ALASKA LEGISLATURE COMMITTEE FILES 1981-1982 8672

1473 SHESS SB 126 - SB 130 1473

arbitration method, but strongly supports the inclusion of options that provide for community involvement if the parties choose to use it.

Amending Article 6

The entire attachment is designed around the amendment of Article 6 as opposed to developing a new statute or revising the Alaska Public Employment Relations Act (PERA). The revision of PERA was discussed on several occasions. These revisions would have to include:

a. Certificated teaching staff as a category of employees.

b. Classify this category in terms of strike or no strike.

c. Modified binding arbitration and other options.

d. Specified steps and time frames in the negotiations process.

e. A method for possible community involvement.

f. An agency that would:

   1. be more than volunteer
   2. have some staff
   3. keep a file of available mediators
   4. operate under the Governor rather than the Department of Labor or Department of Education

To make these revisions would complicate a working, functioning law that adequately deals with a certain category of public employees.

ATTACHMENT 1

Amendment 1

Article 6 should be amended by addition of a Policy Statement. This Statement should state:

1. The policy of the Legislature to promote harmonious and cooperative relations between city, borough and regional school boards and their certificated employees.

2. Recognize that the policy is to protect the interests of students and the public by assuring orderly and effective operation of the public schools.

3. Recognize the right of employees to organize for the purpose of collective bargaining.

4. Employee organizations have the right to negotiate with and enter into written agreements with employers on matters of wages, hours and other terms and conditions of employment.

5. That the best agreement is one reached by the parties involved in negotiations without outside interference or assistance; it is the aim of Article 6 to aid in the settlement.

Amendment 2

Article 6 should be amended by addition of an Employee Rights Statement. This Statement should state:

1. Employees shall have the right to form or join, or to refrain from forming or joining, employee organizations.

2. Employee organizations have the right to participate in collective bargaining with boards of education through representatives of their own choosing.

3. Employees have the right to bargain for the purpose of establishing, maintaining or improving terms and conditions of employment.

Amendment 3

Article 6 should be amended by addition of a Management Rights Statement. This Statement should state:

The right of a school board to:

1. Determine the standards of service to be offered.

2. Recruit and select staff.

3. Direct its employees in their work.

4. Take disciplinary action.

5. Relieve its employees from duty as provided by law or other legitimate reasons.

6. Initiate, prepare, certify, and administer its budget.

7. Exercise all powers and duties granted to the school board by law.

Amendment 4

Article 6 should be amended by the addition of a Public Rights Statement. This statement should state:

The Alaskan public includes:

1. Students who are required by law to attend school.

2. Alaskan citizens who are required to monetarily support public schools.

Therefore, the Alaskan public has the right to orderly and uninterrupted operation and functioning of public schools. To protect this right, work stoppages shall be prohibited under this law.

Amendment 5

Article 6 should be amended by the addition of an Educational Employee Relations Commission, hereinafter called EERC. This Commission should be established as:

1. Three members appointed by the Governor and approved by the Legislature.

2. No more than two of the members shall be from one political party.

3. The chairman of the Commission shall be appointed by the Governor for a 6 year term.

4. All members shall be appointed for 6 year staggered terms.

5. A member may be removed from office due to non-functioning.

6. All staff costs for the Commission shall be borne by the State.

7. The Commission shall administer Article 6. Its duties shall include, but are not limited to:

   a. Act as an appeal board in disputes arising from certification of employee organizations.

   b. Determination of the occurrence of and remedy for unfair labor practices.

   c. Determine the extent of negotiable and non-negotiable items when disputes arise.

   d. Maintain a current file of mediators.

   e. Provide statistical data relating to salaries, wages, benefits and employment practices to the negotiating parties, mediators, fact finders and arbitrators.

   f. Conduct such hearings and inquiries as are deemed necessary to carry out the functions of the Commission.

   g. The Commission shall promulgate rules and regulations necessary to effectively carry out the purposes of this chapter.

When the EERC is developing its regulations, these are some of the ideas for community involvement that the parent members would like to see considered.

The Commission may recommend the following to the negotiators:

1. Establishment of a local committee to perform such duties as:

   a. observe negotiations

   b. publicize proposals and/or progress in negotiations

c. act as liaison between EERC and negotiators

d. conduct public hearings

Suggested selection of committee: An equal number of members from the community at large, chosen by each party, plus a chairman selected by the committee.

2. The parties may be requested to undergo a period of intense negotiations with or without release time.

3. The parties may be requested to undergo a period of intense mediation. This would include both parties, plus a mediator, selected by the EERC. The mediation expenses would be paid for by both parties jointly.

4. The EERC shall cause public hearings to be held whenever they feel that such public hearings will be beneficial toward both parties reaching agreement.

Amendment 6

Article 6 shall be amended by the following steps of negotiations:

Step 1

Initial negotiations should begin by November 1. STEP 1 NEGOTIATIONS MUST BE CONCLUDED WITH BOTH PARTIES REACHING AGREEMENT BY JANUARY 15, OR THE EERC SHALL DEEM THAT THE NEGOTIATIONS HAVE REACHED IMPASSE, AND STEP 2 GOES INTO EFFECT.

Amendment 7

Step 2

The EERC shall transmit a list of 5 mediators to the parties. If the parties cannot agree upon a mediator to be used, the following method shall prevail. Each party shall strike the name of one mediator. The final name remaining shall be the mediator.

A. Mediation shall not exceed a 10 day period.

B. If agreement has not been reached by the end of the 10 day period, the mediator shall prepare a list of unsettled items for publication in the affected community, and Step 3 shall be in effect.

Amendment 8

Step 3

The mediator in the negotiations shall become a fact-finder with both parties (sharing the cost). A period of 15 days shall be allowed for fact-finding, and a written report must be given to both parties within 10 days of the end of the fact-finding period. If agreement is not reached 15 days after receipt of the fact-finder's report, a public hearing shall be held under the auspices of the EERC. No later than May 15 the parties shall have determined final step procedures, which will be either Step 4 Optional, or Step 4 Statutory.

Amendment 9

Step 4 Optional

A local option which could include, but not limited to:

1. Conventional

2. Last offer

    a. Issue by issue
    b. Package
    c. Three choice arbitration - last offers of parties or fact-finder's recommendations

3. Separation of economic vs. non-economic issues. Economic handled one way; non-economic another.

4. Tri-partite arbitration panel - one member by each party, chairman by two advocate members.

5. Single arbitrator selected by parties

6. Public referendum

Step 4 Statutory

1. The EERC will direct the selection of a local tri-partite panel to act as arbitrator. This panel shall be composed of one member selected by each party, with the two advocates selecting the chairman. If agreement cannot be reached in the matter of the chairman selection, the EERC shall appoint the chairman.

2. The items remaining for negotiations shall be limited to salary and benefits.

3. By May 30, the tri-partite panel shall have selected from the last best offer of each party, plus the fact-finder's report.

4. The arbitration award would be binding unless either or both parties appealed the decision to the EERC, which would establish a local appeals panel. This panel could be:

   a. the original local panel

   b. a local panel organized along the lines of the local panel

   c. the legislative body in the area

This panel is an appellate group to determine the merits of the award of the tri-partite panel. The decision of the panel will be final and binding on both parties.

ALL STEPS WILL BE COMPLETED BY JUNE 30.

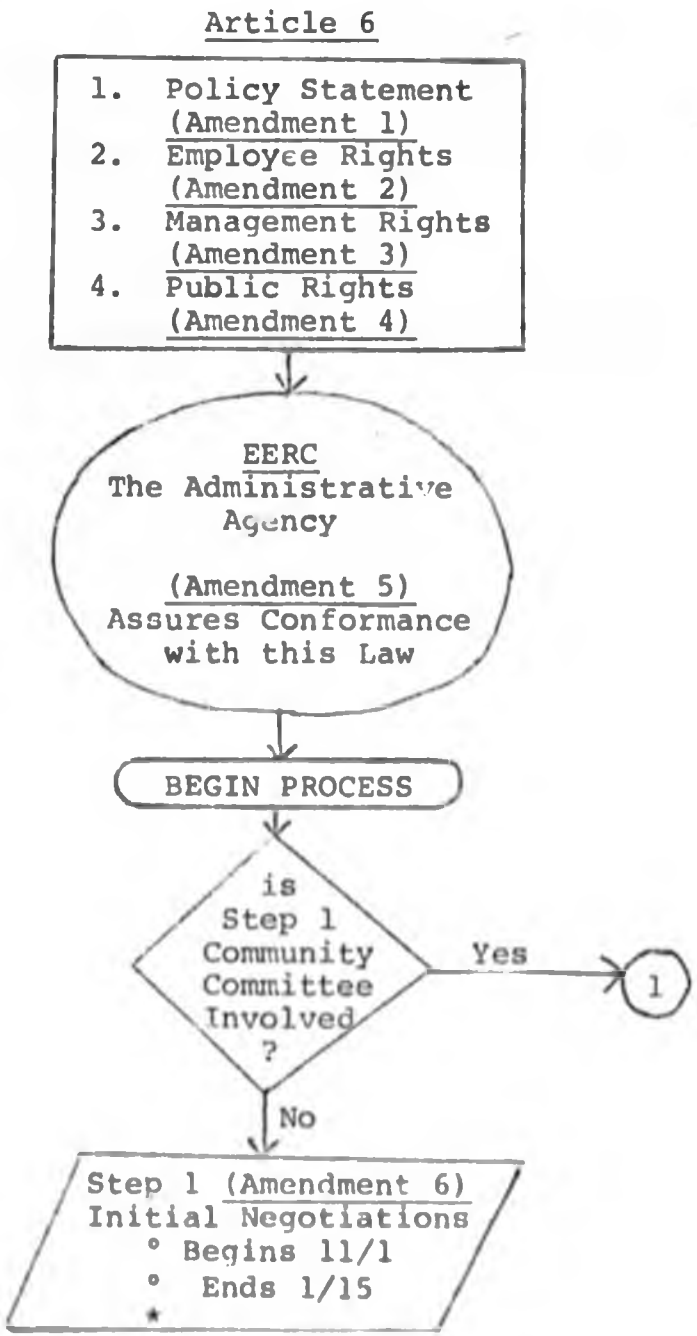
Amendment 10

Article 6 should be amended by the following Sunset provision: These revisions shall be reviewed after a period of 5 years.

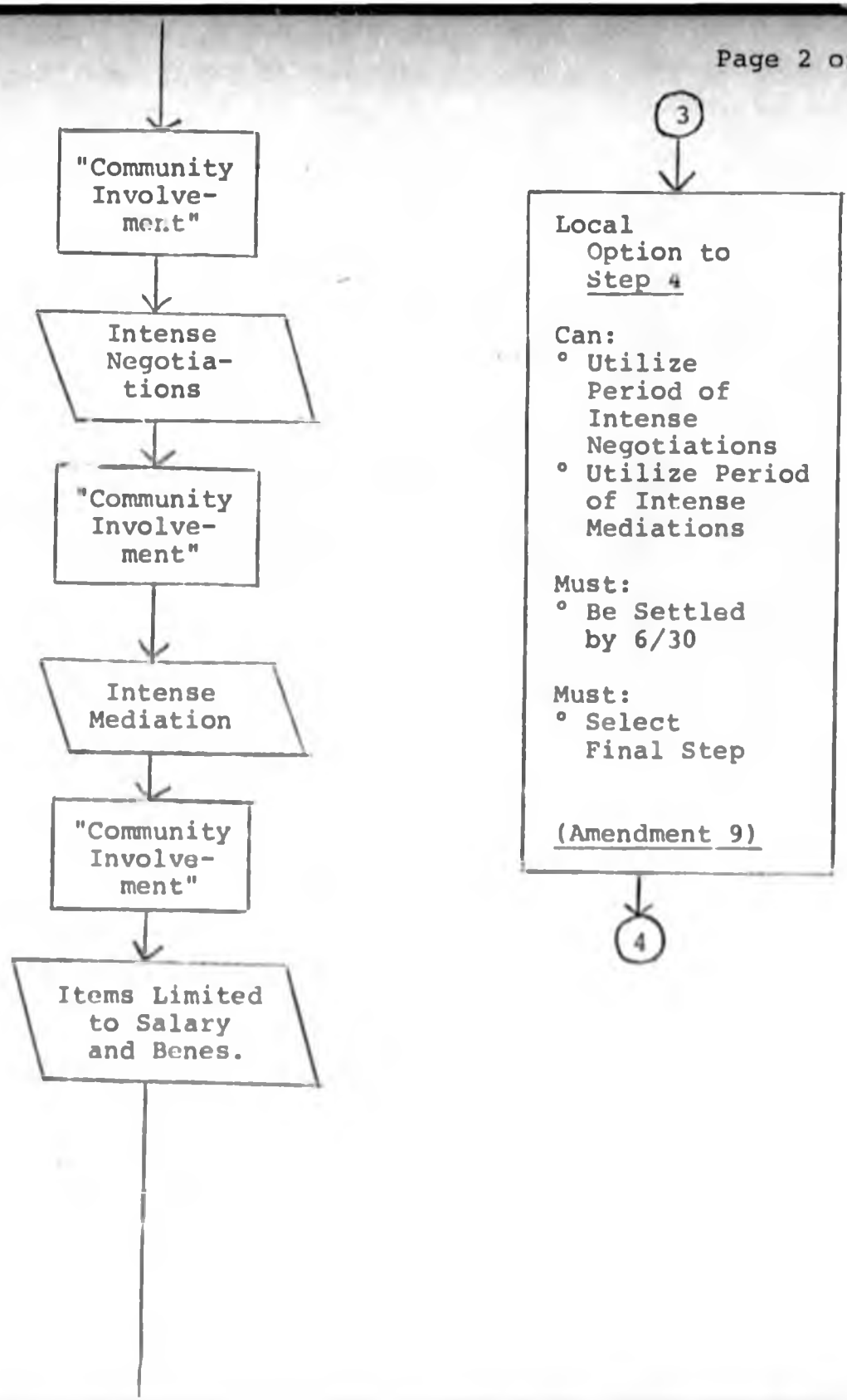
NOTE: THE COMMISSION NEEDS STATUTORY LANGUAGE TO GIVE IT LEGAL ENFORCEMENT PRIVILEGES, as in PERA Secs. 23.40.120, 23.40.130, 23.40.140, 23.40.150, 23.40.160, 23.40.170, 23.40.180...but as it pertains to this statute.

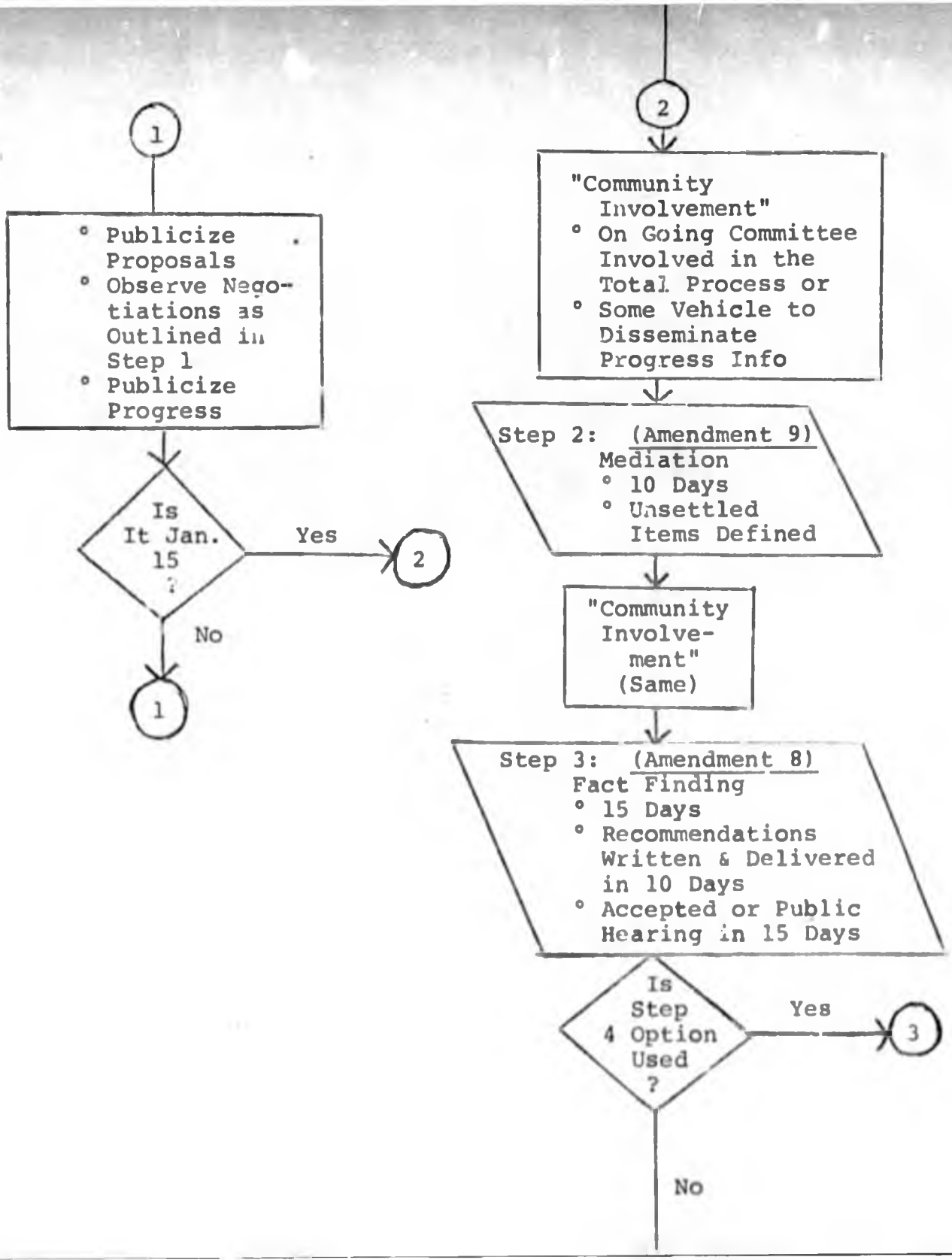
FLOW CHART

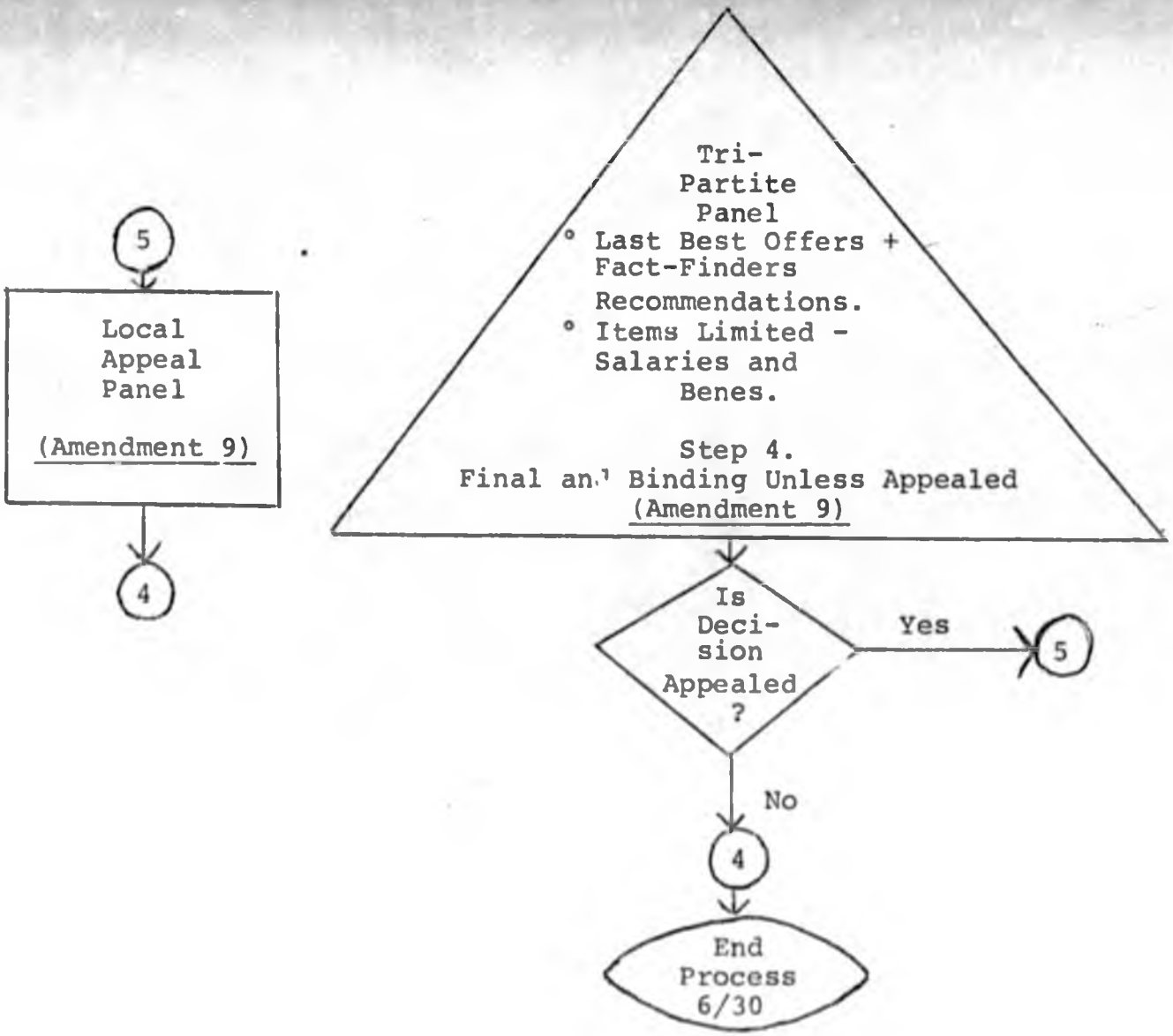
Amendments and Recommended Operational System



*NOTE: Local option: Can include a period of intense negotiations or be limited to this period, but will be declared at impasse 1/15 if not settled.


