

ALASKA LEGISLATURE COMMITTEE FILES 1991-1992 8672
7524 SENATE LABOR & COMMERCE

MICHIGAN (cont.)

Occasionally, a school district and a local will bilaterally agree to arbitrate; it has happened five or six times in twenty years in Michigan. However, it is not encouraged by the Michigan Association of School Boards (MASB). The MASB experience with police and fire arbitration is that arbitration stifles true collective bargaining. In the long run, arbitration awards are more costly to the public employer than negotiated agreements. MASB is on record as preferring the legal right to strike over arbitration.

After twenty years of public sector collective bargaining in Michigan, the public has accepted the adversarial process. MASB feels that one area of the law that leads to considerable confusion is that while it is illegal to strike in Michigan, the courts have effectively removed any penalties the employer could impose on striking locals except that of discharging the offending employee.

Because each striking teacher is entitled to an individual hearing, the cost of discharging a striking faculty can run as high as \$20,000 per teacher if the employer wins, so therefore, school districts are motivated to ignore the illegality of the strike and continue to work to get an agreement without taking the costly action of firing faculty.

MASB tends to think that even with the average of 25 teacher strikes per year, the status quo is preferable over fine tuning the law to eliminate strikes primarily for two reasons: (1) much more is involved than fine tuning a law to guarantee teacher satisfaction, high morale, and a good education for the children, and (2) allowing an outside arbitrator to establish wages is contrary to MASB's strong belief in local control of their school districts.

MINNESOTA

There is one comprehensive public employee bargaining law in the State of Minnesota. The statute covers state employees, including employees of the University of Minnesota, state and junior colleges, and school districts, but excluding employees of charitable hospitals. The law allows non-essential employees to strike after certain conditions are met. However, unions that engage in illegal strikes lose representation status and are ineligible for certification and deduction of dues for two years.

ALL PUBLIC EMPLOYEES

Authority: Minnesota Statutes Annotated, Chapter 179A, Section 179A.01 et seq.

Exclusions: Elected officials, election officers; National Guard; emergency, part-time, temporary, or seasonal employees; employees of charitable hospitals; students; confidential employees of the state and University of Minnesota.

Administrative Agencies: Bureau of Mediation Services (BMS); Appeals, Minnesota Public Employment Relations Board (MPERB).

Unit Determination: BMS; may be appealed to MPERB.

Criteria for Unit Determination: Essential and other than essential employees may not be in same unit; all employees under same appointing authority in one unit except when factors require otherwise, such as: employees' classification, compensation, profession, or craft; relevant administrative supervisory levels of authority; geographical location; history and extent of organization; wishes of the parties. State and University of Minnesota units are established by statute. Supervisory employees, confidential employees, school principals, and assistant principals may form own organizations.

Recognition: Exclusive; by election or by verified majority on joint petition.

Bargaining Rights: Duty to bargain; meet and confer with professional employees on policy.

Scope of Bargaining: Grievance procedure, hours, fringe benefits, and terms and conditions of employment; excluding retirement contributions or benefits, employer's personnel policies, educational policies of school district.

Grievance Procedure: Arbitration .

MINNESOTA (cont.)

Employee Rights: To form or join unions; refrain from doing so; present grievances; designate exclusive representative by secret ballot.

Employer Rights: Policy, budget, technology, organizational structure, and selection of personnel; direction and number of personnel.

Union Security: Dues deduction; agency shop permitted; fair share fee limited to no more than 85 percent of dues.

Unfair Labor Practices by Employer: Interfere with, restrain, or coerce employees; dominate unions; discriminate on account of union membership or testimony; refusal to bargain in good faith; blacklist; refusal to comply with grievance procedure; violate rules and regulations of BMS; refusal to comply with arbitration award; violate or refuse to comply with orders of director of BMS or MPERB; refusal to provide budget information to union.

Unfair Labor Practices by Union: Restrain or coerce employees or employer's representative; refusal to bargain in good faith; violate rules and regulations of BMS; refusal to comply with arbitration award; call a jurisdictional strike; damage property or endanger safety of persons while on strike; force or require employer to assign work to certain employees in a particular union; cause or attempt to cause employer to pay for services not performed; engage in unlawful strike; picketing that has unlawful purpose; picketing that unreasonable interferes with access to employer's facilities; seize, occupy, or destroy employer's property; violate or refuse to comply with orders of director of BMS or MPERB; restrain or coerce any person.

