected the fact-finding report.

In addition, those who disapproved of the show-cause concept, as well as those who endorsed it, emphasized that any attempt to institutionalize a show-cause policy would be contingent upon several modifications in the framework and design of the impasse procedure. Their major suggestions centered on improving the quality of the fact-

finding report and ensuring that a show-cause approach would not run afoul of the procedural due-process standards. Among the suggestions made in the interviews were the following:

- (1) Fact-finding should be performed by a tripartite body.
- (2) The presiding officer of the fact-finding board should be selected by the parties.
- (3) The statutory criteria should be applied to the fact-finding stage as well.
- (4) The parties should not be allowed to raise new issues in arbitration.
- (5) The fact-finding hearings should be on record.

#### The Impact of the Fact-finding Report on the Arbitration Decision

Although the statute was silent about the role of the fact-finding report in the arbitration hearing, section 209.4(c)(v), as interpreted by PERB, encouraged the arbitration panels to use the fact-finding report as a basis for their awards. If, indeed, the arbitration panels adhered to this policy, then one would expect a high rate of congruency between the results of the fact-finding report and the substantive terms of the respective arbitration awards.

In order to assess the extent of congruency in outcomes between the fact-finding reports and the arbitration awards, a comparative analysis of these two documents in each of the cases in the sample was devised.<sup>11</sup> An examination indicated that a total of 53 different issues were considered in these cases. These 53 issues were classified into the following six categories for the purposes of analysis: (1) salary, (2) wage supplements, (3) fringe benefits, (4) work load, (5) personnel management and contract administration, and (6) union institutional benefits.<sup>12</sup> Only those issues that were disposed of by both fact-finding and arbitration were included in the analysis.

Comparisons were made of both the direction and magnitude of the deviations on salary issues. The remaining issues were analyzed only for the presence (or absence) and direction of deviation. The magnitude of deviations on salaries was analyzed by using police and fire fighter's base and maximum salaries. Deviations were computed by comparing three salary figures—salaries in the expired contract, salaries at the end of the first year of the new contract as recommended by the fact finder, and the salaries awarded in arbitration. Lump sum "bonuses" (a polite name for interest payments for time delays) that did not affect the base salaries were ignored in these comparisons.

A three-point coding scheme was used for the analysis of the presence or absence of deviation and its direction. The scheme consisted of these alternative codings: (1) union is worse-off in arbitration than in fact-finding; (2) union is in the same position in arbitration as in fact-finding;

(3) union is better-off in arbitration than in fact-finding. In cases where the direction of change was unclear, a separate coding was assigned.

The positions of the parties during negotiation, fact-finding, and arbitration were used to ascertain the direction of change from the standpoint of the union. Where the arbitration panel remanded an issue to the parties for further negotiations, the issue was traced back to the fact-finding stage in order to learn who was the moving party. In this way we could see whether the award was more favorable to the union or less.

The arbitration panels awarded the salaries recommended by the fact finder in 19 out of 27 cases (70%) where salaries were an issue. In four cases (15%) the panel granted increases above the fact-finding recommendations, and in two cases (7.5%) the panel awarded less than the fact finder. In two cases we could not assess the direction of the deviation based on the information available in the arbitration awards. The magnitude of the changes awarded by the arbitrators (as summarized in Table 7-2) is rather small; the median difference was about 1.25% for the minimum and maximum salaries. (The big difference between the median and the mean reflects the effect of one decision in which the deviation was rather large.)

TABLE 7-2  
Differences between Salary Increases in Arbitration and Fact-finding

	Number of cases	Mean	Median	Minimum	Maximum
Differences in base salary in dollars	7	202	109	-92	600
Differences in base salary in percentages	7	2.61	1.24	1.23	7.91
Differences in maximum salary in dollars	8 <sup>a</sup>	412	150	-174	2350
Differences in maximum salary in percentages	8 <sup>a</sup>	3.5	1.26	-1.53	17.17

<sup>a</sup>In case CA-055 M Orangtown Police, the arbitration panel sustained the fact-finding recommendation on the base salary but modified the recommendation on the salary increases for the top grade.