"Community Involve-ment"
Intense Negotia-tions
"Community Involve-ment"
Intense Mediation
"Community Involve-ment"
Items Limited to Salary and Benes.
3
Local Option to Step 4
Can:
° Utilize Period of Intense Negotiations
° Utilize Period of Intense Mediations
Must:
° Be Settled by 6/30
Must:
° Select Final Step
(Amendment 9)
4


1
° Publicize Proposals
° Observe Negotiations as Outlined in Step 1
° Publicize Progress
Is It Jan. 15 ?
Yes
2
No
1
2
"Community Involvement"
° On Going Committee Involved in the Total Process or
° Some Vehicle to Disseminate Progress Info
Step 2: (Amendment 9)
Mediation
° 10 Days
° Unsettled Items Defined
"Community Involvement" (Same)
Step 3: (Amendment 8)
Fact Finding
° 15 Days
° Recommendations Written & Delivered in 10 Days
° Accepted or Public Hearing in 15 Days
Is Step 4 Option Used ?
Yes
3
No


5
Local
Appeal
Panel
(Amendment 9)
4
Tri-
Partite
Panel
° Last Best Offers +
Fact-Finders
Recommendations.
° Items Limited -
Salaries and
Benes.
Step 4.
Final and Binding Unless Appealed
(Amendment 9)
Is
Deci-
sion
Appealed
?
Yes
5
No
4
End
Process
6/30

MINORITY REPORT PRESENTED BY
THE ASSOCIATION OF ALASKA SCHOOL BOARDS AND
THE ALASKA COUNCIL OF SCHOOL ADMINISTRATORS

MINORITY REPORT PRESENTED BY AASB AND
ALASKA COUNCIL OF SCHOOL ADMINISTRATORS

ASSOCIATION OF ALASKA SCHOOL BOARDS
SUITE 3, 204 NORTH FRANKLIN STREET • JUNEAU, ALASKA 99801 • PHONE 586-1083

RECOMMENDATIONS MADE BY THE ASSOCIATION OF ALASKA SCHOOL BOARDS REGARDING AMENDING ALASKA'S TEACHER BARGAINING LAW

Herewith are submitted recommendations made by the Association of Alaska School Boards as a member participating in the deliberations conducted by the Governor's Blue Ribbon Commission dealing with this topic. The Association's concerns and sentiments parallel to some degree those submitted by the parent delegation to the Commission. They are:

PUBLIC EDUCATION

AASB is concerned about the pressures currently being placed upon the public educational system in the State of Alaska and feel that school boards across the State want to be able to respond to these pressures in a positive manner. School boards feel that while there is a need for the collective bargaining process in the public education system, this process should not be allowed to impact the rights of students and the public to an orderly, uninterrupted and quality educational program. School boards should not be placed in a position whereby the collective bargaining process has an impact upon the daily education of children.

WORK STOPPAGES

Alaska's elected school boards universally would agree with the parent members of the Commission that work stoppages relating to the collective bargaining process have a negative impact upon the educational process for children of the State, and that this negative impact carries on long after the settlement of the labor dispute. While AASB shares this concern, our position on dealing with the matter and considering the fact that work stoppages are principally a labor strategy limited to the more urban areas of the State,

is somewhat in variance with the position taken by the parent group. AASB's position is that there should be a prohibition of work stoppages and job actions of any kind and that the remedy for disputes lies in a more defined and structured process for negotiations. AASB is unalterably opposed to third party intervention on a mandatory basis.

AMENDING ARTICLE 6

AASB is totally supportive of the parent group in their recommendation that any modification of our teacher bargaining statute should be in the form of modifications to the existing statutes (Article 6) as opposed to any effort to modify the Alaska Public Employees Relations Act (PERA).

ATTACHMENT

AMENDMENT 1

AASB agrees with the parent group that there should be included in Article 6 a statement of legislative intent. AASB concurs with the parent-recommended content with some additional clarifying language included. AASB proposes legislative intent should include:

1. That it is the policy intent of the Legislature to promote harmonious and cooperative relations between city, borough and regional school boards and their certificated employees.

2. Recognize that it is the legislative intent to protect the interests of the students and the public as represented by the duly elected school boards of the respective areas by assuring orderly, effective and uninterrupted operation of the public education program for the children of the State.

3. Recognize the rights of employees to organize for the purpose of collective bargaining.

4. Employee organizations have the right to negotiate with and enter into written agreements with employers on matters of wages, hours, time off, fringe benefits and other matters of economic benefit.

5. That the best agreement is one reached by the parties involved in negotiations without outside interference or assistance.

AMENDMENT 2

AASB concurs with the parent group in the inclusion of an employee rights provision in Article 6 and herewith proposes the parent-proposed language with clarifying modifications. AASB proposes a provision to include:

1. Employees shall have the right to form, join or assist, or refrain from joining, forming or assisting, employee organizations.

2. Employee organizations have the right to participate in collective bargaining with boards of education through representatives of their own choosing.

3. Employees have the right to bargain for the purpose of negotiating for wages, hours, time off, and other terms affecting their economic benefit.

AMENDMENT 3

AASB feels that the language proposed by the parent group, while substantially in accord with the position of AASB, is not specific enough to protect management rights. AASB therefore suggests legislative language which is verbatim from the Iowa State Statutes dealing with teacher negotiations. AASB proposes language which would include:

This right of the school board to include, but not be limited to:

School boards shall have, in addition to all powers, duties, and rights established by constitutional provision, statute, ordinance, to:

1. Direct the work of its certificated employees.

2. Hire, promote, demote, transfer, assign, and retain certificated employees within the school district.

3. Suspend or discharge certificated employees for proper cause.

4. Maintain the efficiency of the operation of the school district.

5. Relieve certificated employees from employment because of lack of enrollment, loss of revenue, discontinuance of a job function, or other legitimate reason.

6. Determine and implement methods, means, assignments, and personnel by which the school board shall conduct the district operations.

7. Take such actions as may be necessary to carry out the mission of the school district.

8. Initiate, prepare, certify, and administer the school district budget.

9. Exercise all powers and duties granted to the school board by law.

AMENDMENT 4

AASB is in accord with the position taken by the parent group regarding a proposal to change Article 6. AASB proposes language which is essentially the same as the parent group but has some modifications which are of a technical nature. AASB proposes language in Article 6 which would include:

The Alaskan public includes:

1. Students who are required by law to attend school.

2. Alaskan citizens who are required to monetarily support the public schools.

Therefore, the Alaskan public has a right to orderly and uninterrupted operation and functioning of the public schools. To protect this right, work stoppages or job actions of any kind shall be prohibited under this law.

AMENDMENT 5

Alaska school boards generally support the Blue Ribbon parent group regarding the creation of an Educational Employee Relations Commission under the Office of the Governor. AASB is in concurrence with the parent group in their recommendation as to the makeup and appointment procedures.

AASB agrees with the parent group in that the function of the Commission should be to administer the statute. AASB, in that light, herewith submits proposed language which differs from the parent group only to the extent that AASB emphasizes the adminstration of the statute when it addresses the duties and functions of the EERC Commission proposed. AASB proposes language that would include:

1. Act as an appeal board in disputes arising from certification of employee organizations as bargaining agents.

2 Interpret Alaska Statute (Article 6) to determine the occurrence of and remedy for unfair labor practices.

3. Interpret the statute to determine the extent of negotiable and non-negotiable items when disputes arise.

4. Maintain a current file of mediators.

5. Provide statistical data relating to salaries, wages, benefits, and other matters of economic benefit to the negotiating parties, mediators, fact-finders and other interested parties of interest, including members of the public.

6. Conduct hearings and inquiries as are deemed necessary to carry out the function of the Commission.

7. The Commission shall promulgate rules and regulations necessary to effectively carry out the purposes of this chapter.

AMENDMENT 6

AASB is in complete agreement with the parent group on initial time lines for negotiations, and see this as one step that would facilitate the collective bargaining process and potentially eliminate ultimate impasse problems usually encountered under the present statute every fall.

AMENDMENT 7

AASB is in complete agreement with the parent group on the provision for mediation, if a negotiated settlement is not reached prior to January 15 of the negotiation's year.

AMENDMENT 8

AASB is only in partial agreement with the recommendation of the parent group in a proposed Step 3, and only to the extent that AASB cannot support an involuntary use of an outside third party intervening decision-maker. AASB does support third party intervention if that third party intervener is a local legislative body, and if the issues presented to that body are strictly financial in nature, and the obligation to fund the decision is also passed on to the third party intervener.

AASB proposes a modified Amendment 8 which would include:

... mediator in the negotiations shall become a fact-finder with both parties sharing the cost. A period of 15 days shall be allowed for fact-finding, and a written report must be given to both parties within 10 days of the end of the fact-finding period. If agreement is not reached within 15 days after receipt of the fact-finder's report, a public hearing shall be conducted under the auspices of the EERC. No later than May 15, the parties shall determine final step procedures which may be either Step 4 Optional or Step 4 Mandatory.

Step 4 Optional

The parties of interest may voluntarily agree to third party intervention in a form acceptable to the parties.

The options available to the parties under this section would include, but not be limited to:

1. Last Best Offer

    a. Issue by issue
    b. Package
    c. Fact-finder's recommendation

2. Separation of economic items from non-economic items in the manner in which they are handled.

3. Public Referendum

4. Utilize local legislative body as third party intervener.

Step 4 Mandatory

The EERC will provide mediation service with special authority for the mediator to convene the parties, determine the manner in which the negotiations are to be conducted, and have authority to require intensive bargaining until such time as an agreement is reached. If a negotiated settlement is not reached under these provisions before June 15, further negotiations shall be limited exclusively to salary and fringe benefit items which were included in the fact-finder's report.

As a final item, AASB is in support of the parent group recommendation for a sunset provision in the proposed Article 6 revision providing for an automatic review of these provisions in 5 years.

MINORITY REPORT PRESENTED BY
NEA-ALASKA AND
ALASKA FEDERATION OF TEACHERS

MINORITY REPORT PRESENTED BY
NEA-ALASKA AND ALASKA FEDERATION OF TEACHERS

NEA - ALASKA

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Anchorage Office

Mary Ann Elninger
Deputy Executive Secretary
Fairbanks Office

December 4, 1980

Frank Austin
3339 Apollo Drive
Anchorage, Alaska 99504

Dear Frank,

This letter represents the thinking conclusions and recommendations of NEA and AFT as participants on the Governor's Blue Ribbon Commission on Certified Staff-School Board Negotiations.

It is our understanding that the attached, along with this letter, will be incorporated into and as a part of the composite report/recommendations which are forwarded to the Governor for his consideration.

We basically concur with the substance and content of:

'Blue Ribbon Commission'	page i
'Preface'	pages ii and iii
'Executive Summary of Findings and Recommendations'	page [illegible], 2
'Background'	page 3
'Commission Activities'	page 4 - 6
'Findings'	page 7, 8
'Recommendations'	pages 9, 10

which were reviewed and revised at our last meeting on November 24, 25, 1980.

Our intent is that this letter and the attached which is entitled "NEA/AFT Recommendations to Effect Resolution of Certified Teacher Bargaining Law Problems Through Revision of Alaska Statutes 23.40, the Alaska Public Employment Act (P.E.R.A.)" be incorporated and included as a part of the report/recommendations to the Governor commencing with page 11.

Thank you for your work as chairperson of the commission and for your attention to this matter. We look forward to receiving a final and complete copy of the Commission Report and attachments as soon as it is available.

Sincerely,

Robert Manners
Executive Secretary
NEA/Alaska

Sincerely,
Ralph Mc Grath

Ralph McGrath
Alaska Federation of Teachers

cc: Betty Dillman

NEA/AFT Recommendations to Effect Resolution of Certified Teacher Bargaining Law Problems Through Revision of Alaska Statutes 23.40, the Alaska Public Employment Act (P.E.R.A.)

The Alaska Federation of Teachers and NEA-Alaska do concur with other members of the Blue Ribbon Commission in their identification of the major issues confronting labor and management in school district collective bargaining, and we commend our fellow members for their serious efforts to find a solution to the complex problems facing this Commission. There is a mutually recognized need to address the matters of a policy statement on collective bargaining; employee/employer rights, authority of a labor relations agency; scope of bargaining; right to strike; and finality through binding arbitration.

NEA-Alaska and AFT, however, regard the most viable solution to these issues to be the inclusion of teachers under the present Alaska Public Employee Relations Act (P.E.R.A.) as amended (see attached). It is our conclusion that such an inclusion would meet the concerns expressed by students, parents, teachers, and administrators and insure the constitutional rights of teachers as school district employees.

Our response is basic and striaghtforward. We question the need to establish new agencies, new procedures, and expend additional state funds when in fact an existing state agency charged with those responsibilities already exists. We believe that interjecting such a random and sweeping approach as proposed in other commission member proposals will not lead to an orderly timely or final resolution of labor management problems. We believe that such complicated mechanisms as proposed would likely exacerbate the situation. We strongly support and endorse the findings calling for the establishment of a viable labor relations agency, however, we submit that a strengthened existing agency with public sector experience, the State Labor Relations Agency (S.L.R.A.), can accomplish this mutual objective.

The need for a clearly defined state policy regarding teacher collective bargaining is unquestioned. In the absence of such a policy, only chaotic, unbalanced power by either labor or management can prevail. We are in agreement that a policy statement is essential. We find it to be consistent with, and already incorporated into, P.E.R.A.

We are in agreement that there needs to be an Employee Rights statement; however, we disagree that this Commission has the expertise to define them. It was evident that the teacher, administration, board and parent members could only agree to disagree on what those rights were. We find the clearest deliniation of these rights to be incorporated in P.E.R.A. We believe that the correct interpretation of those rights should rest with a professional disinterested agency, specifically the S.L.R.A.

We support findings relative to the role of a labor relations agency adjudicating unfair labor practice charges. The AFT and NEA-Alaska representatives believe, however, that the Agency's authority should extend to enforcement of the provisions included in any statute on collective bargaining for school employees. Resolution of grievances and interpretations of the terms of a collectively bargained agreement should only be subject to a negotiated grievance procedure.

The teacher representatives are in full agreement that the best agreement is one reached without outside interference or assistance. We do find, however, that availability of external sources (labor relations agency, mediators, arbitrators, legislators and judges) serve in various ways, as catalysts to promote resolution and finality. When their roles, as defined in P.E.R.A., are understood they enhance the likelihood of internal resolution. Their power to issue cease and desist orders, determine findings of bad faith, finalize terms and conditions, enjoin, or refuse to fund are reasons enough for the parties to reach agreement without outside intervention.

We believe that the right to strike is essential to a "good faith" bargaining process. We recommend, however, that the parties be provided an option to waive their right to strike and proceed directly to binding arbitration. We emphasize the workers' right to legal and limited economic sanction. It should be clear to all Commission members, as evidenced in Anchorage last Fall, that teachers have the power to strike and will exercise, or may be forced to exercise, that prerogative. Our intent is to legitimize, through P.E.R.A., the legality of taking such action only after all other avenues have failed. We believe that the P.E.R.A. act has sufficient safeguards to assure that such measures would not occur for unrealistic or transient reasons. An agency empowered with the right to deny such a request, conduct hearings and monitor an election on this matter are guaranteed means to that end. We therefore believe that teachers should be incorporated in the category of class 2 employees with the right to a legal, limited strike.

NEA-ALASKA AND AMERICAN FEDERATION OF TEACHERS

RECOMMENDATIONS TO THE GOVERNORS
TASK FORCE
ON AS 14.20.550--14.20.610

Teacher Bargaining Law

As representatives of NEA and AFT on the Blue Ribbon Commission our recommendations are that the best options for constructive and positive revision to the current teacher bargaining law lie within the current Alaska Statute known as the Public Employment Relations Act (PERA). This Act most effectively addresses the issues and problems attendant to teacher bargaining.

In its eight years of existence this law has proven to be an effective vehicle or public employees and employers to negotiate on hours, wages, and terms and conditions of employment. Slight modifications and revisions can be made to effectively handle the somewhat unique differences in public school bargaining.

Therefore, our approach is to comment, where appropriate, on each of the Sections of PERA.

§ 23.40.070 ALASKA STATUTES § 23.40.070

Article 2. Public Employment Relations Act.

Section
70. Declaration of policy
80. Rights of public employees
90. Collective bargaining unit
100. Representatives and elections
110. Unfair labor practices
120. Investigation and conciliation of complaints
130. Complaint and accusation
140. Orders and decisions
150. Enforcement by injunction
160. Power to investigate and compel testimony
170. Regulations
180. Penalty for violation of order or decision
190. Mediation
200. Arbitration
210. Agreement
215. Funding
220. Labor or employee organization dues and employee benefits, deduction and authorization
230. Assistance by Department of Labor
240. Effect on certain units, representatives and agreements
250. Definitions
260. Short title

Editor's note.—Section 4, ch. 113, SLA 1972, provides: "This Act is applicable to organized boroughs and political subdivisions of the state, home rule or otherwise, unless the legislative body of the political subdivision, by ordinance or resolution, rejects having its provisions apply."

Sec. 23.40.070. Declaration of policy. The legislature finds that joint decision-making is the modern way of administering government. If public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method for dealing with disputes and work stoppages, to strengthen the merit principle where civil service is in effect and to maintain a favorable political and social environment. The legislature declares that it is the public policy of the state to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are to be effectuated by

(1) recognizing the right of public employees to organize for the purpose of collective bargaining;

(2) requiring public employers to negotiate with and enter into written agreements with employee organizations on matters of wages, hours, and other terms and conditions of employment;

(3) maintaining merit-system principles among public employees. (§ 2 ch 113 SLA 1972)

It is essential that there be a legislative statement of commitment to the principles of collective bargaining and this section is appropriate for same.

Sec. 23.40.080. Rights of public employees. Public employees may self-organize and form, join or assist an organization to bargain collectively through representatives of their own choosing, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. (§ 2 ch 113 SLA 1972)

Appropriate as is.

Sec. 23.40.090. Collective bargaining unit. The labor relations agency shall decide in each case, in order to assure to employees the fullest freedom in exercising the rights guaranteed by §§ 70—260 of this chapter, the unit appropriate for the purposes of collective bargaining, based on such factors as community of interest, wages, hours and other working conditions of the employees involved, the history of collective bargaining, and the desires of the employees. Bargaining units shall be as large as is reasonable, and unnecessary fragmenting shall be avoided. (§ 2 ch 113 SLA 1972)

It is appropriate for a labor relations agency to make determinations relative to the appropriateness of a bargaining unit. This section accommodates that need.

Sec. 23.40.100. Representatives and elections. (a) The labor relations agency shall investigate a petition if it is submitted in a manner prescribed by the labor relations agency and is

(1) by an employee or group of employees or an organization acting in their behalf alleging that 30 per cent of the employees of a proposed bargaining unit

(A) want to be represented for collective bargaining by a labor or employee organization as exclusive representative, or

(B) assert that the organization which has been certified or is currently being recognized by the public employer as bargaining representative is no longer the representative of the majority of employees in the bargaining unit; or

(2) by the public employer alleging that one or more organizations have presented to it a claim to be recognized as a representative of a majority of employees in an appropriate unit.

(b) If the labor relations agency has reasonable cause to believe that a question of representation exists, it shall provide for an appropriate hearing upon due notice. If the labor relations agency finds that there is a question of representation, it shall direct an election by secret ballot to determine whether or by which organization the employees desire to be represented and shall certify the results of the election. Nothing in this section prohibits the waiving of hearings by stipulation for the purpose of a consent election in conformity with the regulations of the labor relations agency or an election in a bargaining unit agreed upon by the parties. The labor relations agency shall determine who is eligible to vote in an election and shall establish rules governing the election. In an election in which none of the choices on the ballot receives a majority of the votes cast, a runoff election shall be conducted, the ballot providing for selection between the two choices receiving the largest and the second largest number of valid votes cast in the election. If an organization receives the majority of the votes cast in the election it shall be certified by the labor relations agency as exclusive representative of all the employees in the bargaining unit.

(c) An election may not be held in a bargaining unit or in a subdivision of a bargaining unit if a valid election has been held within the preceding 12 months.

(d) Nothing in this chapter prohibits recognition of an organization as the exclusive representative by a public agency by mutual consent.

(e) No election may be directed by the labor relations agency in a bargaining unit in which there is in force a valid collective bargaining agreement, except during a 90-day period preceding the expiration date. However, no collective bargaining agreement may bar an election upon petition of persons in the bargaining unit but not parties to the agreement if more than three years have elapsed since the execution of the agreement or the last timely renewal, whichever was later. (§ 2 ch 113 SLA 1972)

100 - Representatives and Elections

This section is most appropriate since it relieves local school boards from responsibility for decisions outside their experience and which may have a high potential for litigation. The presence of a Labor Relations Board having responsibility in their area insurea a logical and orderly process in assuming the opportunity for fair representation.

Sec. 23.40.110. Unfair labor practices. (a) A public employer or his agent may not

(1) interfere, restrain or coerce an employee in the exercise of his rights guaranteed in § 80 of this chapter;

(2) dominate or interfere with the formation, existence or administration of an organization;

(3) discriminate in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage membership in an organization;

(4) discharge or discriminate against an employee because he has signed or filed an affidavit, petition or complaint or given testimony under §§ 70—260 of this chapter;

(5) refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

(b) Nothing in this chapter prohibits a public employer from making an agreement with an organization to require as a condition of employment

(1) membership in the organization which represents the unit on or after the 30th day following the beginning of employment or on the effective date of the agreement, whichever is later; or

(2) payment by the employee to the exclusive bargaining agent of a service fee to reimburse the exclusive bargaining agent for the expense of representing the members of the bargaining unit.

(c) A labor or employee organization or its agents may not

(1) restrain or coerce

(A) an employee in the exercise of the rights guaranteed in § 80 of this chapter, or

(B) a public employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances;

(2) refuse to bargain collectively in good faith with a public employer, if it has been designated in accordance with the provisions of §§ 70—260 of this chapter as the exclusive representative of employees in an appropriate unit. (§ 2 ch 113 SLA 1972)

110

This section is extremely important in that it defines the concept of fair/unfair labor practices, the rights of both parties regarding same, obligations of both parties, and again, most importantly an orderly procedure relative to resolution of same. This can only help in removing some of the personal attitudinal conflicts as well as reducing unnecessary time frames and costly court procedures.