Impasse Procedure: Mediation - Either party may petition BMS for mediation or director of BMS may initiate. Arbitration - Mandatory for essential employees in the event the parties are determined to be at impasse by the director of BMS; tripartite panel unless parties agree to single arbitrator; for principals and assistant principals, panel selects final offer on each impasse item; for others, if parties agree, panel selects final offer on each impasse item or final offer of one party by package; award issued within ten days of conclusion of hearing; costs shared equally by the parties.

Criteria for Arbitration Award: Statutory rights of employer to efficiently manage operations.

Strike Policy: Prohibited for confidential, essential, and managerial employees; non-essential employees may strike provided contract has expired, mandatory mediation period has been completed, or, if there is no agreement, impasse has occurred; teachers generally may strike if contract has expired or if there is no contract and impasse has occurred,

MINNESOTA (cont.)

mediation period has been completed, neither party requests interest arbitration or arbitration has been rejected, employer refuses to comply with arbitration award; unions that violate strike ban lose representative status and are ineligible for certification and dues deduction for two years.

Note: All negotiations, mediation sessions, and hearings between employer and union shall be in public except as provided by director of PMS. Contract duration may not exceed three years except for duration of teachers' contracts, which may not exceed two years. Teacher contracts shall not contain wage reopeners or any other provision for renegotiation of compensation.

Between 1971 and 1981 the following statistics were fairly constant. Approximately 435 K-12 units bargained biennially. Approximately 100 (23%) settled voluntarily; approximately 300 (69%) settled in mediation; and approximately 35 (8%) settled in arbitration.

Between 1973 and 1981 there were 14 teacher strikes. In 1981-1982 there were 35 strikes and in 1983-1984 there were eight strikes. The high incidence of strikes in 1981-1982 may be attributed to the fact that teachers were using the amended right to strike clause experimentally. It is doubtful that such incidence will occur again because it proved ineffective.

Bargaining units in Minnesota do not particularly care for arbitration. It's an open process; employees and employers agree on the kind they want before beginning, i.e., conventional, item by item, final offer, etc. Up to the past couple of years, the awards have been slightly lower than average. The past three awards have been outstanding in favor of teachers. On average, however, arbitration has been just OK. All in all, the Minnesota Education Association (MEA) prefers the right to strike to arbitration and, of course, negotiated settlements to either.

A change to PELRA is being considered by the MEA; teachers have the option of choosing binding arbitration if the contract negotiations goes into the second year of bargaining without agreement in sight. There is strong sentiment from both sides that maybe, just maybe, binding arbitration is not a bad thing if employees have gone a year or two without a contract.

The current law is effective and accepted by the bargaining units. The MEA feels that compared with many other states, the Minnesota PELRA is a good law. It has had generous support from both parties. The MEA believes that arbitration will be the law for the foreseeable future because it is seen by many as preferable to the right to strike.

MINNESOTA (cont.)

Case Law

Fair share provision of the Act does not violate the due process clause of the U.S. or state constitutions. Robbinsdale Educ. Ass'n v. Teachers, Local 872, 92 LRRM 2417 [1976] reversing 90 LRRM 2702; affirmed by Threlkeld v. Robbinsdale Educ. Ass'n, 110 LRRM 3067 [1982].

Because terms and conditions of employment and inherent management policy may overlap, a public employer may voluntarily negotiate over these matters. AFSCME Council 96 v. St. Louis County, 106 LRRM 2635 [1980].

Though a transfer is a managerial decision and not bargainable, whether or not the transfer conforms to negotiated transfer criteria is a proper subject of arbitration. Minneapolis Teachers Federation v. School District, 96 LRRM 2706 [1977].

NEVADA

The single public employee bargaining statute in the State of Nevada covers local government employees, including teachers and nurses. The statute carries strong penalties for strikes. Union may be fined \$50,000 per day; union leaders, \$1,000 per day, or they may be imprisoned. Employers may dismiss, suspend, or demote striking employees, cancel a collective bargaining agreement, or withhold wages for the period of a strike.

TEACHERS

Authority: Nevada Revised Statutes, Section 288.010 et seq (1969).

Exclusions: Confidential employees.

Administrative Agency: Local Government Employee-Management Relations Board (EMRB).