The frequency and direction of changes between the arbitration awards and fact-finding recommendations on all issues are summarized in Table 7-3. Here it can be seen that the arbitration panels adopted the fact-finding recommendations on 74% of the issues dealt with in both proceedings. Arbitrators were least likely to deviate on work conditions issues. When they deviated on salary and wage supplement issues, they

were twice as likely to improve the union's position as they were to worsen it. The reverse is true, however, for fringe benefits. Overall, the major conclusion from these data is that arbitration panels were very reluctant to deviate from the fact-finding recommendations. Where they did deviate, the magnitude of the changes was generally quite small.

**TABLE 7-3**  
Reasons for Diverting from the Fact-finding Report

Reasons	Presiding officer	Union delegate	Employer delegate	Total
Inadequacies of fact-finding report <sup>1</sup>	9	2	1	12
Unacceptability of the solution recommended by the fact finder	15	7	6	28
Changes in the situation due to the time lag <sup>2</sup>	16	6	11	33
Other reasons <sup>3</sup>	3	—	1	4
<b>Total</b>	<b>43</b>	<b>15</b>	<b>19</b>	<b>77</b>

NOTE: Number of responses is larger than number of cases because respondents pointed to more than one reason.

<sup>1</sup>Inadequacies include: The report didn't dispose of all issues, was not well reasoned or documented, and made improper use of criteria.

<sup>2</sup>Among the frequently cited changes: The rise in cost of living, new information about recent settlements and arbitration awards, and new studies published by PERB.

<sup>3</sup>Other reasons include: Inability to award three-year agreement because of statutory prohibition, a hint from the parties as to a mutually denied deviation, and misunderstandings of the report.

In order to explore why and under what circumstances deviations were most likely to occur, panel members were asked in their interview to record the reasons that induced the panel to divert from the fact-finding recommendations. Their responses are summarized in Table 7-3. The data clearly demonstrate that in the majority of cases the panel departed from the fact-finding recommendations either because it disagreed with the fact finder's judgment or because the time lag between the issuance of the report and the commencement of arbitration brought about a change in the parameters of the dispute. Although the former reason may be attributed to the design of the impasse procedure, the latter generally stemmed from changes in the economic environment.

Since arbitration is invoked after the fact-finding is deemed unacceptable to one or both parties, and since in interest disputes there are many equally plausible and sound solutions, a sensitive panel may implicitly perceive its charge to be that of modifying or reshaping the recommendations somewhat (regardless of their quality) in order to come up with a more workable and acceptable award. For example,

one panel, which seemed to find the fact-finding report flawless, expressly stated:

We have by agreement of the panel members reshuffled benefits proposed by the fact finder for both sides within the same cost structure to improve the impact of the settlement on both management and labor.<sup>13</sup>

In addition, the tripartite structure and the majority rule may generate pressures by the partisan arbitrators for a compromise somewhere around the fact-finding recommendations. A neutral chairman, especially one who seeks a unanimous award, must judge the fact-finding report unacceptable and deviate from it in order to formulate a solution that either one or preferably both of the partisan arbitrators will embrace.

The time lag has emerged as a salient cause of deviation primarily because of changes in the rate of inflation that occurred between the time of the fact-finding hearing and the arbitration award. In addition, because of the time lag between hearings, the arbitration panel often had new data on comparable settlements that were reached since the time of the fact-finding report. Usually one of the parties argued that these new settlements should be considered and the other argued that they should be ignored. Some panels did consider these "new" data and some did not.

The policy espoused by PERB as to the role of the fact-finding recommendations in the arbitration proceedings is partially based on the assumption that the parties will present practically the same evidence and arguments in fact-finding and in arbitration. In order to test this assumption, the public employer and union representatives were asked (in the mailed questionnaires) whether their presentations in the arbitration hearing were substantially different from their presentations in the fact-finding hearing. Although 85% of the public employers reported that they presented about the same evidence and arguments at the arbitration hearing and the fact-finding hearing, the union representatives reported that they followed this practice in only 65% of the cases.