Sec. 23.40.120. Investigation and conciliation of complaints. If a verified written complaint by or for a person claiming to be aggrieved by a practice prohibited by § 110 of this chapter, or a written accusation that a person subject to §§ 70—260 of this chapter has engaged in a prohibited practice, is filed with the labor relations agency, it shall investigate the complaint or accusation. If it determines after the preliminary investigation that probable cause exists in support of the complaint or accusation, it shall try to eliminate the prohibited practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during this endeavor may be used as evidence in a subsequent proceeding. (§ 2 ch 113 SLA 1972)

Sec. 23.40.130. Complaint and accusation. If the labor relations agency fails to eliminate the prohibited practice by conciliation and to obtain voluntary compliance with §§ 70—260 of this chapter, or, before it attempts conciliation, it may serve a copy of the complaint or accusation upon the respondent. The complaint or accusation and the subsequent procedures shall be handled in accordance with the administrative adjudication portion of the Administrative Procedure Act (AS 44.62). (§ 2 ch 113 SLA 1972)

Sec. 23.40.140. Orders and decisions. If the labor relations agency finds that a person named in the written complaint or accusation has engaged in a prohibited practice, the labor relations agency shall issue and serve on the person an order or decision requiring him to cease and desist from the prohibited practice and to take affirmative action which will carry out the provisions of §§ 70—260 of this chapter. If the labor relations agency finds that a person named in the complaint or accusation has not engaged or is not engaging in a prohibited practice, the labor relations agency shall state its findings of fact and issue an order dismissing the complaint or accusation. (§ 2 ch 113 SLA 1972)

Sec. 23.40.150. Enforcement by injunction. The labor relations agency may apply to the superior court in the judicial district in which the prohibited practice occurred for an order enjoining the prohibited acts specified in the order or decision of the labor relations agency. Upon a showing by the labor relations agency that the person has engaged or is about to engage in the practice, an injunction, restraining order, or other order which is appropriate may be granted by the court and shall be without bond. (§ 2 ch 113 SLA 1972)

Sec. 23.40.160. Power to investigate and compel testimony. (a) For the purpose of the investigations, proceedings, or hearings which the labor relations agency considers necessary to carry out the provisions of §§ 70—260 of this chapter, the labor relations agency may issue subpoenas requiring the attendance and testimony of witnesses and the production of relevant evidence.

(b) The labor relation agency may administer oaths, examine witnesses, and receive evidence.

(c) The attendance of witnesses and the production of evidence may be required from any place in the state at any designated place of hearing.

(d) If a person refuses to obey a subpoena issued under §§ 70—260 of this chapter, the superior court in the district in which the person resides or is found may, upon application by the labor relations agency, issue an order requiring him to comply with the subpoena. (§ 2 ch 113 SLA 1972)

Sec. 23.40.170. Regulations. The labor relations agency may adopt regulations under the Administrative Procedure Act (AS 44.62) to carry out the provisions of §§ 70—260 of this chapter. (§ 2 ch 113 SLA 1972)

Sec. 23.40.180. Penalty for violation of order or decision. A person who violates a provision of an order or decision of the labor relations agency is guilty of a misdemeanor and is punishable by a fine of not more than $500. (§ 2 ch 113 SLA 1972)

This is one of the more critical areas of considerations.

.120 - Investigation and Conciliation of Complaints

.130 - Complaint and Accusations

.140 - Orders and Decision

.150 - Enforcement by Injuctions

.160 - Power to Investigate and Compel Testimony

.170 - Regulation

.180 - Penalty for Violation of Order or Decision

These sections all outline the duties and responsibilities of the Labor Relations Agency to enforce effective collective bargaining and all are essential to effective implementation of any bargaining law. The presence of these sections insures that both parties to collective bargaining can participate as equal partners in the process.

Sec. 23.40.190. Mediation. If, after a reasonable period of negotiation over the terms of a collective bargaining agreement, a deadlock exists between a public employer and an organization, the labor relations agency may appoint a competent, impartial, disinterested person to act as mediator in any dispute either on its own initiative or on the request of one of the parties to the dispute. The parties may also select a mediator by agreement or mutual consent. It is the function of the mediator to bring the parties together voluntarily under such favorable auspices as will tend to effectuate settlement of the dispute, but neither the mediator nor the labor relations agency has any power of compulsion in mediation proceedings. (§ 2 ch 113 SLA 1972)

.190 - Mediation

Intervention by a competent, unpartial, disinterested professional serves as a catalyst in assisting both parties to clarify and resolve differences.

Sec. 23.40.200. Arbitration. (a) For purposes of this section, public employees are employed to perform services in one of the three following classes:

(1) those services which may not be given up for even the shortest period of time;

(2) those services which may be interrupted for a limited period but not for an indefinite period of time; and

(3) those services in which work stoppages may be sustained for extended periods without serious effects on the public.

(b) The class in (a)(1) of this section is composed of police and fire protection employees, jail, prison and other correctional institution employees, and hospital employees. Employees in this class may not engage in strikes. Upon a showing by a public employer or the labor relations agency that employees in this class are engaging or about to engage in a 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. If an impasse or deadlock is reached in collective bargaining between the public employer and employees in this class, and mediation has been utilized without resolving the deadlock, the parties shall submit to arbitration to be carried out under AS 09.43.030.

(c) The class in (a)(2) of this section is composed of public utility, snow removal, sanitation and [public school and other educational institution employees.] Employees in this class may engage in a strike after mediation, subject to the voting requirement of

(d) of this section, for a limited time. The limit is determined by the interests of the health, safety or welfare of the public. The public employer or the labor relations agency may apply to the superior court in the judicial district in which the strike is occurring for an order enjoining the strike. A strike may not be enjoined unless it can be shown that it has begun to threaten the health, safety or welfare of the public. A court, in deciding whether or not to enjoin the strike, shall consider the total equities in the particular class. "Total equities" includes not only the impact of a strike on the public but also the extent to which employee organizations and public employers have met their statutory obligations. If an impasse or deadlock still exists after the issuance of an injunction, the parties shall submit to arbitration to be carried out under AS 09.43.030.

(d) The class in (a)(3) of this section includes all other public employees who are not included in the classes in (a)(1) or (a)(2) of this section. Employees in this class may engage in a strike if a majority of the employees in a collective bargaining unit vote by secret ballot to do so.

(e) Notwithstanding the provisions of (b), (c) and (d) of this section, the employees with the concurrence of the employer may agree in writing to submit a dispute arising from interpretation or application of a collective bargaining agreement to arbitration.

(f) The parties to a collective bargaining agreement may provide in the agreement a contract for arbitration to be conducted solely according to the Uniform Arbitration Act (AS 09.43) if the Act is incorporated into the agreement or contract by reference. (§ 2 ch 113 SLA 1972)

.200 - Arbitration

Public school teachers naturally fit into the (a) (2) "limited period" category.

Add a new subsection:

.205 - Mediation/Arbitration

In that the Commission has received evidence and testimony that mediation/arbitration has proven to be an effective means of negotiations dispute settlement, it is our recommendation that such a process be provided as an alternative to either party, to be determined at the outset of negotiations.

(a) The parties to a collective bargaining agreement may provide in the agreement a contract for mediation/arbitration to be conducted according to procedures set forth therein.

(b) In the initial round of negotiations under this Act, either party may request the other party to enter into a mediation/arbitration agreement as an alternative to the dispute settlement procedures contained herein. If either party declines such an agreement the party making the request for mediation/arbitration may petition the Labor Relations Board for a final and binding determination on the issue.

Sec. 23.40.210. Agreement. Upon the completion of negotiations between an organization and a public employer, if a settlement is reached, the employer shall reduce it to writing in the form of an agreement. The agreement may include a term for which it will remain in effect, not to exceed three years. The agreement shall include a grievance procedure which shall have binding arbitration as its final step. Either party to the agreement has a right of action to enforce the agreement by petition to the labor relations agency. (§ 2 ch 113 SLA 1972)

Appropriate as is.

Sec. 23.40.215. Funding. The monetary terms of any agreement entered into under the Public Employment Relations Act are subject to funding through legislative appropriation. (§ 2 ch 113 SLA 1972)

Appropriate as is.

Sec. 23.40.220. Labor or employee organization dues and employee benefits, deduction and authorization. Upon written authorization of a public employee within a bargaining unit, the public employer shall deduct from the payroll of the public employee the monthly amount of dues, fees and other employee benefits as certified by the secretary of the exclusive bargaining representative and shall deliver it to the chief fiscal officer of the exclusive bargaining representative. (§ 2 ch 113 SLA 1972)

Appropriate as is.

Sec. 23.40.225. Exemption from Public Employment Relations Act. Notwithstanding the provisions of § 220 of this chapter, a collective bargaining settlement reached, or agreement entered into, under § 210 of this chapter that incorporates union security provisions, including but not limited to a union shop or agency shop provision or agreement, shall safeguard the rights of nonassociation of employees having bona fide religious convictions based on tenets or teachings of a church or religious body of which an employee is a member. Upon submission of proper proof of religious conviction to the labor relations agency, the agency shall declare the employee exempt from becoming a member of a labor organization or employee association. The employee shall pay an amount of money equivalent to regular union or association dues, initiation fees, and assessments to the union or association. Nonpayment of this money subjects the employee to the same penalty as if it were nonpayment of dues. The receiving union or association shall contribute an equivalent amount of money to a charity of its choice not affiliated with a religious, labor or employee organization. The union or association shall submit proof of contribution to the labor relations agency. (§ 1 ch 85 SLA 1976)

Cross reference. — As to applicability of this article to ferry personnel, see note following article 2 analysis.

Effective date. — Section 3, ch. 85, SLA 1976, makes this section effective May 27, 1976, in accordance with AS 01.10.070(c).

Editor's note. — Section 2, ch. 85, SLA 1976, effective May 27, 1976, provides: "If any portion of AS 23.40.225 is declared unconstitutional or void by a court of competent jurisdiction, then that entire section is void."

Applied in Hafling v. Inlandboatmen's Union, Sup. Ct. Op. No. 1743 (File No. 3139), 565 P.2d 870 (1978).

Appropriate as is.

Sec. 23.10.230. Assistance by Department of Labor. When state employees are involved, the Department of Labor shall, if requested by the personnel board, and if there is no objection by the organization involved, assist the personnel board on matters such as, but not limited to, conducting elections and investigating unfair labor practices. (§ 2 ch 113 SLA 1972)

Editorial change is needed on line #2. Insert after employees *and public school employees*.

Sec. 23.10.240. Effect on certain units, representatives and agreements. Nothing in this chapter terminates or modifies a collective bargaining unit, recognition of exclusive bargaining representative, or collective bargaining agreement if the unit, recognition, or agreement is in effect on September 5, 1972. (§ 2 ch 113 SLA 1972)

Appropriate as is.

Sec. 23.10.250. Definitions. In §§ 10—260 of this chapter, unless the context otherwise requires,

(1) "collective bargaining" means the performance of the mutual obligation of the public employer or his designated representatives and the representative of the employees to meet at reasonable times, including meetings in advance of the budget-making process and negotiate in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or negotiation of a question arising under an agreement and the execution of a written contract incorporating an agreement reached if requested by either party, but these obligations do not compel either party to agree to a proposal or require the making of a concession;

(2) "election" means a proceeding conducted by the labor relations agency in which the employees in a collective bargaining unit cast a secret ballot for collective bargaining representatives, or for any other purpose specified in §§ 70—260 of this chapter;

(3) "labor relations agency" means the state personnel board with regard to the state and employees of the state, and means the Department of Labor with regard to all other public employees and all other public employers;

(4) "organization" means a labor or employee organization of any kind in which employees participate and which exists for the primary purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment and conditions of employment;

(5) "public employee" means any employee of a public employer, whether or not in the classified service of the public employer, except elected or appointed officials or teachers or noncertificated employees of school districts;

(6) "public employer" means the state or a political subdivision of the state, including without limitation, a town, city, borough, district, board of regents, public and quasi-public corporation, housing authority or other authority established by law, and a person designated by the public employer to act in its interest in dealing with public employees;

(7) "terms and conditions of employment" means the hours of employment, the compensation and fringe benefits, and the employer's personnel policies affecting the working conditions of the employees; but does not mean the general policies describing the function and purposes of a public employer. (§ 2 ch 113 SLA 1972)

Sec. 23.10.260. Short title. Sections 70—260 of this chapter may be cited as the Public Employment Relations Act. (§ 2 ch 113 SLA 1972)

.250 - Definitions

Regarding # 1 and 2 - Appropriate as is.

Regarding #3 - "Labor Relations Agency" shall mean a three-person Board, of which at least the Chairperson shall be a full-time employee of the State of Alaska.

Regarding #4 - Appropriate as is.

Regarding #5 - "Public employee" means any employee of a public employer, whether or not in the classified service of the public employer, except elected or appointed officials.

Regarding # 6 and 7 - Appropriate as is.

Regarding #8 - Regarding sub-section 190 - Mediation - "Reasonable Period" means the Labor Relations Board shall consider the academic year, calendar year, fiscal year, and budget making process in determining the appropriateness of intervention by mediation into a potential collective bargaining dispute.

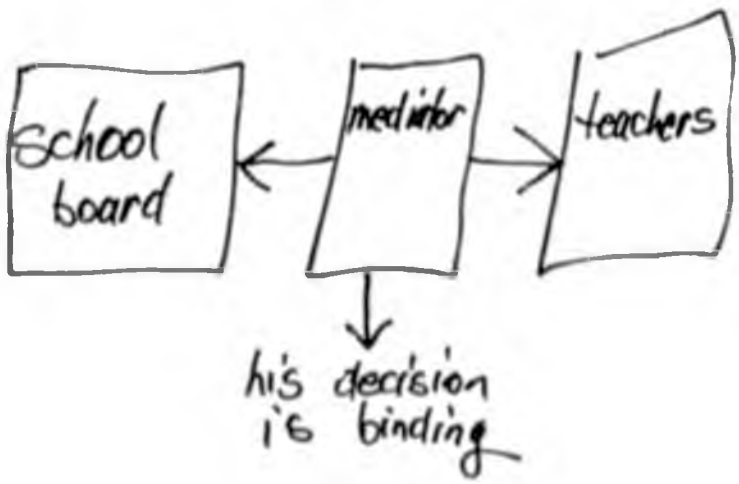
Regarding Scope of Negotiations or Negotiability:

It is our feeling and recommendation that such determinations are more appropriately a matter for the Labor Relations Board using criteria, guidelines and case law such as had evolved from the National Labor Relations Board.

PLEASE NOTE: THE PRECEDING PAGES WERE TREATED AS A UNIT IN THE ORIGINAL DOCUMENT.

Binding Arb.

Labor
Kay Rosier
Cherry Shelly



CHAPTER 20

PUBLIC EMPLOYMENT RELATIONS (COLLECTIVE BARGAINING)

As Amended by SF499 Enacted by the 68th General Assembly, 1979

This chapter shall become effective on July 1, 1974, but the provisions of this chap... relative to the duty to bargain shall not become effective until July 1, 1975. However, public employees of the state, its boards, commissions, departments, and agencies may not bargain collectively until June 1, 1976.

20.1 Public policy. The general assembly declares that it is the public policy of the state to promote harmonious and co-operative relationships between government and its employees by permitting public employees to organize and bargain collectively; to protect the citizens of this state by assuring effective and orderly operations of government in providing for their health, safety, and welfare; to prohibit and prevent all strikes by public employees; and to protect the rights of public employees to join or refuse to join, and to participate in or refuse to participate in, employee organizations.

20.2 Title. This chapter shall be known as the "Public Employment Relations Act."

20.3 Definitions. When used in this chapter, unless the context otherwise requires:

1. *"Public employer"* means the state of Iowa, its boards, commissions, agencies, departments, and its political subdivisions including school districts and other special purpose districts.

2. *"Governing body"* means the board, council, or commission, whether elected or appointed, of a political subdivision of this state, including school districts and other special purpose districts, which determines the policies for the operation of the political subdivision.

3. *"Public employee"* means any individual employed by a public employer, except individuals exempted under the provisions of section 20.4.

4. *"Employee organization"* means an organization of any kind in which public employees participate and which exists for the primary purpose of representing public employees in their employment relations.

5. *"Board"* means the public employment relations board established under section 20.5.

6. *"Strike"* means a public employee's refusal, in concerted action with others, to report to duty, or his willful absence from his position, or his stoppage of work, or his abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing or coercing a change in the conditions, compensation, rights, privileges or obligations of public employment.

7. *"Confidential employee"* means any public employee who works in the personnel office of a public employer or who has access to information subject to use by the public employer in negotiating or who works in a close continuing working relationship with public officers or representatives associated with negotiating on behalf of the public employer.

"Confidential employee" also includes the personal secretary of any of the following: Any elected official or person appointed to fill a vacancy in an elective office, member of any board or commission, the administrative officer, director, or chief executive officer of a public employer or major division thereof, or the deputy or first assistant of any of the foregoing.

8. *"Mediation"* means assistance by an impartial third party to reconcile an impasse between the public employer and the employee organization through interpretation, suggestion, and advice.

9. *"Arbitration"* means the procedure whereby the parties involved in an impasse submit their differences to a third party for a final and binding decision or as provided in this chapter.

10. *"Impasse"* means the failure of a public employer and the employee organization to reach agreement in the course of negotiations.

11. *"Professional employee"* means any one of the following:

a. Any employee engaged in work:

(1) Predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical or physical work;

(2) Involving the consistent exercise of discretion and judgment in its performance;

(3) Of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

(4) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.

b. Any employee who.

(1) Has completed the courses of specialized intellectual instruction and study described in paragraph "a", subparagraph 4, of this subsection, and

(2) Is performing related work under the supervision of a professional person to qualify himself or herself to become a professional employee as defined in paragraph "a" of this subsection.

12. *"Fact-finding"* means the procedure by which a qualified person shall make written findings of fact and recommendations for resolution of an impasse.

20.4 Exclusions. The following public employees shall be excluded from the provisions of this chapter:

1. Elected officials and persons appointed to fill vacancies in elective offices, and members of any board or commission.

2. Representatives of public employer, including the administrative officer, director or chief executive officer of a public employer or major division thereof as well as his deputy, first assistant, and any supervisory employees.

Supervisory employee means any individual having authority in the interest of the public employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward or discipline other public employees, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. All school superintendents, assistant superintendents, principals and assistant principals shall be deemed to be supervisory employees.

3. Confidential employees.

4. Students working as part-time public employees twenty hours per week or less except graduate or other postgraduate students in preparation for a profession who are engaged in academically related employment as a teaching, research, or service assistant.

5. Temporary public employees employed for a period of four months or less.

6. Commissioned and enlisted personnel of the Iowa national guard.

7. Judges of the supreme court, district judges, district associate judges and judicial magistrates, and the employees of such judges and courts.

8. Patients and inmates employed, sentenced or committed to any state or local institution.

9. Persons employed by the state department of justice.

10. Persons employed by the commission for the blind.

Referred to in sec. 20.3(3)

20.5 Public employment relations board.

1. There is established a board to be known as the "Public Employment Relations Board." The board shall consist of three members appointed by the governor, with approval of two-thirds of the senate. No more than two members shall be of the same political affiliation and no member shall engage in any political activity while holding office and the members shall devote full time to their duties.

Each member shall be appointed for a term of four years, except that of the members first appointed, two members shall be appointed for a term of two years commencing July 1, 1974 and ending June 30, 1976, and one member shall be appointed for a term of four years commencing July 1, 1974 and ending June 30, 1978.

The member first appointed for a term of four years shall serve as chairman and each of his successors shall also serve as chairman.

2. Any vacancy on the commission which may occur when the general assembly is not in session shall be filled by appointment by the governor, which appointment shall expire at the end of thirty days following the convening of the next session of the general assembly. Prior to the expiration of the thirty-day period, the governor shall transmit to the senate for its approval the name of the appointee for the unexpi[illegible]tion of the regular term. Any vacancy occ[illegible]n the general assembly is in session s[illegible]d in the same manner as regular appoin[illegible]e made, and before the end of such sessio[illegible]for the unexpired portion of the regular term.

3. In selecting the members of the board, consideration shall be given to their knowledge, ability, and experience in the field of labor-management relations. The chairperson and the remaining two members shall each receive an annual salary as set by the general assembly.

4. The board may employ such persons as are necessary for the performance of its functions.

Personnel of the board shall be employed pursuant to the provisions of chapter 19A.

5. Members of the board and other employees of the board shall be allowed their actual and necessary expenses incurred in the performance of their duties. All expenses and salaries shall be paid from appropriations for such purposes and the board shall be subject to the budget requirements of chapter 8.

Referred to in sec. 20.3(5)

20.6 General powers and duties of the board. The board shall:

1. Administer the provisions of this chapter.

2. Collect, for public employers other than the state and its boards, commissions, departments, and agencies, data and conduct studies relating to wages, hours, benefits and other terms and conditions of public employment and make the same available to any interested person or organization.

3. Maintain, after consulting with employee organizations and public employers, a list of qualified persons representative of the public to be available to serve as mediators and arbitrators and establish their compensation rates.

4. Hold hearings and administer oaths, examine witnesses and documents, take testimony and receive evidence, issue subpoenas to compel the attendance of witnesses and the production of records, and delegate such power to a member of the board, or persons appointed or employed by the board, including hearing officers for the performance of its functions. The board may petition the district court at the seat of government or of the county wherein any hearing is held to enforce a board order compelling the attendance of witnesses and production of records.

5. Adopt rules in accordance with the provisions of chapter 17A as it may deem necessary to carry out the purposes of this chapter.

20.7 Public employer rights. Public employers shall have, in addition to all powers, duties, and rights established by constitutional provision, statute, ordinance, charter, or special act, the exclusive power, duty and the right to:

1. Direct the work of its public employees.

2. Hire, promote, demote, transfer, assign and retain public employees in positions within the public agency.

3. Suspend or discharge public employees for proper cause.

4. Maintain the efficiency of governmental operations.

5. Relieve public employees from duties because of lack of work or for other legitimate reasons.

6. Determine and implement methods, means, assignments and personnel by which the public employer's operations are to be conducted.

7. Take such actions as may be necessary to carry out the mission of the public employer.

8. Initiate, prepare, certify and administer its budget.

9. Exercise all powers and duties granted to the public employer by law.

20.8 Public employee rights. Public employees shall have the right to:

1. Organize, or form, join, or assist any employee organization.

2. Negotiate collectively through representatives of their own choosing.

3. Engage in other concerted activites for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the state.

4. Refuse to join or participate in the activities of employee organizations, including the payment of any dues, fees or assessments or service fees of any type.