Unit Determination: Local government employer; EMRB in cases of dispute.

Criteria for Unit Determination: Community of interest; department heads, administrative employees, and supervisors shall not be in same unit as employees they supervise, may form own unit; police officers may only join unions composed of law enforcement personnel. Principals, assistant principals, or other school administrators below rank of superintendent, associate superintendent, or assistant superintendent shall not be members of same unit with teachers, unless school district employs fewer than five principals, but may join others of same rank in separate unit.

Recognition: Exclusive; by voluntary designation or by election.

Bargaining Rights: Duty to Bargain.

Scope of Bargaining: Salary, wage rates, or other forms of direct monetary compensation; sick leave, vacation leave, holidays, and other paid or nonpaid leaves of absence; insurance benefits; total hours of work required of an employee on each work day or work week; total number of days of work required in a work year; discharge and disciplinary procedures; recognition clause; method used to classify employees in the bargaining unit; deduction of dues for the recognized union; protection of employees in the bargaining unit from discrimination because of participation in recognized unions; no strike provisions; grievance and arbitration procedures for resolution of disputes relating to interpretation or application of collective bargaining agreements; general saving clauses; duration of collective bargaining agreement; safety; teacher preparation time; procedures for reduction in workforce; any provision negotiated and in effect as of 5/15/75.

Employee Rights: To join or refrain from joining any union; present grievance.

NEVADA (cont.)

Employer Rights: Manage operation in most efficient manner consistent with public interest; take necessary actions in cases of emergency; hire, direct, assign, or transfer an employee, but excluding right to assign or transfer as a form of discipline; layoff of any employee because of lack of work or funds, subject to established procedures; determine appropriate staffing levels and work performance standards except for safety consideration; determine content or work day, including, without limit, workload factors, except for safety consideration; determine quality and quantity of services to be offered to public; determine means and methods of offering services; safety of the public.

Unfair Labor Practices by Employer: Interfere with, restrain, or coerce employees; dominate unions; discriminate on account of union membership or testimony; refusal to bargain in good faith, including impasse procedure; discriminate on account of race, color, religion, sex, age, physical or visual handicap, national origin, political or personal reasons or affiliations; failure to provide information requested by union concerning matters to be negotiated.

Unfair Labor Practices by Union: Interfere with, restrain, or coerce employees; refusal to bargain in good faith, including impasse procedure; discriminate on account of race, color, religion, sex, age, physical or visual handicap, national origin, political or personal reasons or affiliations; failure to provide information requested by employer concerning matters to be negotiated.

Impasse Procedure: As first step in negotiations, parties shall discuss procedures to be followed in case of impasse. Mediation - Either party may request mediator after July 1; before July 1, dispute may be submitted to mediator if both parties agree; labor commissioner submits list of mediators if parties cannot agree; mediator tries to help settle disputes by July 10; if dispute goes to factfinding, mediator must report to commissioner by July 15 on efforts to settle dispute; costs shared equally by the parties. Factfinding - If agreement is not reached in mediation by August 1 or if the unit has fewer than 30 employees, either party may request factfinding up to September 20; single factfinder; mediator may also be factfinder; if parties cannot agree on factfinding, either may request seven name list from AAA of FMCS; FMCS used if parties cannot agree on service to use; nonbinding report due within 30 days after end of hearing; costs shared equally by the parties. Binding Factfinding - Parties may agree in advance to be bound by any or all parts of factfinding report; if they do not agree, either party may request three member panel to determine if any or all of factfinder's recommendations are binding; panel makes determination based on public interest, fiscal effect, and public safety.

Criteria for Binding Factfinding Award: Ability to pay must be established first, then normal standards used in interest disputes are applied.

NEVADA (cont.)

Strike Policy: Prohibited; strikes may be enjoined; union may be fined \$50,000 per day, its leaders may be fined \$1,000 per day or jailed; employer may dismiss, suspend, or demote strikers, cancel collective bargaining agreement, or withhold wages for period of strike.

Note: An employee-management advisory committee has been created consisting of three designees of unions and three designees of local government employers. Duties include; interviewing applicants and submitting an agreed upon list of applicants to governor for positions on EMRB; advising EMRB; filing a report with legislature regarding procedures in statute and recommending desirable legislation.