Thus, while the majority of the parties conformed to PERB's assumption, the conformity was not universal. There were cases, for example, where one of the parties complained that the other had not presented its "best case" in fact-finding but rather held back information and arguments in anticipation of going to arbitration. One management negotiator defended this strategy as follows:

Why should I lay out all of my arguments at fact-finding? It only gives the union three months to figure out how to counter them.

Another said:

The instant replay of arbitration simply helps the party least prepared at fact-finding.

Perhaps the most extreme illustration of this problem and its consequences for the fact-finding process is described in the following quote from a fact-finding report. It speaks for itself eloquently.

The city has also argued that the association's wage demands be denied because it (the association) has failed to prove that the city has the ability to pay requested salary increases. Since the association has not made such a demonstration, the city has maintained that there is no need for it to take a position on the ability to pay question. In the opinion of the fact finder, this entire line of argumentation has been merely a concocted device on the part of the city to temporarily abdicate its responsibility relative to the ability to pay issue. This regrettable behavior has seemingly occurred in anticipation of interest arbitration, at which point the city will no longer withhold its position on ability to pay. In the mind of the fact finder such procedure can only be viewed as an inappropriate and subversive use of the fact-finding process in the resolution of interest disputes.

#### Cost/Effectiveness Analysis of the Fact-finding Step

The two most visible cost items in the fact-finding step are the time delay and monetary expenses incurred both by PERB and the parties. When compared with procedures in Wisconsin or Connecticut, the fact-finding procedure in New York was completed in a relatively shorter period, but it did consume about three months. A summary of the New York performance record is provided in Table 7-4.

TABLE 7-4  
Time Required for Fact-finding

	Number of observations	Average days	Median days	Minimum days	Maximum days
Fact finder appointment to first hearing	23	33	33	6	71
Fact finder appointment to report and recommendation					
Fact-finding without prior mediation	19	91	81	21	230
Fact-finding with prior mediation	49	82	84	17	171

An interesting conclusion that can be drawn from the data in Table 7-4 is that the compression of mediation and fact-finding into a single step did not have a significant effect on the time span under fact-finding. It might attest to the fact that, even before the merger of the two functions, the fact finders attempted mediation before assuming their formal fact finder role.

Data from Wisconsin and Connecticut indicate that their median fact-finding cases consumed 163.5 days and 98 days, respectively.<sup>14</sup> Both

the Wisconsin and Connecticut impasse procedures provided for mediation prior to the petition for fact-finding. In comparison, the New York record is quite encouraging. The fact-finding step, however, still claimed about one-third of the period between the declaration of an impasse and the issuance of an arbitration award.

A second visible cost item is the fact finder's fee. As stated previously, in almost all the cases studied PERB appointed the fact finder and paid his fee. A separate cost figure for fact finders in public safety employee cases was not available; the average cost of a fact-finding case for PERB during the fiscal year 1975-1976 was \$576.<sup>15</sup>

#### Rate of Settlement in Fact-finding

It is assumed that an effective fact-finding procedure will facilitate settlements on its own. It is further assumed that even if it fails to bring about a settlement, it will reduce the number of issues submitted to arbitration, will narrow the gap between the parties' positions, and will cut down the length of the arbitration hearing.

Data from the impasse history for police and fire fighter negotiations reveal that during the fiscal years 1974 and 1975, 19% and 11%, respectively, of police impasses were settled during the fact-finding stage. For fire fighters these figures are slightly higher—23% and 22%.<sup>16</sup> Thus, about 20% of the police and fire fighters' negotiation impasses were settled in fact-finding under the arbitration amendments.

In case the parties fail to resolve their differences in line with the fact finder recommendations, one may expect that at least some of the issues will be withdrawn and the parties will adjust their position in the spirit of the recommendations. In order to ascertain the extent to which fact-finding affected the number of issues submitted to arbitration, the issues that were disposed of by the fact finder and the arbitration panel were compared.

The range, mean, and median number of issues submitted to fact-finding and arbitration are summarized in Table 7-5. As can be seen in this table, on the average, only one or two issues were dropped in moving from fact-finding to arbitration. The median number of issues introduced into fact-finding and arbitration were 13 and 11, respectively.