Referred to in sec. 20.10

20.9 Scope of negotiations. The public employer and the employee organization shall meet at reasonable times, including meetings reasonably in advance of the public employer's budget-making process, to negotiate in good faith with respect to wages, hours, vacations, insurance, holidays, leaves of absence, shift differentials, overtime compensation, supplemental pay, seniority, transfer procedures, job classifications, health and safety matters, evaluation procedures, procedures for staff reductions, in-service training and other matters mutually agreed upon. Negotiations shall also include terms authorizing dues checkoff for members of the employee organization and grievance procedures for resolving any questions arising under the agreement, which shall be embodied in a written agreement and signed by the parties. If an agreement provides for dues checkoff, a member's dues may be checked off only upon the member's written request and the member may terminate the dues checkoff at any time by giving thirty days' written notice. Such obligation to negotiate in good faith does not compel either party to agree to a proposal or make a concession.

Nothing in this section shall diminish the authority and power of the merit employment department, board of regents' merit system, educational radio and television facility board's merit system, or any civil service commission established by constitutional provision, statute, charter or special act to recruit employees, prepare, conduct and grade examinations, rate candidates in order of their relative scores for certification for appointment or promotion or for other matters of classification, reclassification, or appeal rights in the classified service of the public employer served.

All retirement systems shall be excluded from the scope of negotiations.

Referred to in secs. 20.10, 20.17

20.10 Prohibited practices.

1. It shall be a prohibited practice for any public employer, public employee or employee organization to willfully refuse to negotiate in good faith with respect to the scope of negotiations as defined in section 20.9.

2. It shall be a prohibited practice for a public employer or his designated representative willfully to:

a. Interfere with, restrain or coerce public employees in the exercise of rights granted by this chapter.

b. Dominate or interfere in the administration of any employee organization.

c. Encourage or discourage membership in any employee organization, committee or association by discrimination in hiring, tenure, or other terms or conditions of employment.

d. Discharge or discriminate against a public employee because he has filed an affidavit, petition or complaint or given any information or testimony under this chapter, or because he has formed, joined or chosen to be represented by any employee organization.

e. Refuse to negotiate collectively with representatives of certified employee organizations as required in this chapter.

f. Deny the rights accompanying certification or exclusive recognition granted in this chapter.

g. Refuse to participate in good faith in any agreed upon impasse procedures or those set forth in this chapter.

h. Engage in a lockout.

i. Picket for any unlawful purpose.

3. It shall be a prohibited practice for public employees or an employee organization or for any person, union or organization or their agents willfully to:

a. Interfere with, restrain, coerce or harass any public employee with respect to any of his rights under this chapter or in order to prevent or discourage his exercise of any such right, including, without limitation, all rights under section 20.8.

b. Interfere, restrain, or coerce a public employer with respect to rights granted in this chapter or with respect to selecting a representative for the purposes of negotiating collectively on the adjustment of grievances.

c. Refuse to bargain collectively with a public employer as required in this chapter.

d. Refuse to participate in good faith in any agreed upon impasse procedures or those set forth in this chapter.

e. Violate section 20.12.

f. Violate the provisions of sections 736B.1 to 736B.3, which are hereby made applicable to public employers, public employees and public employee organizations.

g. Picket in a manner which interferes with ingress and egress to the facilities of the public employer.

h. Engage in, initiate, sponsor or support any picketing that is performed in support of a strike, work stoppage, boycott or slowdown against a public employer.

4. The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of any unfair labor practice under any of the provisions of this chapter, if such expression contains no threat of reprisal or force or promise of benefit.

Reference in sec. 20.11

20.11 Prohibited practice violations.

1. Proceedings against a party alleging a violation of section 20.10, shall be commenced by filing a complaint with the board within ninety days of the alleged violation causing a copy of the complaint to be served upon the accused party in the manner of an original notice as provided in this chapter. The accused party shall have ten days within which to file a written answer to the complaint. However, the board may conduct a preliminary investigation of the alleged violation, and if the board determines that the complaint has no basis in fact, the board may discuss the complaint. The board shall promptly thereafter set a time and place for hearing in the county where the alleged violation occurred. The parties shall be permitted to be represented by counsel, summon witnesses, and request the board to subpoena witnesses on the requestor's behalf. Compliance with the technical rules of pleading and evidence shall not be required.

2. The board may designate a hearing officer to conduct the hearing. The hearing officer shall have such powers as may be exercised by the board for conducting the hearing and shall follow the procedures adopted by the board for conducting the hearing. The decision of the hearing officer may be appealed to the board and the board may hear the case de novo or upon the record as submitted before the hearing officer, utilizing procedures governing appeals to the district court in this section so far as applicable.

3. The board shall appoint a certified shorthand reporter to report the proceedings and the board shall fix the reasonable amount of compensation for such service, which amount shall be taxed as other costs.

4. The board shall file its findings of fact and conclusions of law. If the board finds that the party accused has committed a prohibited practice, the board may, within thirty days of its decision, enter into a consent order with the party to discontinue the practice, or petition the district court for injunctive relief pursuant to rules of civil procedure 320 to 330.

5. Any party aggrieved by any decision or order of the board may within ten days from the date such decision or order is filed, appeal therefrom to the district court of the county in which the hearing was held, by filing with the board a written notice of appeal setting forth in general terms the decision appealed from and the grounds of the appeal. The board shall forthwith give notice to the other parties in interest.

6. Within thirty days after a notice of appeal is filed with the board, it shall make, certify, and file in the office of the clerk of court to which the appeal is taken, a full and complete transcript of all documents in the case, including any depositions and a transcript or certificate of the evidence together with the notice of appeal.

7. The appeal shall be triable at any time after the expiration of twenty days from the date of filing the transcript by the board and after twenty days' notice in writing by either party and the board upon the other.

8. The transcript as certified and filed by the board shall be the record on which the appeal shall be heard, and no additional evidence shall be heard. In the absence of fraud, the findings of fact made by the board shall be conclusive if supported by a substantial evidence on the record considered as a whole.

9. Any order or decision of the board may be modified, reversed, or set aside on one or more of the following grounds and on no other:

a. If the board acts without or in excess of its powers.

b. If the order was procured by fraud or is contrary to law.

c. If the facts found by the board do not support the order.

d. If the order is not supported by a preponderance of the competent evidence on the record considered as a whole.

10. When the district court, on appeal, reverses or sets aside an order or decision of the board, it may remand the case to the board for further proceedings in harmony with the holdings of the court, or it may enter the proper judgment, as the case may be. Such judgment or decree shall have the same force and effect as if action had been originally brought and tried in said court. The assessment of costs in such appeals shall be in the discretion of the court.

11. An appeal may be taken to the supreme court from any final order, judgment, or decree of the district court.

Referred to in sec. 20.13, 20.14.

20.12 Strikes prohibited.

1. It shall be unlawful for any public employee or any employee organization, directly or indirectly, to induce, instigate, encourage, authorize, ratify or participate in a strike against any public employer.

2. It shall be unlawful for any public employer to authorize, consent to, or condone a strike; or to pay or agree to pay any public employee for any day in which the employee participates in a strike; or to pay or agree to pay any increase in compensation or benefits to any public employee in response to or as a result of any strike or any act which violates subsection 1. It shall be unlawful for any official, director, or representative of any public employer to authorize, ratify or participate in any violation of this subsection. Nothing in this subsection shall prevent new or renewed bargaining and agreement within the scope of negotiations as defined by this chapter, at any time after such violation of subsection 1 has ceased; but it shall be unlawful for any public employer or employee organization to bargain at any time regarding suspension or modification of any penalty provided in this section or regarding any request by the public employer to a court for such suspension or modification.

3. In the event of any violation or imminently threatened violation of subsection 1 or 2, any citizen domiciled within the jurisdictional boundaries of the public employer may petition the district court for the county in which the violation occurs or the district court for Polk county for an injunction restraining such violation or imminently threatened violation. Rules of civil procedure 320 to 330 regarding injunctions shall apply. However, the court shall grant a temporary injunction if it appears to the court that a violation has occurred or is imminently threatened; the plaintiff need not show that the violation or threatened violation would greatly or irreparably injure him; and no bond shall be required of the plaintiff unless the court determines that a bond is necessary in the public interest. Failure to comply with any temporary or permanent injunction granted pursuant to this section shall constitute a contempt punishable pursuant to chapter 665. The punishment shall not exceed five hundred dollars for an individual, or ten thousand dollars for an employee organization or public employer, for each day during which the failure to comply continues, or imprisonment in a county jail not exceeding six months, or both such fine and imprisonment. An individual or an employee organization which makes an active good faith effort to comply fully with the injunction shall not be deemed to be in contempt.

4. If a public employee is held to be in contempt of court for failure to comply with an injunction pursuant to this section, or is convicted of violating this section, he shall be ineligible for any employment by the same public employer for a period of twelve months. His public employer shall immediately discharge him, but upon his request the court shall stay his discharge to permit further judicial proceedings.

5. If an employee organization or any of its officers is held to be in contempt of court for failure to comply with an injunction pursuant to this section, or is convicted of violating this section, the employee organization shall be immediately decertified, shall cease to represent the bargaining unit, shall cease to receive any dues by checkoff, and may again be certified only after twelve months have elapsed from the effective date of decertification and only after a new compliance with section 20.14. The penalties provided in this section may be suspended or modified by the court, but only upon request of the public employer and only if the court determines the suspension or modification is in the public interest.

6. Each of the remedies and penalties provided by this section is separate and several, and is in addition to any other legal or equitable remedy or penalty.

Referred to in sec. 20.10

20.13 Bargaining unit determination.

1. Board determination of an appropriate bargaining unit shall be upon petition filed by a public employer, public employee, or employee organization.

2. Within thirty days of receipt of a petition or notice to all interested parties if on its own initiative, the board shall conduct a public hearing, receive written or oral testimony, and promptly thereafter file an order defining the appropriate bargaining unit. In defining the unit, the board shall take into consideration, along with

other relevant factors, the principles of efficient administration of government, the existence of a community of interest among public employees, the history and extent of a public employee organization, geographical location, and the recommendations of the parties involved.

3. Appeals from such order shall be governed by appeal provisions provided in section 20.11.

4. Professional and nonprofessional employees shall not be included in the same bargaining unit unless a majority of both agree.

Referred to in sec. 20.14

20.14 Bargaining representative determination.

1. Board certification of an employee organization as the exclusive bargaining representative of a bargaining unit shall be upon a petition filed with the board by a public employer, public employee, or an employee organization and an election conducted pursuant to section 20.15.

2. The petition of an employee organization shall allege that:

a. The employee organization has submitted a request to a public employer to bargain collectively with a designated group of public employees.

b. The petition is accompanied by written evidence that thirty percent of such public employees are members of the employee organization or have authorized it to represent them for the purposes of collective bargaining.

3. The petition of a public employee shall allege that an employee organization which has been certified as the bargaining representative does not represent a majority of such public employees and that the petitioners do not want to be represented by an employee organization or seek certification of an employee organization.

4. The petition of a public employer shall allege that it has received a request to bargain from an employee organization which has not been certified as the bargaining representative of the public employees in an appropriate bargaining unit.

5. The board shall investigate the allegation of any petition and shall give reasonable notice of the receipt of such a petition to all public employees, employee organizations and public employers named or described in such petitions or interested in the representation questioned. The board shall thereafter call an election under section 20.15, unless:

a. It finds that less than thirty percent of the public employees in the unit appropriate for collective bargaining support the petition for decertification or for certification.

b. The appropriate bargaining unit has not been determined pursuant to section 20.13.

6. The hearing and appeal procedures shall be the same as provided in section 20.11.

Referred to in secs. 20.12, 20.15

20.15 Elections.

1. Upon the filing of a petition for certification of an employee organization, the board shall submit a question to the public employees at an election in an appropriate bargaining unit. The question on the ballot shall permit the public employees to vote for no bargaining representation or for any employee organization which has petitioned for certification or which has presented proof satisfactory to the board of support of ten percent or more of the public employees in the appropriate unit.

2. If a majority of votes cast on the question are for no bargaining representation, the public employees shall not be represented by an employee organization. If a majority of the votes cast on the question is for a listed employee organization, then the employee organization shall represent the public employees in an appropriate bargaining unit.

3. If none of the choices on the ballot receive the vote of a majority of the public employees voting, the board shall conduct a runoff election among the two choices receiving the greatest number of votes.

4. Upon written objections filed by any party to the election within ten days after notice of the results of the election, if the board finds that misconduct or other circumstances prevented the public employees eligible to vote from freely expressing their preferences, the board may invalidate the election and hold a second election for the public employees.

5. Upon completion of a valid election in which the majority choice of the employees voting is determined, the board shall certify the results of the election and shall give reasonable notice of the order to all employee organizations listed on the ballot, the public employers, and the public employees in the appropriate bargaining unit.

6. A petition for certification as an exclusive bargaining representative shall not be considered by the board for a period of one year from the date of the certification or noncertification of an exclusive bargaining representative or during the duration of a collective bargaining agreement which shall not exceed two years. A collective bargaining agreement with the state, its boards, commissions, departments, and agencies shall be for two years and the provisions of a collective bargaining agreement except agreements agreed to or tentatively agreed to prior to July 1, 1977, or arbitrators' award affecting state employees shall not provide for renegotiations which would require the refinancing of salary and fringe benefits for the second year of the term of the agreement, except as provided in section twenty point seventeen (20.17), subsection six (6) of the Code and the effective date of any such agreement shall be July first of odd-numbered years, provided that if an exclusive bargaining representative is certified on a date which will prevent the negotiation of a collective bargaining agreement prior to July first of odd-numbered years for a period of two years, the certified collective bargaining representative may negotiate a one-year contract with a public employer which shall be effective from July first of the even-numbered year to July first of the succeeding odd-numbered year when new contracts shall become effective. However, if a petition for decertification is filed during the duration of a

collective bargaining agreement, the board shall award an election under this section not more than one hundred eighty days nor less than one hundred fifty days prior to the expiration of the collective bargaining agreement. If an employee organization is decertified, the board may receive petitions under section 20.14, provided that no such petition and no election conducted pursuant to such petition within one year from decertification shall include as a party the decertified employee organization.

20.16 Duty to bargain. Upon the receipt by a public employer of a request from an employee organization to bargain on behalf of public employees, the duty to engage in collective bargaining shall arise if the employee organization has been certified by the board as the exclusive bargaining representative for the public employees in that bargaining unit.

20.17 Procedures.

1. The employee organization certified as the bargaining representative shall be the exclusive representative of all public employees in the bargaining unit and shall represent all public employees fairly. However, any public employee may meet and adjust individual complaints with a public employer.

2. The employee organization and the public employer may designate any individual as its representative to engage in collective bargaining negotiations.

3. Negotiating sessions, including strategy meetings of public employers, or employee organizations, mediation and the deliberative process of arbitrators shall be exempt from the provisions of chapter 28A. However, the employee organization shall present its initial bargaining position to the public employer at the first bargaining session. The public employer shall present its initial bargaining position to the employee organization at the second bargaining session, which shall be held no later than two weeks following the first bargaining session. Both sessions shall be open to the public and subject to the provisions of chapter 28A. Hearings conducted by arbitrators shall be open to the public.

4. The terms of a proposed collective bargaining agreement shall be made public and reasonable notice shall be given to the public employees prior to a ratification election. The collective bargaining agreement shall become effective only if ratified by a majority of those voting by secret ballot.

5. Terms of any collective bargaining agreement may be enforced by a civil action in the district court of the county in which the agreement was made upon the initiative of either party.

6. No collective bargaining agreement or arbitrators' decision shall be valid or enforceable if its implementation would be inconsistent with any statutory limitation on the public employer's funds, spending or budget or would substantially impair or limit the performance of any statutory duty by the public employer. A collective bargaining agreement or arbitrators' award may provide benefits conditional upon specified funds to be obtained by the public employer, but the agreement shall provide either for automatic reduction of such conditional benefits or for additional bargaining if the funds are not obtained or if a lesser amount is obtained.

7. If agreed to by the parties nothing in this chapter shall be construed to prohibit supplementary bargaining in behalf of public employees in a part of the bargaining unit concerning matters uniquely affecting those public employees in a part of the bargaining unit concerning matters uniquely affecting those public employees or co-operation and coordination of bargaining between two or more units.

8. The salaries of all public employees of the state under a merit system and all other fringe benefits which are granted to all public employees of the state shall be negotiated with the governor or his designee on a state-wide basis, except those benefits which are not subject to negotiations pursuant to the provisions of section 20.9.

9. A public employee or any employee organization shall not negotiate or attempt to negotiate directly with a member of the governing board of a public employer if the public employer has appointed or authorized a bargaining representative for the purpose of bargaining with the public employees or their representative, unless the member of the governing board is the designated bargaining representative for the public employer.

10. The negotiation of a proposed collective bargaining agreement by representatives of a state public employer and a state employee organization shall be complete not later than March fifteenth of the year when the agreement is to become effective. The board shall provide, by rule, a date on which any impasse item must be submitted to binding arbitration and for such other procedures as deemed necessary to provide for the completion of negotiations of proposed state collective bargaining agreements not later than March fifteenth. The date selected for the mandatory submission of impasse items to binding arbitration shall be sufficiently in advance of March fifteenth to insure that the arbitrators' decision can be reasonably made before March fifteenth.

Referred to in sec. 20.22

20.18 Grievance procedures. An agreement with an employee organization which is the exclusive representative of public employees in an appropriate unit may provide procedures for the consideration of public employee grievances and of disputes over the interpretation and application of agreements. Negotiated procedures may provide for binding arbitration of public employee grievances and of disputes over the interpretation and application of existing agreements. An arbitrator's decision on a grievance may not change or amend the terms, conditions or applications of the collective

bargaining agreement. Such procedure shall provide for the invoking of arbitration only with the approval of the employee organization, and in the case of an employee grievance, only with the approval of the public employee. The costs of arbitration shall be shared equally by the parties.

Public employees of the state shall follow either the grievance procedures provided in a collective bargaining agreement, or in the event that no such procedures are so provided, shall follow grievance procedures established pursuant to chapter 19A.

20.19 Impasse procedures — agreement of parties. As the first step in the performance of their duty to bargain, the public employer and the employee organization shall endeavor to agree upon impasse procedures. Such agreement shall provide for implementation of these impasse procedures not later than one hundred twenty days prior to the certified budget submission date of the public employer. If the parties fail to agree upon impasse procedures under the provisions of this section, the impasse procedures provided in sections 20.20 to 20.22 shall apply.

20.20 Mediation. In the absence of an impasse agreement between the parties or the failure of either party to utilize its procedures, one hundred twenty days prior to the certified budget submission date, the board shall, upon the request of either party, appoint an impartial and disinterested person to act as mediator. It shall be the function of the mediator to bring the parties together to effectuate a settlement of the dispute, but the mediator may not compel the parties to agree.

Referred to in sec. 20.19.

20.21 Fact-finding. If the impasse persists ten days after the mediator has been appointed, the board shall appoint a fact-finder representative of the public, from a list of qualified persons maintained by the board. The fact-finder shall conduct a hearing, may administer oaths, and may request the board to issue subpoenas. The fact-finder shall make written findings of facts and recommendations for resolution of the dispute and, not later than fifteen days from the day of appointment, shall serve such findings on the public employer and the certified employee organization.

The public employer and the certified employee organization shall immediately accept the fact-finder's recommendation or shall within five days submit the fact-finder's recommendations to the governing body and members of the certified employee organization for acceptance or rejection. If the dispute continues ten days after the report is submitted, the report shall be made public by the board.

Referred to in sec. 20.19.

20.22 Binding arbitration.

1. If an impasse persists after the findings of fact and recommendations are made public by the fact-finder, the parties may continue to negotiate or the board shall have the power, upon request of either party, to arrange for arbitration, which shall be binding. The request for arbitration shall be in writing and a copy of the request shall be served upon the other party.

2. Each party shall submit to the board within four days of request a final offer on the impasse items with proof of service of a copy upon the other party. Each party shall also submit a copy of a draft of the proposed collective bargaining agreement to the extent to which agreement has been reached and the name of its selected arbitrator. The parties may continue to negotiate all offers until an agreement is reached or a decision rendered by the panel of arbitrators.

As an alternative procedure, the two parties may agree to submit the dispute to a single arbitrator. If the parties cannot agree on the arbitrator within four days, the selection shall be made pursuant to subsection 5. The full costs of arbitration under this provision shall be shared equally by the parties to the dispute.

3. The submission of the impasse items to the arbitrators shall be limited to those issues that had been considered by the fact-finder and upon which the parties have not reached agreement. With respect to each such item, the arbitration board award shall be restricted to the final offers on each impasse item submitted by the parties to the arbitration board or to the recommendation of the fact-finder on each impasse item.

4. The panel of arbitrators shall consist of three members appointed in the following manner:

a. One member shall be appointed by the public employer.

b. One member shall be appointed by the employee organization.

c. One member shall be appointed mutually by the members appointed by the public employer and the employee organization. The last member appointed shall be the chairman of the panel of arbitrators. No member appointed shall be an employee of the parties.

d. The public employer and employee organization shall each pay the fees and expenses incurred by the arbitrator each selected. The fee and expenses of the chairman of the panel and all other costs of arbitration shall be shared equally.

5. If the third member has not been selected within four days of notification as provided in subsection 2, a list of three arbitrators shall be submitted to the parties by the board. The two arbitrators selected by the public employer and the employee organization shall determine by lot which arbitrator shall remove the first name from the list submitted by the board. The arbitrator having the right to remove the first name shall do so within two days and the second arbitrator shall have one additional day to remove one of the two remaining names. The person whose name remains shall become the chairman of the panel of arbitrators and shall call a meeting within ten days at a location designated by him.

6. If a vacancy should occur on the panel of arbitrators, the selection for replacement of such member shall be in the same manner and within the same time limits as the original member was chosen. No final selection under subsection 9

b. Business or financial interests of its officers and agents, their spouses, minor children, parents or otherwise, that conflict with the fiduciary obligation of such persons to the organization shall be prohibited.

c. Every official or employee of an employee organization who handles funds or other property of the organization, or trust in which an organization is interested, or a subsidiary organization, shall be bonded. The amount, scope, and form of the bond shall be determined by the board.

4. The governing rules of every employee organization shall provide for periodic elections by secret ballot subject to recognized safeguards concerning the equal right of all members to nominate, seek office, and vote in such elections, the right of individual members to participate in the affairs of the organization, and fair and equitable procedures in disciplinary actions.