The monetary provisions of most of Nevada's 17 school districts are negotiated annually. Occasionally a two year agreement is reached; however, that is not the norm. As of August 27, 1986, there is only one district which may arbitrate for the 1986-1987 contract year. Two other districts have not settled; it is expected that they will settle without outside assistance.

Last best offer is not mandated for schools, thus arbitration, when utilized, is conventional. Most local governments in Nevada are not enthusiastic about their experiences with arbitrators' decision. They feel the list of arbitrators available tends generally to be labor oriented and, since the persons available are almost without exception non-Nevadans, their decisions are all the more suspect. There is a general feeling that arbitrators' decisions erode the management and decision making duties of elected local officials.

Nevada law prohibits strikes of public employees. There have not been any strikes since the law was enacted. Generally, the Nevada State School Boards Association (NSSBA) feels that most educators agree that strikes would be disruptive to the education process, thus arbitration may be the better alternative. Many local government officials, including educators, have expressed to legislative committees that perhaps a right to strike provision might have a beneficial effect on the process because a strike would bring home to the public the true impacts of public employee collective bargaining.

The NSSBA feels that the provisions dealing with the list of items identifying the scope of mandatory bargaining is one of the critical areas for consideration. There has not been a legislative session when bills have not been considered to add to or to delete from the list. Some of the items, for example "safety of the employee", are subject to interpretation and cause undue problems in negotiating sessions. Collective bargaining laws are now accepted but not with a great degree of enthusiasm. The bargaining process results in many confrontations, posturing on both sides and time commitments which might be more well spent elsewhere. Without a decent alternative available both sides must continue to negotiate these conflicts. The process is effective, but is not without problems.

NEVADA (cont.)

The Nevada Education Association (NEA) believes that automatic binding arbitration is preferable to the right to strike for several reasons; first, because services continue to be rendered, and second, because 20 percent of the employees reside in smaller counties, a strike may be ineffective. The employee, no matter where he/she resides, has the same rights. A strike in a county of 10,000 people will not have the same impact as a strike in a county with 100,000 people.

Generally, the NEA believes that arbitrators' awards have been fair. Forty-two contracts have been negotiated in the past three years. Only two contracts have been resolved through arbitration. In each case the NEA's position was compromised.

NEA's position on interest arbitration is that last best offer is preferable to conventional. It forces the negotiating parties to get together and work out their differences. Arbitrators do not particularly care for last best offer and often end up playing mediator. One side always loses in last best offer, so generally, contracts can be settled before impasse is reached.

NEW JERSEY

One employee bargaining statute in the State of New Jersey extends collective bargaining rights to public as well as private employees. The law permits bargaining over grievance procedures and terms and conditions of employment but excludes standards of employee performance. A separate law provides for arbitration of contract disputes for police and fire fighters.

PUBLIC, PRIVATE EMPLOYEES

Authority: New Jersey Statutes Annotated, Title 34, Section 34:13A-1 et seq (1968) as last amended July 30, 1982.

Exclusions: Elected officials; members of boards and commissions, managerial executives; confidential employees.

Administrative Agency: Public Employment Relations Commission (PERC).

Unit Determination: PERC in cases of dispute.

Criteria for Unit Determination: Community of interest; professionals cannot be in a unit of non-professionals except by election; appropriate unit of employees; separate supervisory units.

Recognition: Exclusive; by voluntary designation or by election.

Bargaining Rights: Duty to bargain.

Scope of Bargaining: Grievances; disciplinary disputes, and terms and conditions of employment.

Grievance Procedure: Mandatory in all agreements; arbitration permitted.

Union Security: Dues deduction mandatory; agency shop permitted; fair share fee limited to no more than 85 percent of dues; must provide for a procedure for rebate upon demand of any employee of pro rata share for activities or causes only incidentally related to terms and conditions of employment.

Unfair Labor Practices by Employer: Interfere with, restrain, or coerce employees; dominate unions; discriminate on account of union membership or testimony; refusal to bargain or to process grievances in good faith; refusal to reduce agreement to writing and to sign it; violate PERC rules and regulations.

Unfair Labor Practices by Union: Interfere with, restrain, or coerce employees or employer's representatives; refusal to bargain in good faith; refusal to reduce agreement to writing and to sign it; violate PERC rules and regulations; discriminate on account of union membership or testimony.

NEW JERSEY (cont.)