Since the data in Table 7-5 focus on the total number of issues, they fail to capture some of the dynamics of the impasse procedure. A further analysis was designed that focused on the history of specific issues while the cases were traveling through the impasse procedure. The analysis employed the same categorization of issues that was used in the study of deviation, i.e., issues that were submitted to either fact-finding or arbitration were classified into six categories—salary, wage supplement, fringe benefits, work load, personnel management and

**TABLE 7-5**  
Number of Issues in Fact-finding and Arbitration

Number of issues	N <sup>1</sup>	Minimum	Maximum	Mean	Median
Fact-finding	27	1	29	12	13
Arbitration	27	2	28	11	11

<sup>1</sup>Number of issues for the four cases that are excluded:

Case No. 12	Fact-finding 17	Arbitration 42
Case No. 34	Fact-finding 4	Arbitration 2
Case No. 39	Fact-finding 3	Arbitration 3
Case No. 42	Fact-finding 1	Arbitration 1

The New Rochelle case was excluded because it deviated greatly (17 fact-finding issues and 42 arbitration issues) from the remainder of the cases. If it were included, it would distort the pattern found in the other cases. The other cases were excluded because they were wage reopeners rather than complete contract negotiations.

contract administration, and union institutional benefits. An inflow and outflow of issues as the cases moved from fact-finding to arbitration is presented in Table 7-6. The data in this table indicate that, although many issues were eliminated after fact-finding, the number of issues involved in arbitration did not change substantially because many new issues were introduced for the first time in arbitration. Since some of the issues were withdrawn during arbitration, the total number of issues in arbitration was still smaller than in fact-finding.

**TABLE 7-6**  
Types of Issues Submitted to Fact-finding and Arbitration

Category of issues	Involved only in fact-finding	Withdrawn during arbitration	Involved only in arbitration
Salary	0	1	1
Wage supplements	22	3	15
Fringe benefits	28	11	18
Work load	7	1	3
Personnel management and contract administration	6	4	6
Union institutional benefits	1	0	2
Total	64	20	47

To find out whether following fact-finding the parties revised their positions for arbitration, their representatives were asked in the questionnaire to compare their overall position in fact-finding with their overall position at the arbitration hearing. Both parties reported that in the majority of cases—81% for the union and 83% for the public employer—the position at the arbitration hearing was virtually the same as in fact-finding.

It was also expected that the fact-finding process would save time and labor for the arbitration panel since, after a full fact-finding hearing, the arbitration hearing would be relatively short. Data from 27 arbitration cases reveal that hearing days ranged from 1 to 5 with an average of 1.7 days and median of 2. Comparable data from police and fire fighters' arbitration in Michigan that were not preceded by fact-finding revealed that hearings were slightly longer. Bowers reported that in Michigan, hearing days in police cases ranged from 1 to 10 days with a median of 2, and ranged from 1 to 17 in fire fighters' cases with a median of 3.<sup>17</sup> In Pennsylvania, however, Loewenberg reported that hearing days in police and fire cases ranged from 1 to 5 days with a median of 1 day.<sup>18</sup> As the data indicate, the existence of fact-finding had very little effect in reducing the time required for the arbitration hearing.

The focal policy question addressed in this chapter is whether the fact-finding stage should be retained in or removed from the impasse procedure. This question was posed to the members of the arbitration panels as well as to the public employer and union representatives. Their responses are summarized in Table 7-7. In short, a majority of the neutral arbitrators and the employer respondents prefer to keep fact-finding while a majority of union respondents prefer to eliminate it.

**TABLE 7-7**  
Preferences for (against) Retaining Fact-finding

	Public providing officer (N=30)		Union partisan arbitrator (N=15)		Employer partisan arbitrator (N=14)		Union representative (N=27)		Employer representative (N=26)	
	Fre- quency	Per- cent	Fre- quency	Per- cent	Fre- quency	Per- cent	Fre- quency	Per- cent	Fre- quency	Per- cent
Eliminate the fact-finding procedure	10	33.3	10	66.6	1	7	16	59.3	5	19
Retain the fact-finding procedure	20	66.6	5	33.3	13	93	11	41	21	81