5. The board shall prescribe rules necessary to govern the establishment and reporting of trusteeships over employee organizations. Establishment of such trusteeships shall be permitted only if the constitution or bylaws of the organization set forth reasonable procedures.

6. An employee organization that has not registered or filed an annual report, or that has failed to comply with other provisions of this chapter, shall not be certified. Certified employee organizations failing to comply with this chapter may have such certification revoked by the board. Prohibitions may be enforced by injunction upon the petition of the board to the district court of the county in which the violation occurs. Complaints of violation of this section shall be filed with the board.

7. Upon the written request of any member of a certified employee organization, the auditor of state may audit the financial records of the certified employee organization.

20.26 Employee organizations — political contributions. Any employee organization shall not make any direct or indirect contribution out of the funds of the employee organization to any political party or organization or in support of any candidate for elective public office.

Any employee organization which violates the provisions of this section or fails to file any required report or affidavit or files a false report or affidavit shall, upon conviction, be subject to a fine of not more than two thousand dollars.

Any person who willfully violates this section, or who makes a false statement knowing it to be false, or who knowingly fails to disclose a material fact shall, upon conviction, be subject to a fine of not more than one thousand dollars or imprisoned for not more than thirty days or shall be subject to both such fine and imprisonment. Each individual required to sign affidavits or reports under this section shall be personally responsible for filing such report or affidavit and for any statement contained therein he knows to be false.

Nothing in this section shall be construed to prohibit voluntary contributions by individuals to political parties or candidates.

Nothing in this section shall be construed to limit or deny any civil remedy which may exist as a result of action which may violate this section.

20.27 Conflict with federal aid. If any provision of this chapter jeopardizes the receipt by the state or any of its political subdivisions of any federal grant-in-aid funds or other federal allotment of money, the provisions of this chapter shall, insofar as the fund is jeopardized, be deemed to be inoperative.

20.28 Inconsistent statutes — effect. A provision of the Code which is inconsistent with any term or condition of a collective bargaining agreement which is made final under this chapter shall supersede the term or condition of the collective bargaining agreement unless otherwise provided by the general assembly. A provision of a proposed collective bargaining agreement negotiated according to this chapter which conflicts with the Code shall not become a provision of the final collective bargaining agreement until the general assembly has amended the Code to remove the conflict.

20.29 Filing agreement — public access. Copies of collective bargaining agreements entered into between the state and state employees' bargaining representatives and made final under this chapter shall be filed with the secretary of state and be made available to the public at cost.

shall be made by the board until the vacancy has been filled.

7. The panel of arbitrators shall at no time engage in an effort to mediate or otherwise settle the dispute in any manner other than prescribed in this section.

8. From the time of appointment until such time as the panel of arbitrators makes its final determination, there shall be no discussion concerning recommendations for settlement of the dispute by the members of the panel of arbitrators with parties other than those who are direct parties to the dispute. The panel of arbitrators may conduct formal or informal hearings to discuss offers submitted by both parties.

9. The panel of arbitrators shall consider, in addition to any other relevant factors, the following factors:

a. Past collective bargaining contracts between the parties including the bargaining that led up to such contracts.

b. Comparison of wages, hours and conditions of employment of the involved public employees with those of other public employees doing comparable work, giving consideration to factors peculiar to the area and the classifications involved.

c. The interests and welfare of the public, the ability of the public employer to finance economic adjustments and the effect of such adjustments on the normal standard of services.

d. The power of the public employer to levy taxes and appropriate funds for the conduct of its operations.

10. The chairman of the panel of arbitrators may hold hearings and administer oaths, examine witnesses and documents, take testimony and receive evidence, issue subpoenas to compel the attendance of witnesses and the production of records, and delegate such powers to other members of the panel of arbitrators. The chairman of the panel of arbitrators may petition the district court at the seat of government or of the county in which any hearing is held to enforce the order of the chairman compelling the attendance of witnesses and the production of records.

11. A majority of the panel of arbitrators shall select within fifteen days after its first meeting the most reasonable offer, in its judgment, of the final offers on each impasse item submitted by the parties, or the recommendations of the fact-finder on each impasse item.

12. The selections by the panel of arbitrators and items agreed upon by the public employer and the employee organization, shall be deemed to be the collective bargaining agreement between the parties.

13. The determination of the panel of arbitrators shall be by majority vote and shall be final and binding subject to the provisions of section 20.17, subsection 6. The panel of arbitrators shall give written explanation for its selection and inform the parties of its decision.

Referred to sec. 20.12

20.23 Legal actions. Any employee organization and public employer may sue or be sued as an entity under the provisions of this chapter. Service upon the public employer shall be in accordance with law or the rules of civil procedure. Nothing in this chapter shall be construed to make any individual or his assets liable for any judgment against a public employer or an employee organization.

20.24 Notice and service. Any notice required under the provisions of this chapter shall be in writing, but service thereof shall be sufficient if mailed by restricted certified mail, return receipt requested addressed to the last known address of the parties, unless otherwise provided in this chapter. Refusal of restricted certified mail by any party shall be considered service. Prescribed time periods shall commence from the date of the receipt of the notice. Any party may at any time execute and deliver an acceptance of service in lieu of mailed notice.

20.25 Internal conduct of employee organizations.

1. Every employee organization which is certified as a representative of public employees under the provisions of this chapter shall file with the board a registration report, signed by its president or other appropriate officer. The report shall be in a form prescribed by the board and shall be accompanied by two copies of the employee organization's constitution and bylaws. A filing by a national or international employee organization of its constitution and bylaws shall be accepted in lieu of a filing of such documents by each subordinate organization. All changes or amendments to such constitutions and bylaws shall be promptly reported to the board.

2. Every employee organization shall file with the board an annual report and an amended report whenever changes are made. The reports shall be in a form prescribed by the board, and shall provide the following information:

a. The names and addresses of the organization, any parent organization or organizations with which it is affiliated, the principal officers, and all representatives.

b. The name and address of its local agent for service of process.

c. A general description of the public employees the organization represents or seeks to represent.

d. The amounts of the initiation fee and monthly dues members must pay.

e. A pledge, in a form prescribed by the board, that the organization will comply with the laws of the state and that it will accept members without regard to age, race, sex, religion, national origin or physical disability as provided by law.

f. A financial report and audit.

3. The constitution or bylaws of every employee organization shall provide that:

a. Accurate accounts of all income and expenses shall be kept, and annual financial report and audit shall be prepared, such accounts shall be open for inspection by any member of the organization, and loans to officers and agents shall be made only on terms and conditions available to all members.

In simple outline, the idea of "final-offer arbitration" is appealing, especially in public employment: after the parties narrow the gap as much as they can, let an arbitrator decide upon one or the other of the two final proposed settlements. According to proponents, the risk that the other side will be found more reasonable will force both to adopt a realistic posture. The idea has merit, and there has already been some satisfactory experience with it. But final-offer arbitration is not without its difficulties. It works better, the author says, when single issues stand in the way of agreement, than when the whole contract, including a variety of economic and non-economic benefits are at stake. But with more experimentation, "it may prove to be the most satisfactory alternative to the strike in the public sector."

FINAL-OFFER ARBITRATION: SOME PROBLEMS

by Nels E. Nelson*

There are a variety of statutory alternatives to the strike in the public sector. Some jurisdictions provide for mediation, factfinding, legislative determination or some combination of these. A small but growing number of jurisdictions have established compulsory arbitration for the settlement of unresolved contract disputes, especially for disputes involving policemen or firemen.[1] Despite the fact that only a few jurisdictions now have compulsory arbitration, the list of advocates is quite impressive.[2] Many authorities feel that it is the only acceptable alternative to the strike in the public sector. In fact, compulsory arbitration has been hailed by one expert as "the wave of the future" in public employee disputes.[3]

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1. Among the states with compulsory arbitration for at least some public employees are Alaska, Pennsylvania, Rhode Island, Massachusetts, New York, Wisconsin, Wyoming and Oregon.
2. Thomas P. Gilroy and Anthony V. Sinicropi, "Impasse Resolution in Public Employment: A Current Assessment," *Industrial and Labor Relations Review*, Vol. 25, No. 4, (July 1972), pp. 502-503.
3. Arvid Anderson, "A Survey of Statutes with Compulsory Arbitration Provisions for Fire and Police," *Arbitration of Police and Firefighters Disputes* (New York: American Arbitration Association, 1971), p. 9.

The most serious problem associated with compulsory arbitration is that it may damage or destroy negotiations preceding arbitration. In compulsory arbitration the award incorporates parts of both parties' proposals so that it appears to the parties that the dispute is settled by compromise of the positions they present to the arbitrator. As a result, the parties may hold back in negotiations if they believe that the dispute will eventually be settled by arbitration. This is the so-called "chilling effect" of compulsory arbitration on negotiations.[4]

A new solution to the impasse problem in the public sector has been suggested which is designed to meet this objection to compulsory arbitration. This procedure is called final-offer arbitration. In final-offer arbitration, both parties submit final-offers to the arbitrator who simply selects the most reasonable final offer without modification.

At present, there are a few states and municipalities that have statutes or ordinances establishing final-offer arbitration.[5] This paper will look at a number of the most important problems in final-offer arbitration in light of the limited experience in final-offer arbitration.

Effect on Negotiations

One of the most damaging criticisms of conventional arbitration is the adverse effect that compulsory arbitration may have on negotiations. When the parties to a dispute believe that the dispute will eventually be settled by arbitration, the incentive to compromise may be weakened. In final-offer arbitration, however, both parties should be anxious to compromise in order to avoid the possibility that an arbitrator will find the other party's final offer more reasonable. When the opponent's final offer is selected, the first party loses on *every* point. Final-offer arbitration, therefore, should encourage compromise by both parties.

Actual final-offer arbitration experience can shed some light on this point. In Eugene, Oregon, where final-offer arbitration was established by local ordinance, no adverse effect on negotiations was apparent in the first six contracts negotiated under this procedure. In fact, in only one of six cases did a complete contract go to arbitration and, although arbitration was involved in four of the remaining five cases, two of these disputes were settled by the parties during the arbitration proceedings after receiving feedback from the chairman of the arbitration panel. The authors of a recent article describing the Eugene

4. Carl M. Stevens, "Is Compulsory Arbitration Compatible with Bargaining?" *Industrial Relations*, Vol. 5, No. 2 (February 1966), pp. 44-45.
5. States with final-offer arbitration legislation include Massachusetts, Michigan, Minnesota, and Wisconsin.

final-offer arbitration experience conclude that "the Eugene experience suggests . . . that final-offer arbitration, as compared to conventional arbitration, can increase the probability of negotiated settlements."[6]

In a number of additional final-offer arbitration cases reported in the *Government Employment Relations Report*, arbitrators indicated that the parties bargained effectively and, in most cases, reached agreement on all but a few issues before arbitration. In one of the first cases decided under Michigan's Policemen's and Firemen's Arbitration Act as amended in 1972 to provide for final-offer arbitration in impasse proceedings initiated after January 1, 1973, the arbitrators observed that the parties had made highly responsible efforts to reach agreement.[7] In an earlier Michigan case arising before the final-offer procedure was mandated but where the parties opted for final-offer arbitration, the arbitration panel stated that the contract "represents not so much the imposition of outside authority, but rather the good faith efforts of the participants."[8]

However, final-offer arbitration was judged more harshly in Indianapolis, where the city and the American Federation of State, County, and Municipal Employees agreed to settle a contract dispute using final-offer arbitration. One of the members of the arbitration panel felt that the Indianapolis case did not indicate that final-offer arbitration was conducive to effective negotiation. "Advocates of final-offer arbitration argue that a party will bargain more realistically and refrain from making unreasonable proposals if it fears that its final offer may not be selected by the panel. There is, of course, no empirical evidence that the threat of final-offer arbitration will produce such behavior at the bargaining table."[9]

In most cases, however, effective bargaining took place prior to arbitration and often continued after arbitration was invoked. In any event, the argument that arbitration of any kind has a "chilling" effect on negotiations seems ironic when strikes by public employees are almost always prohibited. According to one arbitrator, "if the strike threat is effectively eliminated, so that the public employer need not worry about its employees striking, that fact in itself is likely to chill

6. Gary Long and Peter Feuille, "Final-Offer Arbitration: 'Sudden Death' in Eugene," *Industrial and Labor Relations Review*, Vol. 27, No. 2 (January 1974), p. 203.
7. *Government Employee Relations Report*, No. 545 (Washington: Bureau of National Affairs, Inc. 1974), p. E-1.
8. *Government Employee Relations Report*, No. 501, p. B-10.
9. Fred Witney, "Final-Offer Arbitration: The Indianapolis Experience," *Monthly Labor Review*, Vol. 96, No. 5 (May 1973), p. 35.

the bargaining process, and it is arguable that the addition of arbitration in whatever form can do no worse."[10]

Elimination of Arbitrators' Discretion

Another frequently voiced objection to final-offer arbitration is that it eliminates discretion of the arbitrator to design a workable agreement. The arbitrator may feel that when he is limited to choosing between final-offers, he may have to select an offer which he is confident he could improve upon if he were allowed some flexibility.

The arbitrators in the Indianapolis case objected strenuously to their lack of discretion. They felt that they were forced to choose the city's offer but had they had the authority, they would have selected the union's wage offer along with some of the city's other proposals. The Board stated that "some degree of flexibility [should] be granted arbitrators in future cases so that they may appraise the merits of respective proposals, and make a determination on the basis of the reasonableness of terms and conditions 'individually,' as well as the total impact of the package."[11]

In some jurisdictions the arbitrator's selection of final-offers is on an issue-by-issue basis.[12] The arbitrator doesn't pick one entire package or the other but may select one party's proposal on one issue and the other party's proposal on another issue. This procedure certainly allows the arbitrator more discretion but it may reduce the incentive to compromise during negotiations by reducing the probability that the other party's entire proposal will be selected. In addition, each party would realize that the arbitrator would to some extent compromise, i.e., select part of each party's proposal; as in conventional arbitration, it would not pay to give up too much before reaching arbitration.

The criticism that final-offer arbitration limits the discretion of the arbitrator involves a misconception of the final-offer procedure. The goal of final-offer arbitration is to make arbitration unnecessary. The compromises are supposed to be made by the parties in negotiations prior to arbitration not by the arbitrator. The function of the arbitrator is simply to penalize the least reasonable party by selecting the other party's offer.

Sophistication in Bargaining

Some experts feel that final-offer arbitration is best suited for

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10 Joseph R. Grodin, "Either-Or Arbitration for Public Employee Disputes," *Industrial Relations*, Vol. 11, No. 2 (May 1972), p. 263.

11 Witney, "Final-Offer Arbitration: The Indianapolis Experience," p. 23.

12 *Government Employee Relations Report*, Reference File-81, 51:3114-3116.

parties with sophistication in the bargaining process.[12] The argument is that without experience in bargaining, the parties will be unable to judge the reasonableness of their own offer. Even where specific criteria are provided, parties inexperienced in bargaining might not be able to interpret or apply the criteria as an arbitrator would. As a result, "a serious misjudgment by either or both of the parties could produce gaps so extreme that any result will destroy the general acceptability of the arrangement."[14]

This is an important criticism since final-offer arbitration is being considered as an alternative to the strike or other impasse procedures for the public sector where both parties are likely to have limited experience with collective bargaining. This is not to say that there are not long standing bargaining relationships in the public sector but the fact is that public sector bargaining to a large extent is a relatively recent development. If a procedure is adopted for the public sector which requires too high a degree of bargaining sophistication, serious problems will be created.

Fortunately, experience under final-offer arbitration indicates that inexperience in collective bargaining will not create serious difficulties in final-offer arbitration. In Eugene, where final-offer arbitration appears to be successful, the parties had little collective bargaining experience. In fact, two initial contracts were included in the first six contracts negotiated under the final-offer ordinance.[15]

The success in Eugene can be credited to the nature of the arbitration panel provided by the city ordinance.[16] The arbitration panel consists of three members—one representing each party and a neutral chairman. The fact both parties are represented, facilitates the flow of communications between the parties and, more importantly, between the parties and the chairman. As a result, two disputes were settled by the parties during arbitration after receiving feedback from the chairman concerning his view of their proposals. In effect, the arbitrator by indicating to the parties his opinion of their proposals, served in a med-arb capacity. In Eugene it appears that final-offer arbitration may have facilitated rather than impeded the negotiations between parties with little bargaining experience.

Arbitrators reported similar experiences in Michigan. In a dispute involving the city of Mt. Clemens and Teamster Local 214

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13. Gradia, "Either-Or Arbitration for Public Employee Disputes," p. 264.
14. *Ibid.*
15. Long and Feuille, "Final-Offer Arbitration: 'Sudden Death' in Eugene," pp. 193-195.
16. *Government Employee Relations Report*, Reference File 81, 51:4618-4620.

(police officers) five issues went to arbitration, but all but wages were settled during arbitration.[17] At Oakland University in Rochester, Michigan, an agreement between the American Association of University Professors chapter and the University provided for final-offer arbitration on a issue-by-issue basis.[18] In this case, the suggestions provided by the chairman during arbitration led to agreement on all but four issues.

The role played by the arbitration panel in Indianapolis was different. The arbitrators chided the parties for changing their proposals during the arbitration proceedings rather than encouraging them to be flexible so that a negotiated agreement could be reached or so that the scope of disagreement could be narrowed. The arbitrators felt that "a party should not alter the character of its proposals once arbitration is underway otherwise the collective bargaining process would be less meaningful, and whatever value there may be in final-offer arbitration would be considerably reduced."[19]

Multi-Issue Disputes

When final-offer arbitration involves a single issue, the process is relatively simple, especially if the issue is wages. In the well-publicized baseball salary arbitration, all items except a player's salary were covered by a master agreement between the major league baseball clubs and the players' association so that the arbitrator simply picked the player's or club's salary offer.[20] In deciding between alternative wage offers, the criteria are relatively unambiguous, but when there are noneconomic issues involved, the criteria are less clear and more difficult to apply.

In the case of a multi-issue dispute involving a number of noneconomic as well as economic issues, the job of the arbitrator is much more difficult. Not only are the criteria for noneconomic items like the grievance procedure, seniority, and union security less clear, but each final-offer involves trade-offs between the various issues with each party trying to present the most reasonable combination of proposals. In such a situation, it becomes difficult for the arbitrator to justify his final-offer selection. Yet, in final-offer arbitration, where compromise by the arbitrator is not possible, justifying or rationalizing the arbitration decision is especially important. Unless the arbitrator is able to

17. *Government Employee Relations Report*, No. 501, pp. B-9-B-10.
18. *Government Employee Relations Report*, No. 526, pp. B-15-B-18.
19. Witney, "Final-Offer Arbitration: The Indianapolis Experience," p. 12.
20. See Peter Seitz, "Footnote to Baseball Arbitration," *The Arbitration Journal*, Vol. 29, No. 2 (June 1974), pp. 98-101.

rationalize his selection, acceptance of final-offer awards by the public and the parties may be in jeopardy.

One possible solution to the problem presented by multi-issue disputes, is issue-by-issue selection. Michigan's Policemen's and Firemen's Arbitration Act provides that the arbitration panel will select the most reasonable last offer on each economic issue (the panel is not required to choose one or the other on economic matters).[21] The final-offer arbitration agreed upon by Oakland University and the Oakland chapter of the American Association of University Professors was also on an issue-by-issue basis.[22]

Although the reports of final-offer arbitration on an issue-by-issue basis referred to above did not discuss any particular problems associated with selecting final-offers on an issue-by-issue basis, an important problem can arise. Issue-by-issue arbitration would lead each party to make demands on every front, knowing it had nothing to lose and might gain a bit here and there. This variety of final-offer arbitration ignores the trade-offs and compromises within a contract. It might therefore make negotiations prior to arbitration less likely to lead to agreement.

The final-offer arbitration procedure in Eugene allows each party to submit two final-offers.[23] This may be useful in a multi-issue dispute. Not only will two offers by each party give the arbitrator more flexibility but it may make agreement between the two parties more likely, since the employer's "high" offer and the union's "low" offer might be quite close. After considering the possibility of multiple offers and issue-by-issue selection, one expert still concludes that "considering the complexities of multi-issue bargaining, the prospects for structuring positions to enable rational choice by the arbitrator do not seem bright."[24]

New Fringe Benefits

One important problem in final-offer arbitration which has been overlooked is the difficulty which employee organizations may face in establishing new fringe benefits. If an organization's demand is refused by an employer and an impasse is reached, an arbitrator under final-offer arbitration chooses between the final-offers of the parties

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21. See footnote 12
22. See footnote 18.
23. See footnote 19 and Long and Feuille, "Final-Offer Arbitration: 'Sudden Death' in Eugene," p. 198.
24. Gondo, "Either-Or Arbitration for Public Employee Disputes," p. 265.

on the basis of specific criteria. The criteria involve comparisons of each of the parties' offers with what other workers performing similar work receive.

The specific criteria established by the various final-offer statutes are similar. The Eugene ordinance directs the arbitrator to select the most reasonable offer based on past collective bargaining agreements between the parties, comparisons of wages, hours, and conditions of employment with employees doing comparable work, similar comparisons with other municipalities, the public interest, and the ability of the city to finance economic adjustments.[25] The Michigan and Wisconsin statutes add to these criteria the cost-of-living, overall compensation including the stability of employment and "other factors . . . normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining."[26]

If the most important criterion for final-offer selection becomes what other public employees currently receive, the introduction of a new fringe benefit in the face of employer opposition may be impossible, since arbitrators prefer to leave the introduction of new fringe benefits to negotiations between the two parties. An arbitrator may not be confident that he can understand all the ramifications of a new fringe benefit or he may not want his decision to serve as a precedent for the other arbitrators' decisions. In any case, the employee organization would have to present a very convincing argument for an arbitrator to establish a new fringe benefit.

This situation arose in one of the first cases decided under the Michigan final-offer statute.[27] The Police Officers Association of Dearborn, in negotiations with the city, proposed a dental health plan, a recent innovation in fringe benefits which only a few cities had adopted for police officers. In denying the request, the arbitrators' opinion stated that although "this should not be conclusive in ruling it out as part of an arbitration award . . . it does seem to place a special burden of persuasion on the proponents."[28] The opinion added that the chairman of the Panel "would ordinarily prefer to leave most of the pioneering in labor agreements to voluntary bargaining, rather than impose new provisions through compulsory arbitration."[29]

25. *Government Employee Relations Report*, Reference File-81, 51:4620.
26. *Government Employee Relations Report*, Reference File-78, 51:5821 and Reference File 69, 51:3115.
27. *Government Employee Relations Report*, No. 545, pp. E-1-E-6.
28. *Ibid.*, p. E-2.
29. *Ibid.*

Conclusion

The adoption of final-offer arbitration on a trial basis by additional states and municipalities seems desirable. The final-offer procedure not only protects the public from the damage and inconvenience caused by public employee strikes but it minimizes the adverse effect of arbitration on contract negotiations. In addition, limited experience indicates that the procedure can be used successfully by parties with little collective bargaining experience.