Respondents provided a whole host of reasons to explain their positions on this issue. Those who expressed preference for the preservation of fact-finding stipulated that it provides additional opportunity for settlement with an active third party's assistance; that the report establishes the magnitude of the probable award, the benchmark, and the framework for arbitration. It was also argued that fact-finding serves important functions for the constituency and for intraorganiza-

tional bargaining. Several presiding officers stated that eliminating fact-finding will put too heavy a responsibility on the arbitration panel and will reinforce the need for judicial review. In order to increase the effectiveness of fact-finding, however, several arbitrators suggested that (1) a strict show-cause policy stipulating that the report will carry presumptive value should be included in the statute or in PERB's rules, (2) fact finders should be carefully selected, and (3) PERB should insist on a complete fact-finding report with detailed rationale and reasoning. Those who espoused these views pointed out that the effectiveness of fact-finding as part of an arbitration model must be measured in the long run, especially if the arbitration awards rarely deviate from the fact-finding recommendations.

Those who argued for the elimination of the fact-finding stage reasoned that to have fact-finding and arbitration in one impasse procedure is a wasteful duplication, which adds delay and cost with little or no contribution. They proposed that people in general like to delay making crucial decisions and fact-finding gives them a legitimate excuse. It was suggested that for some disputes the mandated fact-finding step is completely wasteful since parties who previously "needed" a fact-finding report for practical consumption will also need an arbitration award. Several respondents expressed the fear illustrated above that fact-finding will bring about withholding of information. Finally, if fact-finding becomes a rehearsal for arbitration, then disputants who are not well prepared in fact-finding will get extra time and the benefit of their opponent's presentation.

#### Summary and Conclusions

The data presented in this chapter suggest that there are at least two alternative ways to proceed in dealing with the fact-finding procedure in a dispute resolution system ending in arbitration.

The first would be simply to eliminate fact-finding as a mandatory step in the impasse resolution process. Instead, under this approach, fact-finding could be available as part of the mediator's "arsenal of weapons" and would therefore be used only if the mediator felt it could contribute to the resolution of the dispute. A host of arguments can be derived from our analyses to advocate the elimination of fact-finding as a mandatory intermediate step. Among the more important reasons are the following: (1) Fact-finding added additional costs to the impasse procedures. (2) It increased the amount of time required to complete the impasse procedures by about one-third. (3) The parties reverted back to positions in fact-finding more extreme than those they were willing to accept in mediation. (4) It was successful in resolving only a minor number of disputes reaching this stage. (5) It did not reduce

the number of issues going to arbitration. (6) The parties seldom modified their positions on the issues between fact-finding and arbitration. (7) It is logically inconsistent to design a tripartite arbitration procedure and instruct the panel to consider statutory criteria (which the fact finder is not bound to consider) when the fact finder's recommendations are arrived at in solo. (8) The arbitration awards deviated little from the fact finder's recommendations, and thus much of the time and money spent preparing for, presenting, hearing, and deciding the arbitration cases proved to be a redundant waste of resources. (9) The show-cause approach preferred by PERB did not work and probably cannot work in the absence of specific statutory authorization. (10) The existence of fact-finding as an additional step at and after which mediation can occur probably reduces the incentive to bargain and to settle in mediation before the recommendations are issued. (11) Where the arbitrators did deviate from the fact finder's recommendations, they most frequently did so because time had passed since the recommendations and economic conditions had changed, inevitable facts of life that parties must endure any time they sign a contract for a fixed period of time. (12) Finally, and perhaps most important, some impasses are inevitably destined to go the complete route through whatever procedures are available; in such cases, having to go through fact-finding is a total waste of time.

This approach would argue that fact-finding can make few contributions that could not be just as, or even more, effectively performed in a dispute resolution procedure that provides one initial and flexible intervention effort prior to certifying a case to arbitration. In this first step the emphasis could be on mediation, or if the neutral feels it would be helpful, a combination of mediation and fact-finding. If it is clear to the neutral, however, that neither mediation nor fact-finding is likely to be successful, then the dispute should be transferred directly to arbitration in order to allow the tripartite structure to play out its role.