The procedure will present substantial new challenges to arbitrators. Multi-issue disputes, in particular, may present very difficult problems. The experience of arbitrators in grievance cases, however, should prove valuable; furthermore, the success of grievance arbitration demonstrates the capability and resourcefulness of arbitrators and the adaptability of the parties to collective bargaining. As public employers and unions become more familiar with final-offer arbitration procedures, it may prove to be the most satisfactory alternative to the strike in the public sector.

The negotiation and arbitration experience of six jurisdictions with different final-offer systems are analyzed and a final-offer arbitration procedure designed to increase incentives to negotiate is proposed. In his research, the author seeks to determine those conditions under which (a) rapid settlements are reached by the parties using as few steps as possible, (b) there are more negotiated agreements over time, and (c) there are smaller areas of disagreement when awards are made. Based on these findings, a procedure is developed that combines mediation with final-offer arbitration. This procedure is implemented immediately after a declaration of impasse, with the same person serving as mediator and arbitrator.

FINAL-OFFER ARBITRATION AND NEGOTIATING INCENTIVES

by Peter Feuille*

In the past decade final-offer arbitration has emerged first as an idea[1] and then as a process used to resolve bargaining impasses in several public and private jurisdictions. Hundreds of negotiations have occurred under these final-offer procedures, and dozens of impasses have been resolved by arbitration awards. These experiences, when compared to conventional arbitration experiences, have shown that final-offer arbitration does a reasonably good job of protecting the parties' incentives to negotiate but that it does not operate as effectively as its theoretical rationale suggests it should. The purpose of this paper is to use these final-offer experiences, supplemented with experimental bargaining and impasse resolution research, to see how more effective final-offer procedures might be designed.

Effectiveness Criteria

Before examining any data it is necessary to identify some effectiveness criteria, and the most useful criteria can be developed

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1. Carl M. Stevens, "Is Compulsory Arbitration Compatible with Bargaining?" *Industrial Relations*, Vol. 5, No. 2 (February 1966), pp. 38-52.

from the rationale for final-offer arbitration's existence. Final-offer arbitration has been offered as an antidote to the "chilling effect" upon the parties' incentives to negotiate their own agreements that is said to exist under conventional arbitration (which assumes, of course, that there is a perceived need for an impasse resolution procedure which will prevent strikes by imposing binding outcomes upon the parties).[2] This chilling effect allegedly exists because of the manner in which impasses will be resolved: the conventional arbitrator will issue an award which is a compromise or a split of the difference between the parties' positions, and hence each party has an incentive to maintain an extreme position in the hope of getting a more favorable split. There is no strike, and the parties can avoid the hard bargaining necessary to reach agreement.

In contrast, final-offer arbitration makes such behavior costly by eliminating arbitral discretion and requiring the arbitrator to select one or the other party's offer without modification. Because of the mutual fear that the arbitrator may select the other party's offer, both parties should develop ever more reasonable positions, and these mutual attempts to be reasonable should result in the parties being so close together they will create their own settlement. In other words, the possibility that either party may lose everything in arbitration will act as an incentive for them to seek security in their own agreement.[3]

As a result of this rationale, the most appropriate criterion used to evaluate final-offer procedures is "negotiating effectiveness," or the extent to which the procedures induce desired negotiating behavior among the parties. There are several specific dimensions along which the negotiating effectiveness of final-offer procedures may be measured. First, the most effective final-offer procedures are the ones which are invoked least, for their lack of use indicates that the parties are negotiating their own agreements.

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2. Professor Roy Adams uses the Canadian public sector impasse experience to note that this strikes-are-inappropriate assumption may be more firmly held in the United States than in other countries.
3. This conceptual rationale is much more applicable to final-offer arbitration with entire package selection rather than issue-by-issue selection. For more detailed discussions of the final-offer concept, see Stevens *op. cit.*; Peter Feuille, *Final Offer Arbitration: Concepts, Developments, Techniques*, Public Employee Relations Library No. 50 (Chicago: International Personnel Management Association, 1975), pp. 12-14; and James L. Stern, Charles M. Rehmus, J. Joseph Loewenberg, Hirschel Kasper, and Barbara D. Dennis, *Final Offer Arbitration* (Lexington, Mass.: D. C. Heath, 1975), pp. 117-41.

Second, if a procedure is invoked, an important criterion is the extent to which the parties reach their own agreements prior to the issuance of awards, with a larger proportion of negotiated agreements indicating increased effectiveness. A third and closely-related criterion involves the proportion of impasse steps the parties utilize before reaching agreement, with increased effectiveness associated with agreements reached at early rather than later impasse steps. If an award is necessary, a fourth criterion is the extent to which the parties narrow their area of disagreement, either by reducing the number of disputed issues or by reducing the range of disagreement on the disputed issues (or both), with smaller areas of disagreement indicating increased effectiveness. A fifth criterion involves longitudinal measurements along the above dimensions, *e.g.*, an increasing proportion of negotiated agreements over time indicates increased effectiveness. These measurements usually are made against some comparison data, most frequently the negotiation and arbitration experiences under conventional arbitration procedures.[4] It should be emphasized that these negotiating dimensions will be applicable only to the extent that their users prefer negotiated agreements over imposed awards. If this preference does not exist, the above criteria are meaningless.

Three other effectiveness criteria can be specified. One is "compliance effectiveness," or the extent to which the parties comply with the final-offer process and its outcomes. This criterion can be measured by the proportion of negotiations which involve refusals to participate in the process, refusals to implement awards, court appeals of awards, and post-award work stoppages, with the smaller the proportion of these kinds of behavior the more effective the final-offer process. A second and related criterion is "outcome effectiveness," or the manner in which final-offer outcomes impact upon the parties. This criterion can be measured along such dimensions as the proportion of union (or management) arbitration victories (or losses), or the extent to which agreements negotiated prior to awards more closely resemble the unions' or managements' final positions. The more effective final-offer processes are those which yield the more equitable outcomes (which assumes, of course, that equitable outcomes can be defined and measured in a manner which satisfies the

4. For an excellent discussion of impasse resolution evaluation research, see Thomas A. Kochan, "Evaluating the Effectiveness of Impasse Procedures: Some Conceptual and Research Design Issues," paper presented at the 1975 annual meeting of the Society of Professionals in Dispute Resolution.

various negotiating perspectives). Compliance and outcome effectiveness may be related in that a party's compliance with the process may depend upon its perception of the equitableness of the outcomes.

A third and more subjective criterion is "political effectiveness," or the manner in which the final-offer process resolves competing interest group claims upon scarce resources. This criterion can be measured by the extent to which the final-offer process reduces bargaining conflict and hostility by providing for a determinate solution to these competing claims, by providing a third party who functions as a safety valve for the parties' dissatisfactions with the process or its outcomes, and by the establishment of beliefs among members of these competing groups that their legitimate interests have been adequately considered in the process. The more politically effective final-offer processes are those which do the best job of achieving these objectives, especially the third one.[5]

In the analysis that follows only the negotiating effectiveness criteria will be used, with the focus on longitudinal changes in the proportion of negotiated agreements in various jurisdictions. Since the primary (some might say only) reason for final-offer arbitration's existence is to induce (or scare) the parties into negotiating their own agreements, the effectiveness measures ought to focus on the extent to which this is accomplished.

Final-Offer Experiences

Three key methods to evaluate the negotiating effectiveness of final-offer procedures come readily to mind. One method is to compare final-offer negotiating and arbitration outcomes with pre-strike and post-strike negotiated settlements where the employees have the right to strike. If final-offer arbitration is an effective "strikelike" impasse resolution mechanism, the proportion of arbitration awards in final-offer jurisdictions should be similar to the proportion of strike-induced settlements in right-to-strike jurisdictions. Problems with these comparisons emerge, though, because it is common for different occupational groups to have the right to strike and to arbitrate, and because of the small number of jurisdictions with the right to strike.

A second evaluation method is to compare final offer with con-

5. For a more general discussion of the political nature of public sector impasse procedures, see George T. Sulmer, "The Political Functions of Impasse Procedures," *Industrial Relations*, forthcoming; and Raymond D. Horton, "Arbitration, Arbitrators and the Public Interest," *Industrial and Labor Relations Review*, Vol. 28, No. 4 (July 1975), pp. 497-507.

ventional arbitration experiences, either on a cross sectional or longitudinal basis, and the analyses that have done this generally show that arbitration award rates are proportionately lower in final offer than in conventional jurisdictions.[6] Although most of these comparisons are rather primitive and do not control for environmental and situational variables which may affect the use of these procedures, and therefore it may be difficult to prove that these negotiation and arbitration differences are directly attributable to the different procedural designs, the direction of the differences is consistent with the predictions made on behalf of the final-offer concept. As a result, it seems fair to tentatively conclude that on the basis of the available evidence (which admittedly is incomplete) final-offer arbitration is more effective than conventional arbitration in inducing negotiated agreements.

A third evaluation method is to compare the negotiation and arbitration experiences under various final-offer systems with each other. This method will be used in this section, with special attention devoted to how the reliance on impasse procedures has changed over time in the six jurisdictions examined—five public and one private.

Eugene. The City of Eugene, Oregon and its unions have completed twelve sets of negotiations under a municipal final offer with package selection procedure.[7] As Table 1 indicates, in nine cases the parties reached their own agreement on all issues, either prior to the invocation of the arbitration procedure (six times) or prior to the issuance of an award (three times). In two other cases agreement of the Eugene experience is the parties' decreasing reliance over time was reached on almost all the items, with only one issue in each instance taken to arbitration. Perhaps the most noteworthy aspect on arbitration awards, to the point that there have been no awards issued in any of the last six negotiations (three in 1974-75, three in 1975-76).

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6. Peter Feuille, *op. cit.*, pp. 28-33; Peter Feuille "Final Offer Arbitration and the Chilling Effect," *Industrial Relations*, Vol. 14, No. 3 (October 1975), pp. 302-10; Stern, *et al*, *op. cit.*; and Thomas A. Kochan, Ronald G. Ehrenberg, Jean Baderschneider, Todd Jick, and Mordehai Mironi, "An Evaluation of Impasse Procedures for Police and Firefighters in New York: An Interim Report," unpublished manuscript, New York State School of Industrial and Labor Relations, Cornell University, June 1976, pp. 5-6.
7. For a report on the early experience under this procedure, see Gary Long and Peter Feuille, "Final Offer Arbitration: 'Sudden Death' in Eugene," *Industrial and Labor Relations Review*, Vol. 27, No. 2 (January 1974), pp. 186-203.

TABLE 1 Eugene Negotiation-Arbitration Experience (1971-76)

Employee Group	*Arbitration Invoked?*	*Items Submitted to Arbitrators*	*Outcome*
1971-72 negotiations:			
Fire Fighters	Yes	Entire contractual package	City first offer selected
Police Patrolmen	Yes	Entire contractual package	Agreement negotiated during arbitration proceedings
AFSCME	Yes (binding fact-finding)*	Union security; all other items agreed to in negotiations	Union position (agency shop) selected
1972-73 negotiations:			
Fire Fighters	Yes	Longevity pay; all other items agreed to in negotiations	City alternate offer selected
Police Patrolmen	No	—	Negotiated agreement
AFSCME	Yes	Economic issues; noneconomic issues agreed to in negotiations	Agreement negotiated during arbitration proceedings
1974-75 negotiations:			
Fire Fighters	No	—	Negotiated agreement
Police Patrolmen	No	—	Negotiated agreement
AFSCME (salary reopener)	No	—	Negotiated agreement
1975-76 negotiations:			
Fire Fighters (salary reopener)	No	—	Negotiated agreement
Police Patrolmen (salary reopener)	No	—	Negotiated agreement
AFSCME	Yes	Entire contractual package	Agreement negotiated during arbitration proceedings

Source: Peter Feuille, *Final Offer Arbitration: Concepts, Development, Techniques*, Public Employee Relations Library, series no. 50 (Chicago: International Personnel Management Association, 1975), p. 17; and Gary Long, Personnel Director, City of Eugene, telephone conversation, October 11, 1976.

Note: *The two sides agreed to use the fact-finding services provided free by the state and to be bound by the fact-finder's decision.

The Eugene experience suggests that over time the city's procedure has become more rather than less effective in preserving the parties' incentives to reach their own agreements (at least prior to an award). It may be difficult to pinpoint the precise reasons for this result (and even more difficult to attach weights to them); they apparently include early union losses and a desire to avoid repetitions, a speedy arbitration timetable, the package selection requirement, the absence of impasse steps between negotiation and arbitration, arbitrator encouragement of negotiations after the procedure has been invoked, and an early final-offer submission deadline (five days prior to the commencement of the arbitration process).[8] Whatever the exact reasons, the Eugene experience suggests that unions and managements operating under a final-offer procedure can reduce their use of the procedure as they become more familiar with its operation.

Baseball. The recent major league baseball collective bargaining agreement provided for final-offer arbitration to resolve salary disputes between players and club owners.[9] As Table 2 indicates, the

TABLE 2
Baseball Salary Arbitration Experience

Year	*Total Eligible*	*Arbitration Invoked*	*Settled Prior to Award*	*Arbitration Awards*
1974	500 (approx.)	54 (11%)[a]	26 (5%)[a]	28 (5%)[a]
1975	500 (approx.)	38 (8%)	24 (5%)	14 (3%)
Totals	1,000 (approx.)	92 (9%)	50 (5%)	42 (4%)

SOURCE: James B. Dworkin, "The Impact of Final Offer Interest Arbitration on Bargaining: The Case of Major League Baseball," Purdue University, Krannert Graduate School of Industrial Administration, Working Paper No. 554, June 1976, p. 6 (to be published in the *Proceedings* of the Twenty-Ninth Annual Winter Meeting of the Industrial Relations Research Assn.).
NOTE: [a]All percentage figures are percent of total eligible.

procedure was used during 1974 and 1975 in about nine percent of the salary negotiations. The most noteworthy aspects of baseball's arbitration experience is that over half of the cases taken to arbitration were settled prior to an award and that the arbitration usage rate declined significantly from the first year to the second.

8. For the specific details of the Eugene and the other public sector procedures, see Bureau of National Affairs, *Government Employee Relations Report, Reference File.*
9. James B. Dworkin, "The Impact of Final Offer Interest Arbitration on Bargaining: The Case of Major League Baseball," Working Paper No. 554, Krannert Graduate School of Industrial Administration, Purdue University, 1976 (to be published in the *Proceedings* of the Twenty-Ninth Annual Winter Meeting of the Industrial Relations Research Association).

The baseball final-offer procedure is unique—it covers an unusual group of workers, is applied on an individual basis to a single issue, has a very speedy timetable, and prohibits explanatory opinions—and hence it is difficult to compare the negotiating experiences under it to those in various public sector jurisdictions. It is worth noting, though, that the baseball experience is similar to Eugene's in that over time the use of the procedure has decreased, which suggests again that it is possible for the contending parties to decrease their recourse to a final-offer procedure as they become more familiar with its operation.

Wisconsin. As Table 3 indicates, the Wisconsin experience shows

TABLE 3

Wisconsin Negotiation-Arbitration Experience

Settlement Method	*1968-71[a]* *Fact-finding* *No.*	*Percent*	*1973-74* *Arbitration* *No.*	*Percent*	*July 1974-June 1976* *Arbitration* *No.*	*Percent*
Total Public Safety Negotiations	427	100	320	100	260[b]	100
Settled in Direct Negotiations	300	70[c]	205	64[c]	107	41[c]
Cases Going to Impasse	127	30	115	36	153	59
Settled in Mediation	102	24	79	25	89[d]	34
Settled in Fact-finding[e]	24	6	—	—	—	—
Settled in Arbitration Prior to Award	—	—	n.a.		3	2
Settled by Arbitration Award	—	—	36	11	36[f]	14
Cases Pending	—	—	—	—	2	9

Source: For 1968-74, from James L. Stern, Charles M. Rehmus, J. Joseph Loewenberg, Hirschel Kasper, and Barbara D. Dennis, *Final Offer Arbitration* (Lexington, Mass.: D. C. Heath, 1975), pp. 88 and 90; for 1974-76 from the files of the Wisconsin Employment Relations Commission and supplied by Professor Thomas Kochan, Cornell University.

Notes: [a]1972 data have been omitted because both the fact-finding and arbitration statutes existed in that year; [b]Preliminary estimate of total negotiations. Final figure may be larger; [c]All percent figures are percentages of total negotiations during relevant time period; [d]Includes 35 cases settled by mediation after declaration of impasse, and 54 cases settled by mediation after petition for arbitration and prior to appointment of arbitrator; [e]Prior to 1972, fact-finding was the terminal step for public safety negotiations; in 1972 the fact-finding step was deleted and replaced by arbitration; and [f]This figure will increase if some of the pending cases are resolved by arbitration awards.

an increasing proportion of public safety negotiations taken to impasse over the four year life of that state's final offer with package selection procedure (and compared to the previous fact-finding procedure). In addition, a larger proportion of cases are culminating in arbitration awards during the recent two years than during the first two years, and the proportion of arbitration awards is larger than the proportion of fact-finding reports during the years prior to the passage of the arbitration statute. It is also noteworthy that a majority of the recent cases taken to impasse are settled via mediation.

The Wisconsin data suggest that the parties are learning how to incorporate mediation and arbitration into their bargaining strategies, with the results that third-party intervention is increased. This increased use of the impasse procedure may reflect a more difficult economic environment for bargaining, or it may result from such procedural components as the ability to modify final offers within five days of the arbitration hearing (which means that the "final" final-offer submission deadline comes rather late in the process). Whatever the reasons, the Wisconsin impasse procedure has been receiving proportionately more use over time.

Massachusetts. The available Massachusetts data do not include the total number of public safety negotiations, and therefore it is not possible to compute the proportion of police and fire cases going to impasse or culminating in an arbitration award. However, Table 4 does contain some figures describing the number and disposition of impasses, and it is apparent that under the final-offer with package selection procedure the number (and presumably the proportion) of cases going to impasse increased substantially compared to the final year under the previous fact-finding procedure. In addition, it also is apparent that a smaller proportion of these cases are being settled at the formal mediation step, that a substantial number of cases get settled in fact-finding or in arbitration prior to an award, and that the arbitration award rate (19 percent as an outer limit, with the actual rate probably somewhat less) is consistent with the final-offer award rates in Eugene, Wisconsin, and Michigan.

An analysis of the first year under the Massachusetts procedure tentatively suggests that fact-finding may have diluted the negotiating pressures that the final-offer process seeks to place upon the parties.[10] Since the arbitrator must consider the fact-finder's report as one of the

10. Lawrence T. Holden, Jr., "Final-Offer Arbitration in Massachusetts: One Year Later," *The Arbitration Journal*, Vol. 31, No. 1 (March 1976), pp. 26-35.

TABLE 4
Massachusetts Arbitration Experience

Settlement Method	Fiscal 1974: Fact-finding No.	Percent	Fiscal 1975: Arbitration No.	Percent	Fiscal 1976: Arbitration No.	Percent
Number of Impasses	72	100	131	100	116	100
Settled in Mediation	39	54[a]	45	28[a]	31	27[a]
Settled in Fact-finding Without Report	1	1	38	23	5	4
Settled in Fact-finding With Report	2	3	14	9	1	1
Settled in Arbitration Without Award	—	—	10	6	1	1
Settled by Arbitration Award	—	—	31	19	0	0
Impasses Pending at End of Fiscal Year	30	42	24	15	78	67

Source: Collected from the files of the Massachusetts Board of Conciliation and Arbitration and supplied by Professor Thomas Kochan, Cornell University.

Note: [a]All percent figures are percentages of cases that went to impasse during the relevant time period.

selection case, the parties typically attempt to make their final offers conform closely to what the fact-finder recommended. When used in this manner, the fact-finding step is similar to a conventional arbitration proceeding because the fact-finder is not limited to choosing between the parties' final positions, and the fact-finding results are reviewed at the binding final-offer step. To the extent the parties can anticipate such a review, they can use the fact-finder's report to create their own settlement and thus avoid the risk of an all or nothing selection decision.

One of the more noteworthy features of the Massachusetts' procedure in operation is that many impasses apparently drag on for a very long time. At the close of each fiscal year many cases are carried over to the next year, with the most glaring example being the two-thirds of all 1976 impasses listed as pending at the end of the fiscal year (though some of these cases may have been settled and not reported). This time lag may be attributable to the fact that the "final" final-offer submission deadline arrives very late in the process (at the end of the arbitration hearing), to the arbitration chairman's authority to remand the dispute back to the parties for additional bargaining, and to the time required to complete each of mediation, fact-finding, and arbitration steps. Whatever the reasons, it is ap-

parent that there are very few deadline pressures perceived by the parties in Massachusetts public safety negotiations, and the absence of these time pressures may contribute to the use of the impasse process.[11]

Michigan. In contrast to the above procedures, Michigan's public safety final-offer statute provides for issue-by-issue selection on economic issues (and conventional arbitration on noneconomic issues), and as a result final-offer arbitration in that state has much less of an all or nothing flavor than in other jurisdictions. The total award experience in Michigan seems consistent with the experiences in other jurisdictions, as the award rate is estimated at about 16 percent between early 1973 and early 1976.[12] However, the award rate appears to be increasing over time, for during the first eighteen months under the final-offer procedure the award rate was about ten percent.[13] Further, Table 5 indicates that a rather large number

TABLE 5
Michigan Negotiation-Arbitration Experience

	1973 - March 1975		1973 - June 1976	
	No.	*Percent*	*No.*	*Percent*
Cases Submitted to Arbitration	187	100	296	100
Settled During Arbitration Process	114	61*	147	50*
Awards Issued	37	20	103	35
ending	36	19	46	15

ces: 1973-75 figures from Michigan Employment Relations Commission files supplied by Robert G. Howlett, former MERC Chairman; 1973-76 figures from MERC files supplied by Richard Seryak, MERC Administrative Aide.

Note: *All percent figures are percentages of cases submitted to arbitration during the relevant time period.

11. See Paul C. Somers, *An Evaluation of Final-Offer Arbitration in Massachusetts* (Boston: Massachusetts League of Cities and Towns, 1976) for a management-oriented analysis of the final offer system in the Bay State. Somers concludes, among other things, that the impasse declaration rate has increased under arbitration, that proportionately fewer cases are settled in mediation, that the fact-finding process operates as a *de facto* conventional arbitration step, and that impasses which require an award take a very long time (about a year) to get resolved. He also concludes that the arbitration outcomes unduly favor the unions because they have won twice as many awards as management.
12. This award rate was calculated on the basis of 88 actual awards emerging from an estimated 540 negotiations; Kochan, *et al.*, *op. cit.*, p. 5.
13. Charles M. Rehmus, "Legislated Interest Arbitration," *Proceedings of the Twenty-Seventh Annual Winter Meeting of the Industrial Relations Research Association* (Madison: IRRA, 1975), p. 310.

of all negotiations are submitted to arbitration (i.e., involve a request for the appointment of an arbitrator), and that most of these cases are resolved prior to the issuance of an award. The data do not indicate precisely how this resolution is achieved, but many of these cases are settled through the mediatory efforts of arbitrators.[14] Using the estimate of the total number of negotiations that produced the arbitration award rate (see fn. 11), the Table 5 data indicate that about half of all police and fire cases involve a request for arbitration, and the proportion of these requests has been increasing over time.

Michigan seems to be experiencing the same phenomenon observed in Wisconsin: the parties are increasing their use of the arbitration procedure over time. This increasing use has resulted in a larger proportion of awards and in increased reliance upon the arbitration procedure as a vehicle for continued negotiations. In addition, there appears to be an increasing amount of mediation performed by arbitrators. This increased use of the procedure may result from a more difficult economic environment for bargaining or from procedural reasons: the final-offer submission deadline comes late in the procedure (usually at or after the hearing, subject to the discretion of the arbitration panel), and the arbitration chairman has the authority to remand the dispute back to the parties for additional bargaining. Whatever the reasons, the parties in Michigan are becoming more willing to incorporate the arbitration procedure into their bargaining strategies.

Iowa. The Iowa statute is similar to the Eugene ordinance in that it applies to all employees in the jurisdiction (not just police and fire), and is similar to the Michigan statute in that it provides for issue-by-issue selection. Table 6 describes the 1975-76 Iowa impasse experience. As indicated, most negotiations involved a request for mediation, which is not surprising when considering that in most of these negotiations the parties were bargaining for the first time. Most of the impasses were settled at the mediation step, and relatively small proportions were carried to fact-finding or arbitration. In fact, the seven percent final-offer award rate to date is the lowest rate in all the public jurisdictions surveyed.

The Iowa statute is unusual in the extent to which it expressly permits the parties to negotiate their own impasse resolution procedures. As of March 1976, 141 such independent procedures had been negotiated, and in 63 instances the parties chose to exclude

14. Rehmus, *op. cit.*, p. 315; Stern, *et al.*, pp. 63-65.

TABLE 6
Iowa Negotiation-Arbitration Experience

	1975 - October 1976 No.	Percent
Recorded number of negotiations	372[a]	100
Requests for impasse assistance	305	82[b]
Cases assigned to mediation	255[c]	69[c]
Cases settled in mediation	185	50[c]
Cases assigned to fact-finding	48	13
Cases settled in fact-finding	26	7
Arbitration awards	25	7

Source: Figures from the Iowa Public Employment Relations Board supplied by Professor Richard Pegnetter, University of Iowa.
Notes: [a]372 collective bargaining agreements are recorded with the Iowa PERB; additional contracts may have been negotiated but not recorded; [b]All percent figures are percentages of recorded negotiations; and [c]Discrepancies in these figures are due to the flexibility given the parties to negotiate modifications in the impasse procedure. Many such modifications have been implemented.

fact-finding (while retaining arbitration).[16] As a result, it seems fair to conclude that the early experience in Iowa has involved a heavy use of mediation (in part to educate the parties about bargaining) but a fairly low rate of reliance on fact-finding and arbitration.

Procedural Implications

With the caveat that the arbitration data presented in the preceding section represents a very limited and incompete description of the impasse experiences in those jurisdictions, four conclusions seem warranted. First, the Wisconsin, Massachusetts, and Michigan data suggest that over time there appears to be an increasing reliance by the parties upon their impasse procedures. This same result has been noted under impasse procedures culminating in conventional arbitration[17] and in fact-finding.[18] Thus, the final-offer experiences are similar to the experiences with other impasse procedures in that the parties tend to increase their use of or reliance upon these pro-

15. Iowa Public Employment Relations Board, *IPERB: Iowa Public Employment Relations Bulletin*, Vol. 1, No. 1 (Spring 1976), p. 3.
16. Kochan, *et al.*, *op. cit.*, p. 7; Feuille, *Final Offer Arbitration . . . , op. cit.*, pp. 28-33; John C. Anderson and Thomas A. Kochan, "An Examination of Dual Impasse Procedures in the Federal Public Service of Canada," unpublished manuscript, New York State School of Industrial and Labor Relations, Cornell University, April 1976.
17. David B. Lipsky and John E. Drotning, "The Relations Between Teacher Salaries and the Use of Impasse Procedures Under New York's Taylor Law," paper presented at the 1976 Annual Meeting of the Society of Professionals in Dispute Resolution; New York State Public Employment Relations Board, *PERB News*, Vol. 9, No. 3 (March 1976), p. 1.

cedures over time as they become more familiar with their operation. A second conclusion, however, is that the Eugene and baseball experiences indicate that there is no necessary reason why this increased reliance must occur. Third, the fact that the declaration of impasse rates are much larger than the arbitration award rates indicates that the parties are making increased use of the arbitration procedures as forums for continued negotiations. This result is consistent with the lack of risk associated with using the pre-arbitration impasse steps. Fourth, a substantial portion of these continued negotiations are resolved via the mediatory efforts of arbitrators (with Michigan being the best example).

Using these four conclusions, it is possible to propose a final-offer arbitration procedure that should increase the incentives to negotiate and apply these incentives equally to both sides. In those negotiating situations where a binding outcome is deemed necessary, the incentives to negotiate should be increased under a unified mediation and final-offer arbitration procedure with the same person serving as mediator and arbitrator and with an early last possible moment for final-offer submission. Such a procedure would require the parties to submit (to each other and the impasse agency) their final offers as soon as the impasse is declared. The intervenor, who will be the only person assigned to the impasse, shall attempt to mediate a settlement. If his mediatory efforts fail he shall serve as the final-offer arbitrator and shall make an entire package selection. A crucial requirement is that the selection decision shall be between the two final offers originally submitted and shall not be based on any movement that occurred during mediation. Once the impasse moves to arbitration the arbitrator shall have no authority to remand the dispute back to the parties for additional bargaining. The impasse timetable should be precise and concise (no more than three months from impasse declaration to award) and with the objective of achieving a speedy resolution of all impasses.[18] There would be no other steps in this procedure.

Such a procedure should satisfy two conditions necessary for inducing negotiated settlements. First, it should apply in an even-handed manner to both sides. Second, it should increase the costs attached to the use of the procedure to such an extent that the

18. Bowers' examination of the conventional arbitration experience in Pennsylvania suggests that strict time limits will achieve a faster resolution of impasses than the more open-ended procedures that exist in most states. Mollie Bowers, "A Study of Legislated Arbitration and Collective Bargaining in the Public Safety Services in Michigan and Pennsylvania," unpublished Ph.D. dissertation, Cornell University, 1976, pp. 212-13.

parties will prefer to negotiate their own agreements to a greater extent than is presently happening. This larger proportion of negotiated agreements should result from increases in the costs of remaining in disagreement and from the mediator's increased ability to induce concessions from each side.

Costs of Disagreement. Final-offer arbitration with package selection is premised upon risk: it will be risky to take a negotiating impasse to a third party process in which each side stands a fifty percent chance of being branded a loser. However, most final-offer procedures do not create this risk until reasonably late in the impasse chronology (*i.e.*, during or after the arbitration hearing). In contrast, the procedure proposed here seeks to create a high degree of risk at the moment of impasse declaration. As a result, this procedure should increase each party's perceptions of the costs of remaining in disagreement beyond the impasse declaration point, as compared to the magnitude of such costs in the early stages of most impasse processes, because the parties will not be able to modify or amend their final offers at a later date. In other words, this procedure is riskier because the all or nothing pressures are created at the point of impasse, and hence the parties should have increased incentives to avoid impasses and negotiate their own agreements.

This requirement of an early submission of final offers should pose a meaningful deadline for reaching agreement prior to using the impasse process. As Stevens notes, deadline pressures tend to reduce the amount of bluffing in the negotiations and tend to alter the least favorable terms each side is willing to accept.[19] These pressures are commonly associated with strike deadlines in many private sector negotiations, and several experimental negotiation studies have indicated that deadline pressures increase the likelihood of agreement by reducing bargaining demands, aspirations, and bluffing.[20] The deadline in this final-offer proposal should have a similar kind of impact because it increases the costs of declaring an impasse in a manner that most other final-offer procedures do not.[21]

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19. Carl M. Stevens, *Strategy and Collective Bargaining Negotiation* (New York: McGraw-Hill, 1963), p. 100.

20. For a summary of these studies, see Jeffrey Z. Rubin and Bert R. Brown, *The Social Psychology of Bargaining and Negotiation* (New York: Academic Press, 1975), pp. 120-24.

21. As noted earlier, the Eugene procedure has a very early final-offer submission deadline (five days before the start of the arbitration process), and the offers submitted then are the ones from which the arbitrator will make a selection unless the parties reach agreement on all the disputed items. This requirement may be associated with the effectiveness of that city's procedure in inducing negotiated agreements over time.

Making Concessions. It would be foolish to insist that under such a procedure all bargaining would end in negotiated agreements prior to the point of impasse. Some cases, for a variety of political reasons on both sides of the table, will be taken to impasse, and this procedure should increase substantially the ability of the mediator to induce concessions from the two sides so that they may create their own settlement prior to arbitration.

Assuming that a preference for negotiated agreements exists among both contending parties and the mediator, the primary function of a mediator is to assist the two sides in fashioning their own agreement. Assuming that the parties' preferred positions are in excess of their resistance points (*i.e.*, the union will accept less than it is asking for, management will agree to more than it is offering), the mediator's job is to persuade each negotiator to make enough concessions so that an agreement is possible. Therefore, the most effective mediators and mediation procedures are those which do the best job of inducing enough concessionary behavior from the negotiators that agreements are negotiated.[22] In negotiations, however, each negotiator usually is under the opposing pressures of reaching agreement (which means making concessions) and obtaining the best possible terms for his constituents (which means standing firm on a preferred position, or making no concessions). Hence, each negotiator may be caught between the need to concede in order to reach agreement and the need to be perceived as a tough bargainer in order to induce concessions from the other side to obtain favorable terms.

The mediator's job is to assist negotiators in escaping from this dilemma by simultaneously making it possible for them to concede and protecting them from the negative consequences of concessionary behavior. There are both experimental[23] and operational[24] data which indicate that mediators can be effective in pushing or pulling the parties together. Under most mediation procedures, however, mediators do not have very powerful tools to encourage and reward concessionary behavior and discourage and punish nonconcessionary be-

22. For an excellent conceptual and operational analysis of mediator and mediation effectiveness, see Thomas A. Kochan and Todd Jick, "A Theory and Empirical Examination of the Public Sector Mediation Process," paper presented at the 1976 Annual Meeting of the Society of Professionals in Dispute Resolution, October 1976.
23. Rubin and Brown, *op. cit.*, pp. 54-64.
24. Kochan and Jick, *op. cit.*; Stern, *et al.*, *op. cit.*, pp. 117-26.

havior.[25] Mediators may be very aggressive in pressuring the parties to move together, but if this convergent movement is not forthcoming mediators must eventually withdraw, leaving the dispute unsettled.

A key source of mediator effectiveness is the face-saving role played by the third party. Such a role increases the ability of negotiators to make concessions and then justify these concessions to their constituents as required by the mediator.[26] Under the proposed procedure the mediator can play a much larger face-saving role than under most mediation procedures because of his substantially increased ability to reward concessions and punish nonconcessions. The fact that the mediator will serve as the final-offer arbitrator will enable him to make authoritative suggestions to the parties about unacceptable positions and possible areas of agreement which the parties know he will be in a position to enforce if an award becomes necessary. Further, the parties should be inclined to use these suggestions to fashion their own agreement because of their inability to modify their final offers on a piecemeal basis. As a result, these final-offer mediators should be able to use their authority as potential arbitrators to induce enough concessionary behavior from the parties that negotiated agreements are reached in most impasses.

Shortcomings and Criticisms. There are some potential pitfalls in such a procedure. First, it would be unrealistic to expect that such a process will always produce negotiated agreements, for in some negotiations there may be inescapable political pressures on either side of the table which require a third party settlement. Second, the proportion of cases going to impasse may increase, even if the award rate decreases, as the negotiators attempt to use mediator-arbitrators to induce concessions from the other side. Third, such a process relies very heavily for its successful operation on the skills of individuals who must know how to be effective mediators and arbitrators. In particular, some arbitrators may be unaccustomed and/or unwilling

25. For a very interesting account of how several mediators attempt to fashion agreements, see Kenneth Kressel, Labor Mediation: An Exploratory Survey (Albany, New York: Association of Labor Mediation Agencies, 1971).

26. For a report of an experimental manipulation of this aspect of mediation, see Dean G. Pruitt and Douglas F. Johnson, "Mediation as an Aid to Face Saving in Negotiation," *Journal of Personality and Social Psychology*, Vol. 14, No. 3 (1970), pp. 239-46. More specifically, the mediator can work to protect the negotiator making a concession from "position loss," or the weakening of a negotiating position due to the unwritten rule against withdrawing a concession once it has been made, and from "image loss," or weakening of a negotiator's image for having engaged in yielding behavior. See Dean G. Pruitt, "Indirect Communication and the Search for Agreement in Negotiation," *Journal of Applied Social Psychology*, Vol. 1, No. 3 (1971), pp. 205-39.

to play mediatory roles, and hence may engage in only perfunctory attempts to mediate settlement.

Perhaps the strongest criticism of this proposal will be aimed at the manner in which the proposed procedure may generate "inequitable," "unbalanced," or "low quality" arbitration awards as a result of the early final-offer submission deadline, the inability to modify submitted final offers, and the lack of arbitral remand authority. Two points may be noted in response. First, it is very difficult to objectively define what "inequitable" outcomes are in an adversarial interaction context. Second and more important, the above proposal seeks to increase the parties' negotiating incentives. If this is to be accomplished, the impasse process must be constructed in such a manner that the parties will want to avoid it, and the only feasible way for this to occur is for the parties to perceive that the impasse outcomes will be less desirable than negotiated outcomes. This is the premise upon which the final-offer arbitration concept (and this paper) is constructed, and the proposal outlined above seeks to apply this premise more forcefully (*i.e.*, in a more "strikelike" manner) than is done in most existing final-offer procedures."

Conclusion

The final-offer procedures seem to be doing a reasonably good job of inducing negotiated agreements, either prior to impasse or during the impasse process. However, over time there seems to be a general tendency for the parties to increase their reliance upon the final-offer procedures, either as a forum for continued negotiations or as the source of an imposed settlement. This increased usage may be related to the lack of costs attached to declaring impasse and using the early steps of the impasse procedure. If so, the proposal made here—to implement mediation-final-offer arbitration immediately after the declaration of impasse, with the same person serving as the mediator and arbitrator—should provide a procedural mechanism which encourages the parties to reach their own agreements more quickly and to a greater extent than appears to happen under several of the existing public sector final-offer procedures. This increased incentive to negotiate should happen because of the increased all or nothing risk of declaring an impasse and because of the mediator's increased ability to manipulate the negotiators' willingness to make concessions if an impasse is declared.

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21. For a viewpoint and procedural proposal based on a contrary premise, see Hoyt N. Wheeler, "Closed Offer: An Alternative to Final Offer Selection," *Industrial Relations*, forthcoming.

Eggs That I Have Laid:
Teacher Bargaining Reconsidered

by Myron Lieberman

Once a strong advocate of rights for teacher organizations equal to those possessed by unions in the private sector, Mr. Lieberman has now changed his mind. To compensate for the inherent advantages of public employment, he says, teacher representational rights should be considerably reduced.

In 1962 the first significant collective bargaining contract covering teachers was negotiated in New York City. Since then, collective bargaining in education has developed nationally at an impressive pace. At least 32 states now provide teachers with bargaining rights,* and a growing majority of teachers (60% or more) work pursuant to collective bargaining contracts. Membership in teachers unions has increased enormously; simultaneously, dues therein have been increased, so that the resources available to teachers unions may even exceed $500 million annually. Since 60% to 80% of school budgets are spent for personnel, virtually every aspect of education has been affected by this dramatic shift to collectively bargained terms and conditions of employment.

Since 1962 collective bargaining has sometimes been sold to legislatures and school boards on a "try it, you'll like it" basis. Others simply inherited bargaining as a fixture on the educational scene, just as its absence was taken for granted in an earlier era. Regardless of how it is presented or experienced, however, there is one crucial difference between the present situation and the 1960s. Today we have a wealth of experience in teacher bargaining to guide us. What was advocated or opposed in the 1960s on the basis of logic or intuition or speculation or analogy can be tested today against a body of experience. Today there is no excuse for debating whether or how collective bargaining in education differs from collective bargaining in the private sector. The differences are real and important, and they justify this conclusion: Providing public employees collective bargaining rights similar to those provided private sector employees is undesirable public policy.

In the 1960s the appeal to "equity" was the major public policy justification for teacher bargaining. Without bargaining rights, teachers, like other public employees, are allegedly second-class citizens. Privately employed guards can unionize and strike; publicly employed ones cannot. Bus drivers for a privately owned company can strike; if the same routes were taken over and operated as a public utility, the drivers could not bargain or strike. Similarly, teachers in private schools can organize and bargain; those in public schools cannot.

For the sake of argument, let us agree that teachers ought to have "equity" with private sector employees. To assess the equity argument objectively, however, we must consider all the crucial differences between public and private sector employment, not just the absence of bargaining rights in public education. Among these, perhaps the most important difference is that teachers often play an important role in determining who is management. For example, teacher organizations are frequently active in school board elections. In some situations they have a decisive influence upon who is elected. In contrast, private sector employees have no legal or practical role in selecting management, and it would ordinarily be futile for them to try to do so.

In some jurisdictions at least, the political influence of teachers upon public management has been extremely advantageous to teachers. This influence affects not only what is proposed, accepted, rejected, and modified, but the timing of concessions, the management posture toward grievances, and the extent of management support services for bargaining. Sometimes even the choice of management negotiator is subject to an unofficial but effective teacher veto.

It is easy to underestimate the impact of teacher political influence on teacher employment relations, because typically this influence has to be shared. Often, it is more veto power than "do" power. One should not be misled, however, by the fact that teacher-backed candidates do not always support the teachers — or may even oppose them on occasion. Such situations notwithstanding, the political dimension constitutes significant teacher advantages over private sector employment.

In this connection, teacher opportunities to influence the choice of state officials must also be considered. True enough, private sector employees have equal opportunities to influence or to elect such officials. The point is, however, that state officials seldom affect the context or substance of private sector bargaining. Typically, the governor of a state has no

*See the table on p. 47).

MYRON LIEBERMAN was among the first education theorists with a national audience to advocate collective bargaining for teachers. (See his books, Education as a Profession, 1956; The Future of Public Education, 1960, etc.) He was a candidate for the presidency of the American Federation of Teachers in the early 1960s when the AFT was debating its position on collective bargaining. Lieberman is now president of Educational Employment Services in Beverly Hills, Calif., and organizers for boards of education.

Sections of this article were presented as the AASA Distinguished Educator Lecture on February 20, 1977, in Las Vegas, Nevada; at the University of Calgary Symposium on the Profession, July, 1978; and in an address to the Illinois Association of School Boards Annual Convention, October 27, 1978.

"Every group has the right to use the ballot box to advance its interests; [but] the opportunity is more advantageous to teachers than to private sector employees."

role in collective bargaining for private sector employees. Such bargaining is regulated by the National Labor Relations Board, a federal agency. On the other hand, the governor frequently plays a decisive role in whether there is to be public sector bargaining at all, and if there is, on such matters as the scope of bargaining, the nature of unfair labor practices, the relationship of bargaining to budgetary schedules, the impasse procedures, and the balance of bargaining power between the parties. In addition, governors often play a crucial role in substantive matters subject to bargaining. For example, the governor typically is the most important single individual in the annual aid-to-education controversy. Since states provide nearly half of public school revenues, the gubernatorial role is much more important to teachers than it is to most private sector unions. For teachers, as for other local public employees, the implications are obvious. Political activity at the state level pays the teacher a larger dividend than it does the factory worker or the farmer.

The fact that the National Education Association and the American Federation of Teachers are once again seeking to enact federal legislation providing bargaining rights for state and local public employees in no way negates the foregoing analysis. Obviously, if public employee unions can achieve their goals by one legislative enactment instead of 50, they will do so. As a matter of fact, while they are striving for federal and state bargaining laws, they are also seeking state legislative benefits on matters normally considered subject to bargaining. Every group has the right to use the ballot box to advance its interests; my point is only that the opportunity to do so is more advantageous to teachers than to private sector employees.

The political dimension of public sector employment works to the advantage of teachers in several different ways. For example, there is greater turnover in public sector than in private sector management. More important, private sector management tends to have a greater direct and personal stake in resisting unreasonable union demands. This is particularly apparent with respect to pension and retirement benefits. Public management frequently achieves bargaining agreements by excessively generous pension and retirement benefits. Such concessions may not require any immediate tax increase. Thus the management officials responsible for the agreement can be heroes to the public employees for being generous — and to the public for not raising taxes. Unfortunately, the practice saddles taxpayers with enormously expensive long-range commitments. Significantly, the tendency to "end-load" agreements this way has become evident in local, state, and federal agreements. It is difficult to see the equity in requiring private sector employees to provide retirement benefits for public employees that greatly exceed their own, but that is the present situation.