A second alternative would be to keep the fact-finding procedure as an intermediate step between mediation and arbitration. The basic premise underlying this alternative is that the major objections against compulsory arbitration center on the unlimited power it entrusts in the hands of the arbitration panel. One may assume that fact-finding, by virtue of being advisory in nature, may set the stage and shape the attitudes of the parties for the succeeding arbitration stage. Furthermore, the fact-finding report together with the statutory criteria and the tripartite structure produce a check-and-balance system that limits the arbitration panel's range of discretion. These considerations may be important during the initial period under new compulsory arbitration statutes when a high premium is placed on structuring the procedure,

nurturing its acceptability and credibility, and insulating the procedure from the court. In addition, designing the statute in a way that strengthens the fact-finding step may increase its effectiveness as an independent technique for dispute resolution. This might be done by extending the criteria to the fact-finding process, allowing the parties to select the fact finder (rather than having a fact finder assigned), stipulating that the fact-finding report will have a presumptive value in arbitration and that the arbitration hearing will follow strict "show-cause" norms on the basis of the decision and record from fact-finding, and finally by prohibiting the parties from introducing new issues at the arbitration stage.

As is quite obvious from the above discussion, we found little reason to recommend that fact-finding remain as an intermediate step in the New York State arbitration procedure. Consequently we recommended that it be dropped as a mandatory step. Further research would be useful in determining whether the contributions of fact-finding as an intermediate step in other arbitration statutes are great enough to outweigh the limitations of this approach found in New York State.

#### Notes

1. The nine are Connecticut, Iowa, Maine, Massachusetts, Nebraska, New York, Oregon, Vermont, and Washington. Bureau of National Affairs, *Government Employee Relations Report Reference File*, "State and Local Programs," Vol. 51 (1977), pp. 1011-1027.
2. See Herbert R. Northrup and Gordon F. Bloom, *Government and Labor: The Role of Government in Union and Management Relations* (Homewood, Ill.: Richard D. Irwin, 1963), pp. 381-396.
3. According to Arvid Anderson, 30 states have utilized fact-finding in their impasse procedures. Arvid Anderson, "The Labor Management Crises and Conflict Resolution in New York City," *Occasional Paper No. 10* (Ithaca, N.Y.: Institute of Public Employment, New York State School of Industrial and Labor Relations, Cornell University, 1975), p. 11.
4. George H. Hildebrand, "The Public Sector," in *Frontiers of Collective Bargaining*, John T. Dunlop and Neil W. Chamberlain, eds. (New York: Harper and Row, 1967), pp. 125-154; Robert Karr, "Labor Law Strikes by Public Employees—The Invalidity of the Prohibition," *DePauw Law Review*, Vol. 19 (1969), pp. 377-393.
5. See, for example, Jean T. McKelvey, "Fact-finding in Public Employment Disputes: Promise or Illusion?" *Industrial and Labor Relations Review*, Vol. 22 (July 1969), pp. 528-543; Byron Yaffe and Howard Goldblatt, *Fact-finding in Public Employment Disputes in New York State: More Promise Than Illusion* (Ithaca, N.Y.: New York State School of Industrial and Labor Relations, Cornell University, ILR Paperback No. 10, 1971).
6. New York Civil Service Law § 209.4(c)(v) (McKinney, 1975).
7. Martin L. Barr, "The Public Arbitration Panel as an Administrative Agency: Can Compulsory Interest Arbitration Be an Acceptable Dispute Resolution Method in the Public Sector?" *Albany Law Review*, Vol. 39 (1975), pp. 377-392.

8. *Ibid.*, pp. 389-390.

9. *Ibid.*, p. 390.

10. This assumption was based on the construction of the statute that placed the fact-finding report first in order and apart from the other four standards for decision making, as well as in the fact that the law uses the words "may adopt" in reference to the fact-finding reports and the more moderate language "shall take into consideration" in reference to the other statutory criteria.

11. In the Syracuse arbitration the parties skipped the fact-finding step, so the sample for this chapter includes 30 cases.

12. The list of the issues and their allocation can be obtained from the authors on request.

13. *The City of Corning v. Corning Police Department*, Steuben Chapter, C.S.E.A., PERB M74-121; CA-0006.

14. Edward B. Krinsky, "An Analysis of Factfinding as a Procedure for the Settlement of Labor Disputes for Public Employees" (Ph.D. dissertation, University of Wisconsin, 1969), p. 147.

15. Source: New York State Public Employment Relations Board Department of Research, May 24, 1976.

16. See Tables 3-1 and 3-2 of this report.

17. Mollie H. Bowers, "A Study of Legislated Arbitration in the Public Safety Services in Michigan and Pennsylvania" (Ph.D. dissertation, Cornell University, 1973), p. 144.

18. *Ibid.*, p. 211.

THE FOLLOWING PAGES WERE TREATED AS  
A UNIT IN THE ORIGINAL FILE.

IN THE SUPREME COURT OF THE STATE OF ALASKA

**IMPORTANT**

KENAI PENINSULA BOROUGH  
SCHOOL DISTRICT and KENAI  
PENINSULA BOROUGH,

Appellants,

v.

KENAI PENINSULA EDUCATION  
ASSOCIATION,

Appellee.

File No. 2470

ANCHORAGE BOROUGH EDUCATION  
ASSOCIATION,

Appellant,

v.

GREATER ANCHORAGE AREA BOROUGH,  
ANCHORAGE BOROUGH SCHOOL  
DISTRICT,

Appellee.

File No. 2492

MATANUSKA-SUSITNA SCHOOL  
DISTRICT,

Appellant,

v.

MATANUSKA-SUSITNA EDUCATION  
ASSOCIATION,

Appellee.

File No. 2563

[No. 1537 - December 9, 1977]

Appeals from the Superior Court of the State of Alaska, Third Judicial District, at Kenai, No. 2470, James A. Hanson, Judge; at Anchorage, No. 2492, Victor D. Carlson, Judge; at Anchorage, No. 2563, C. J. Occhipinti, Judge.

Appearances: Allen McGrath and John R. Snodgrass, Jr., of Graham & James, Anchorage, for School Districts. John L. Strachan, Anchorage, for Education Associations.

Before: Boochever, Chief Justice, Rabinowitz, Connor, Erwin, and Burke, Justices.

CONNOR, Justice.

These cases present important questions of labor law and constitutional law concerning the collective bargaining requirements for teachers in the public schools. Two of these cases are before us because the teachers' associations (the unions) have sued school districts and boroughs (the school boards) to compel collective bargaining in good faith under AS 14.20.550. In the third, a school board seeks a declaratory judgment that certain issues are not bargainable. The school boards, while not disputing the unions' right to collective bargaining on a number of employment-related issues, contend that they should not be forced to bargain collectively on various items which they regard as affecting educational policy. Educational policy, the

school boards contend, must be determined only by the public through the legislature and, by delegation, through the school boards. We will examine the more specific issues later in this opinion. They include such items as class size and the use of teacher specialists and para-professionals. Of the three trial courts which passed on the matter, one ruled in favor of the school boards,<sup>1/</sup> one ruled in favor of the teachers' union,<sup>2/</sup> and one split the various items,<sup>3/</sup> ruling for the board on some and the unions on others.

### I. Introduction

To facilitate the understanding of our more detailed legal discussion later in this opinion, we will summarize at the outset the contentions of the parties. The statutes at issue in this litigation are AS 14.20.550 and .610, which provide:

"Sec. 14.20.550. Negotiation with certificated employees. Each city, borough and regional school board, shall negotiate with its certificated employees in good faith on matters pertaining to their employment and the fulfillment of their professional duties. (§ 1 ch 19 SLA 1970; am § 3 ch 71 SLA 1972; am § 21 ch 124 SLA 1975)."

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1/ Anchorage Borough Ed. Ass'n. v. GAAB, Anchorage Borough School Dist., No. 2492 (hereinafter Anchorage).

2/ Kenai Pen. Borough Sch. Dist. and Kenai Pen. Borough v. Kenai Pen. Ed. Ass'n, No. 2470 (hereinafter Kenai).

3/ Matanuska-Susitna Sch. Dist. v. Matanuska-Susitna Ed. Ass'n, No. 2563 (hereinafter Mat-Su).