Another crucial point is that public management has less incentive than private management to resist union demands. If private sector management makes a concession that impairs the long-range profitability of the enterprise, that fact is reflected *immediately* in the value of the company. Thus, unlike public sector management, management in the private sector cannot avoid *immediate* accountability by agreement to excessive deferred benefits. Although these observations are subject to exceptions and qualifications, they reflect a significant teacher advantage over private sector employees.

The major disadvantage of public employees relates to revenue-raising and ratification procedures. Normally, the private sector employer can negotiate an agreement without public or political opposition. When the employer representative signs the agreement, the employer is bound. Raising revenue and ratification by a public agency can be more difficult, and the difficulties may serve as a brake on what management is willing to do. For example, a school board may be unwilling to face the opposition to higher taxes needed for justified increases in teacher compensation.

Nevertheless, even on this issue, teachers have some advantages. The school board's financial situation is known to the union, as is the board's room for maneuver. Indeed, teachers union representatives are sometimes more knowledgeable than school administrators about the district budget. My point is not to advocate secrecy in government, but merely to point out that teachers have an inherent advantage over private sector employees with respect to their information needs concerning employment relations.

Another tactical advantage of teachers is that they have very little, if any, obligation of loyalty to their employer. On the other hand, private sector employees are under some obligation not to damage the employer. In the context of a labor dispute, private sector employees can urge the public not to purchase the employer's product or service, but otherwise their rights to criticize the employer's product or service are limited in ways that do not apply to teachers. Again, I am not advocating restrictions on teacher rights to criticize school boards and administrators. The fact is, however, that teachers enjoy legal rights to criticize their employers that exceed such rights in the private sector. Needless to say, this is an advantage over private sector employment, especially in view of the political dimension of teacher bargaining.

The fact that a public enterprise cannot move physically constitutes still another advantage of public sector employees. Again, although the employer's ability to move varies from industry to industry and within industries, the inability of school boards to relocate as a response to employee pressure is obviously advantageous to teachers. In the private sector, multinational corporations have even resisted unionization successfully by moving certain operations from one country to another. Sometimes the threat of doing so helps to moderate union demands. On the other hand, you cannot move the schools of Tucson to Mexico, for example, or even to the Tucson suburbs, in order to avoid excessive demands by Tucson teachers.

Another major advantage of teachers over private employment is that teachers are entitled to certain rights of due process even in the absence of a collective agreement or statutory protection. For example, where teachers have acquired an expectancy of reemployment, they may not be fired without due process. Note that this protection is grounded in the federal Constitution, not state statutory enactments. *Thus teachers without bargaining rights frequently have more protection against arbitrary and unjust employer action than do private sector employees with bargaining rights.* In fact, teachers sometimes have the benefit of an extensive system of statutory benefits that exceed the benefits negotiated in the private sector. In California teachers and teachers unions have the following benefits, among others, under state law:

1. Strong protection against dismissal or suspension
2. Ten days of sick leave, cumulative without limit

3. Right to due process even as probationary employees

4. Substantial notice before termination

5. Layoff rights

6. Military bereavement, personal necessity, legislative, industrial accident, and illness leave

7. Sweeping protections in evaluation

8. Limits on district authority to reduce benefits

9. Protection against noncertified employees doing teacher work

10. Duty-free lunch periods

11. Right to dues deduction

12. Right to prompt payment of salary

13. Right to notice of school closing

14. Protection from legal actions for action in the course of employment

15. Protection from being upbraided, insulted, or abused in the presence of pupils

16. Limits on the work day and work year

In the private sector, collective bargaining is the means of self-help to these benefits; bargaining rights were not superimposed on them. Providing bargaining rights in addition to this vast complex of statutory benefits is not equity for teachers; it is *more than* equity by a wide margin. In the private sector, employees would presumably have had to make various concessions to get these benefits, if they got them at all. In California, as in many other states, the benefits existed prior to bargaining, and no employee concession was or is required to achieve them. This is an enormous advantage to the teachers.

Theoretically, California could repeal all the statutory benefits just mentioned and the teachers could bargain from ground zero. For this reason, it may be argued that the existence of statutory benefits for teachers does not constitute an inherent advantage of public sector over private sector employees. In fact, however, even the legal possibilities are not so clear. In some states, such as New York, public employee pension benefits may not constitutionally be reduced by the state. Unfortunately, this fact did not seem to lessen the generosity of the legislatures, which must now grapple with the problem of funding public employee pension and retirement benefits that require alarming proportions of state revenues.

According to teachers unions, the most glaring inequity between public and private employment is the fact that in most states teacher strikes are prohibited. If we limit our analysis to the legal right to strike, and ignore the practical difficulties of enforcing penalties for illegal teacher strikes, there appears to be an inequity. Nevertheless, this inequity is more technical than practical, and the typical legislative remedy for it has added to the advantages teachers have over private sector employees.

First, we must recognize that teacher strikes are not an economic weapon for teachers. If they are an economic weapon at all, they favor management. The "loss of production" resulting from a teacher strike is hardly noticeable. Who can say, years or even months after the fact, what difference was made by a few days or weeks of schooling, more or less? From the standpoint of putting economic pressure on the employer, the loss of the right to strike in education is no loss at all. On the other hand, because teacher strikes are political, not economic, weapons, not having the right to strike actually strengthens the political effectiveness of teachers. The public is not aware of the economic ineffectiveness of teacher strikes, while it tends to be sympathetic to the argument that something should be done to help employees who cannot strike.

Because teachers typically don't have the right to strike, state legislation usually prescribes considerable time for bargaining and for impasse procedures. As a result, school management often concedes more than it would in a strike settlement. After all, the longer management is at the table, the more it gives away. The concessions management makes to avoid protracted negotiations and impasse procedures are often much greater than the concessions it would make to avoid or settle a strike.

Legislatures ought to be concerned about the fact that too much time, not too little, is devoted to public employee bargaining. Instead of providing a minimum amount of time for bargaining, legislatures should consider a maximum. Teachers unions could still be amply protected against any lack of time due to inadequate management preparation, e.g., through the mechanism of unfair labor practices.

The emphasis on mediation and fact finding in public education has been very costly to the public for another reason, which is widely ignored. This emphasis has been a significant causal factor in teacher persistence in unreasonable demands. A teachers union that has had to settle or strike, and thereby expose its members to loss of income, will be more reasonable than a union whose options were either to settle or to invoke the statutory impasse procedures.

As long as the alternative to settlement is an impasse procedure, teacher persistence in unreasonable demands is only to be expected. In fact, the very existence of the impasse procedures often strengthens teacher determination to concede as little as possible, lest they weaken their position in the impasse procedure. Thus in remedying a legal inequity whose practical importance is vastly overrated, the legislatures have enacted impasse procedures that are more damaging to effective management than the legalization of teacher strikes would be.

The weakness of the equity argument is dramatically illustrated in cases where a board of education tries to discharge striking teachers after the board has bargained in good faith to impasse. In the private sector the employer has the right to replace strikers under these circumstances; "equity" would appear to justify a similar right for school boards.

"*You'll find* School Board Compliance with Union Contracts *under fiction.*"

"What puzzles me now is not that I was mistaken [on professionalism] but that my position was so obviously a mistake."

Nevertheless, striking teachers have successfully argued that they can be fired only pursuant to the causes and procedures set forth in the tenure laws. These procedures typically require a board hearing for each individual teacher; the practical implications are to make it impossible to fire striking teachers in many districts. We are thus treated to the hypocritical spectacle of teachers unions crying to the public about the inequitable absence of a teacher right to strike, while they urge their members to strike because it is practically impossible to discipline or fire striking teachers.

Let me turn next to the impact of collective bargaining upon pupils. There are at least four positions on this subject:

1. Teacher bargaining is good for pupils.
2. Teacher bargaining is bad for pupils.
3. Teacher bargaining has no visible impact on pupils one way or the other.
4. We don't really know what its impact is, and it wouldn't matter much if we did.

Theoretically, each of the four positions might have been valid at one time. In the 1960s we probably did not know enough to draw valid conclusions about the impact of teacher bargaining. Today, however, this agnosticism is not so defensible.

The proposition that collective bargaining is good for pupils has its origins in politics, not in education. Probably the most important single difference between private and public sector bargaining is the political dimension of the latter. Essentially, it is a contest for public opinion. Whoever can appear to be the defender and supporter of children has an enormous advantage in the struggle for favorable public opinion. For this reason teachers union propaganda is almost invariably couched in terms of pupil welfare.

Such appeals have a certain plausibility, but only because at some points teachers interests appear to coincide with pupil interests. For example, teachers want small classes, and small classes appear to be beneficial to students. Teachers want more preparation time, and who can be opposed to adequately prepared teachers?

Nevertheless, even if these teacher proposals were of demonstrable benefit to pupils — and usually they are not — they would not support the conclusion that teacher bargaining is an overall benefit to pupils. For one thing, we must also look at teacher proposals on issues where teacher interests conflict with pupil interests. For example, at least 10 times a year I have to negotiate on teacher proposals that teachers be dismissed in the afternoon when pupils are. A common variant on this theme is that teachers be dismissed when pupils are on Fridays and days preceding a holiday or vacation. Such proposals are hardly in the best interests of pupils. On the contrary, they are obviously in the interest of teachers to the detriment of pupils, as are many other teacher proposals.

In short, teacher interests sometimes support and sometimes conflict with the interests of pupils. When teacher interests can be made to appear as pupil interests, the teachers union will do its utmost to persuade the community that teachers are primarily interested in pupil welfare. Nevertheless, if teacher bargaining is not harmful to pupils, it is only because school boards do not agree to most teacher proposals at the table.

Actually, teacher proposals frequently generate more public support than they really deserve. To illustrate, consider most teacher proposals to limit class size. A wealth of research clearly invalidates the assumption that there is an invariably positive correlation between smaller classes and student achievement; but let us assume that the correlation exists. Assume also that teachers are successful in achieving limits on class size in negotiations. Nevertheless, it would be fallacious to conclude that bargaining has a beneficial effect upon students, or upon student achievement. After all, the practical issue is not only whether lower class size improves student achievement. It is whether the use of district funds to reduce class size is the most optimum use thereof. Pupils may need textbooks or physical security or a decent meal even more than smaller class size. The fact that such alternatives are typically ignored in negotiations helps to explain why most teacher arguments on the subject are nothing more than rationalizations of positions taken solely because they are in the interests of teachers. In saying this, I do not denigrate teacher self interest or challenge the right to pursue it. My point is that, from the teacher point of view, pupil welfare is a secondary or even tertiary consideration in teacher bargaining.

Realistically and practically, why should it be otherwise? How can it be?

The teachers union is legally and practically the representative of *teachers*. [illegible] did not elect teachers unions to represent *pupils*; *teachers* elected them to advance the interests of *teachers*.

In this connection, the advent of collective bargaining clearly should end the controversy over whether teaching is a "profession." This controversy has been around for a long time, and most educators now consider it a semantic morass. Nevertheless, the issue has been definitely resolved by teacher bargaining — resolved in favor of the proposition that under collective bargaining teaching is not and cannot be a profession in the traditional sense. I say this even though I formerly advocated collective bargaining as a means of professionalization. What puzzles me now is not that I was mistaken but that my position was so obviously a mistake. At any rate, let me describe briefly the intellectual process by which I came to the erroneous conclusion that collective bargaining would be supportive of, or at least consistent with, professionalism.

Over 20 years ago I wrote a book titled *Education as a Profession*. Writing it defined a profession as an occupational group that, among other things, emphasizes the service to be rendered rather than the economic gain to the practitioners as the basis for the organization and performance of the service performed.

I then asked this question: What prevents teachers from achieving professional status as defined above? My answer was this: Teachers cannot achieve professional status because their organizations are weak. Their organizations are weak because they are dominated by employers, i.e., by school management. This domination is used to frustrate association efforts to "professionalize" teaching. Example: Superintendents desperately need teachers, hence their association influence is used to oppose efforts to raise certification standards.

My thought was that, under a system of collective bargaining, management would be excluded from teacher organizations. Such exclusion would enable the organizations to become more vigorous and effective advocates of the higher standards that administrators would not and could not support because of their position as management representatives.

In retrospect, part of the analysis was substantially correct. Collective bargaining brought about the exclusion of school administrators from teacher organizations, and these organizations became much stronger in the process. Unfortunately, another crucial consideration was overlooked. In representing teachers, a teachers union cannot be guided strictly

obeyed primarily by public interest considerations. It must necessarily be guided by the interests of its members — an interest basically adverse to the public interest.

On this issue the case is no different from a client's employment of an attorney. An attorney represents the client, not the public interest. This does not mean that there are no limits or constraints upon the representational function — but all of us expect our attorneys to act in our interests, whether we are suing the government, trying to stay out of jail, or seeking government approval to rezone a building.

Teachers frequently object to the proposition that their organizations are primarily oriented to teacher welfare. Nevertheless, this is not only the fact of the matter but it would probably be dangerous if it were not the case. For example, suppose a district desires to dismiss a teacher for alleged incompetence. If the teachers union were to be the judge instead of the teacher advocate, the teacher would be without effective representation. This would be a most undesirable outcome, since effective representation is so important in our society.

Paradoxically, teacher organizations would lose rather than gain support among *teachers* if their organizations adopted a public interest posture in fact as well as in rhetoric; at a rhetorical level there is no problem, because most teachers believe that what's good for teachers is good for the country. At least, I have yet to hear a teachers union assert that more money for teachers, shorter hours, smaller classes, lighter loads, and more teacher benefits generally are not also in the best interests of the community — and I'm not holding my breath.

Assuming that the previous analysis is substantially correct, what of it? What policies or actions does it suggest? Who should do what?

I am troubled by the foregoing analysis; I am troubled especially by the immense practical difficulties of doing anything constructive about it. Clearly, we cannot go back to the pre-bargaining days. For better or for worse, we have institutionalized collective bargaining or something like it in most states. The personnel and resources available to teachers and other public employee unions virtually insure the continuation of collective bargaining in the public sector. Thus the political influence of public employee unions — the same factor that gives them an undue advantage in bargaining — is also a major deterrent to remedial action at the legislative level.

Furthermore, it is useless to look to higher education for any help in this matter. Many institutions of higher education have departments that are supposed to study and analyze labor legislation. Unfortunately, the professors in these departments frequently moonlight as mediators, arbitrators, conciliators, and fact finders. To avoid jeopardizing their moonlighting roles, they avoid criticism of labor legislation generally, and especially of legislation that encourages and promotes the use of extended impasse procedures and grievance arbitration. On the contrary, they frequently promote such legislation, seeing no problem whatever in finding it in the public interest. The relationship is not necessarily conscious and deliberate. My point is, however, that the philosophy that what's good for General Motors is good for the country lives in these departments, as indeed it does in education generally.

As previously noted, the differences between public and private sector bargaining are not all favorable to public employees. In my opinion, however, most of them are, even though their practical importance varies from state to state. Clearly, the justification for public employee collective bargaining is much stronger in states like Mississippi, which have virtually no statutory benefits, than it is in states like California, which have very substantial statutory benefits. Paradoxically, however, bargaining has emerged first and foremost in the states where it has the least justification and has yet to emerge in many states where its justification is comparatively greater. It must be emphasized, however, that most of the advantages of public employment are ineradicable, regardless of the political jurisdiction involved. Short of disenfranchising public employees, we cannot eliminate their additional leverage on their employer through the political process. Similarly, the rights of public employees to due process are grounded in the federal Constitution, and it is not realistic to anticipate the elimination of these rights through the political process. If, therefore, equity is to be achieved, it must be achieved by adjusting the representational rather than the constitutional rights of public employees. To compensate for the inherent advantages of public employment, such adjustment should provide representational rights that are different from, and significantly less than, private sector bargaining rights. □

The Salary Effects of Unionism and Compulsory Bargaining Laws

Many observers regard public employee unionism and compulsory collective bargaining as necessary elements in achieving equitable pay and labor peace. But figures for the period between 1969-70 and 1975-76 do not support this premise, at least insofar as the teacher sector of public employment is concerned, if we are to accept conclusions reached by the Public Service Research Council of Vienna, Virginia. The council says it is devoted solely to research and education about public sector unionism and its effects. It claims to be independent and nonpartisan.

Teachers in 19 states with no collective bargaining law averaged 40.5% in salary increases, according to the council. (Illinois, with no bargaining law, was omitted because salary statistics were unavailable.) Teachers in 30 states where bargaining is mandated averaged increases of 36.6%. Of the 30 states with bargaining legislation, 16 had average salary changes below the mean figure. Thirteen states were above it. In the states without teacher bargaining laws, 11 were above the mean, seven were below it, and one was average.

States without bargaining laws had "only one-third as many strikes," the council says — an average of 11.7 compared with 36.2 in bargaining law states. Of the 223 strikes that occurred in states without legislation, 144 took place in Ohio, where 472 of 640 school districts bargain in the absence of legislation.

The PSRC reported research that compares the rate of growth in salary and compensation for 37 organized college and university campuses. The conclusion: "It would not appear that initiation of collective bargaining was generally accompanied by more rapid than average growth in salary and compensation."

According to the council, these figures mean that teacher unions, coupled with compulsory bargaining laws, produce more strikes and lower rates of salary increase. The council does not attempt to calculate the cost in social unrest or disruption of education.

The PSRC report has been heavily criticized by public sector unions. Among other weaknesses, it does not consider what would have happened to teacher salaries had no states had bargaining laws and if there were no teacher unions.

A full report of the council study appears in the December 1, 1978, issue of *Educators Negotiating Service*, P.O. Box 6266, Arlington, VA 22206.

SB
130

COMMITTEE REPORT

SENATE

FURTHER: Judiciary

2/2/81

Date: _____

Mr. President:

The Committee on HEALTH, EDUCATION & SOCIAL SERVICES has had SB 130

exemption of religious postsecondary educational institutions from AS 14.48

nder consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[ ] same title

[ ] replace with CS for _____ [ ] new title

and recommends _____

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

CHAIRMAN

S 60 (Rev. 12/78)

by this chapter; however, the commission may promulgate regulations to permit the rendering of legitimate public information services without the permit;

(4) instruct or educate, or offer to instruct or educate, enroll or offer to enroll, contract or offer to contract or award an educational credential, or contract with an institution or person to do so, in or outside the state, unless that person is in compliance with the minimum standards set out in AS 14.48.060, the criteria established by the commission under AS 14.48.050(1), and the regulations promulgated by the commissioner under AS 14.48.050(7);

(5) use the term "university" or "college" without authorization to do so from the commission;

(6) grant, or offer to grant, educational credentials, without authorization to do so from the commission. (§ 1 ch 25 SLA 1976)

Sec. 14.48.030. Exemptions. (a) Institutions exclusively offering instruction at one, some or all levels from preschool through grade 12 are exempt from the provisions of this chapter.

(b) The following educational programs or services and educational institutions are exempt from the provisions of this chapter or portions of them, as determined by the commission:

(1) education sponsored by a bona fide trade, business, labor, professional, or fraternal association or organization, recognized by the commission and conducted solely for that association's or organization's membership, or offered on a no-fee basis;

(2) education solely avocational or recreational in nature and institutions offering avocational or recreational education exclusively;

(3) education offered by charitable organizations, recognized by the commission, if the education is not advertised or promoted as leading toward educational credentials;

(4) nonprofit postsecondary educational institutions offering undergraduate or graduate educational programs conducted in the state, but not by correspondence, which are acceptable for credit toward an associate, bachelor's or graduate degree;

(5) postsecondary educational institutions established, operated, and governed by the United States, a state or its political subdivisions. (§ 1 ch 25 SLA 1976; am § 1 ch 50 SLA 1977)

Effect of amendment. — The 1977 amendment rewrote this section.

Sec. 14.48.040. Commission to administer chapter. The Alaska Commission on Postsecondary Education shall administer this chapter and may hire necessary personnel. The commission may obtain from departments, commissions and other state agencies information and

Senate HESS Committee Substitute

Introduced: 2/2/81
Referred: Health, Education & Social Services and Judiciary

IN THE SENATE

BY COLLETTA AND BRADLEY

SENATE BILL NO. 130

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to exemption of religious postsecondary educational institutions from AS 14.48; and providing for an effective date."

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

* Section 1. AS 14.48.030(b) is amended by adding a new paragraph to read:

~~(6) education offered by a [illegible] religious organization recognized by the commission.~~

* Sec. 2. This Act takes effect immediately in accordance with AS 01.10.-070(c).

(6) education offered by a religious organization and conducted solely for that organization or organization's membership and intended for development and work within the organization and for which an academic degree is not awarded.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

ALASKA COMMISSION ON POSTSECONDARY EDUCATION

POUCH F - STATE OFFICE BUILDING
JUNEAU, ALASKA 99811
(907) 465-2854

Statement on SB 130

Under AS 14.48 institutions offering postsecondary education in Alaska must be authorized to do so. An institution wishing to operate in Alaska must submit an application and undergo a review and visitation. There is also a $100 fee assessed in accordance with AS 14.48.090. The purpose of imposing certain minimum standards is to provide consumer protection for Alaskan postsecondary students.

AS 14.48.030(b) provides that certain institutions are exempt from the provisions of AS 14.48, or portions thereof, as determined by the Commission. There are currently five such exemption classifications and this bill, SB 130, would add a sixth. These would then include:

(1) education sponsored by a bona fide trade, business, labor, professional or fraternal association or organization, recognized by the commission and conducted solely for that association's or organization's membership, or offered on a no-fee basis;

(2) education solely avocational or recreational in nature and institutions offering avocational or recreational education exclusively;

(3) education offered by charitable organizations, recognized by the commission, if the education is not advertised or promoted as leading toward educational credentials;

(4) nonprofit postsecondary educational institutions offering undergraduate or graduate educational programs conducted in the state, but not by correspondence, which are acceptable for credit toward an associate, bachelor's or graduate degree;

(5) postsecondary educational institutions established, operated, and governed by the United States, a state or its political subdivisions;

(6) education offered by a bona fide religious organization recognized by the commission.

Position of Commission

The Commission on Postsecondary Education opposes any attempt to categorically exempt religious postsecondary education institutions from AS 14.48. Such a blanket exemption could lead to the type of abuse which this process was intended to eliminate.

There have been problems in Alaska in the past, and one institution with which problems did occur, was a religious institution. If a blanket exemption had been in effect at the time, credits and degrees would have been offered in Alaska which were felt to be far below our adopted standards.