Impasse Procedure: Mediation - Request of either party; costs borne by PERC. Factfinding - PERC may initiate or recommend; single neutral or tripartite panel; costs borne by parties except for police and fire fighters which are borne by PERC. Arbitration - Voluntary interest ARBITRATION upon mutual consent.

Strike Policy: No Specific Provision; strikes by police and fire fighters prohibited.

Note: Between 1975 and 1978, the New Jersey Public Employment Relations Commission (PERC), in numerous decisions, interpreted the Employee-Employer Relations Act to find that school boards and teacher unions could negotiate over permissive subjects, i.e., matters that were not terms and conditions of employment, and were not precluded from negotiations by statute.

The vast majority of districts (97%) have multi-year bargaining contracts which means that every school district does not negotiate every year. On an average, approximately half (45-50%) of New Jersey's school districts negotiate new agreements in any given year.

A little over half of the school districts settle their negotiations without reaching impasse (54% for the 1985-1986 school year). Thirty-six percent of the school districts settled their contracts during mediation; ten percent reported that they utilized both mediation and factfinding before reaching settlement.

Compulsory interest arbitration does not exist for school district negotiations impasses. While school boards and unions may mutually agree to submit their impasse dispute to an interest arbitrator, it very rarely occurs.

There were 64 teacher strikes in New Jersey between 1979 and 1986 which resulted in an average loss of 4.8 school days per strike.

Case Law

Public employees do not have right to strike by inference. Board of Educ. v. New Jersey Education Ass'n, 69 LRRM 2870 [1947].

PENNSYLVANIA

There are three public employee bargaining laws in the State of Pennsylvania. One statute covers state, county, and municipal employees in general and grants the right to strike after mediation and factfinding. Police and fire fighters are covered by a second statute that provides for compulsory arbitration of bargaining disputes. A third statute covers municipal employees.

PUBLIC EMPLOYEES IN GENERAL

Authority: Act 195, Section 101 et seq (1970).

Exclusions: Police and fire fighters; elected or appointed officials; managerial or confidential employees; clergy or employees of church offices.

Administrative Agency: Pennsylvania Labor Relations Board (PLRB).
Pennsylvania Bureau of Mediation (PBM).

Unit Determination: PLRB.

Criteria for Unit Determination: Community of interest; avoidance of over fragmentation; majority of professionals must vote for inclusion in non-professional units; prison and mental hospital guards, court employees, and security guards must form their own units; security guards may not affiliate with unions representing other job classifications; statewide units for statewide bargaining; supervisors must form own units.

Recognition: Exclusive; by voluntary designation or by election.

Bargaining Rights: Duty to bargain; meet and discuss for supervisors.

Scope of Bargaining: Wages, hours, and other terms and conditions of employment; meet and discuss on the impact of decisions made on issues within management rights.

Grievance Procedure: Arbitration required.

Employer Rights: Functions and programs of employer; standards of service; budget; technology; direct personnel and organizational structure; hire or discharge employees for just cause.

Employee Rights: To organize, form, join, or assist unions; engage in lawful concerted activities; refrain from doing so; present grievances.

Union Security: Maintenance of membership permitted.

PENNSYLVANIA (cont.)

Unfair Labor Practices by Employer: Interfere with, restrain or coerce employees; dominate unions; discriminate on account of union membership or testimony; refusal to bargain in good faith, including grievance processing; refusal to reduce agreement to writing and to sign it; violate PLRB rules and regulations regarding conduct of representation elections; refusal to implement arbitration award; refusal to meet and discuss.

Unfair Labor Practices by Union: Restrain or coerce employees or employer's representative; refusal to bargain in good faith; violate PLRB rules and regulations regarding conduct of representation elections; refusal to reduce agreement to writing and to sign it; strike or boycott for jurisdictional reasons; secondary boycott; refusal to implement arbitration award; refusal to meet and discuss.

Impasse Procedure: Mediation - If no agreement is reached within 21 days of negotiations or 150 prior to budget submission date, PBM must be called in; if no agreement after 20 days or 130 days prior to budget submission date, PBM notifies PLRB. Factfinding - PLRB may name a single or tripartite panel; report due within 40 days of PBM notice to PLRB; state pays one half the cost, parties each pay one fourth. Arbitration - Voluntary; tripartite panel; PLRB pays for neutral, parties pay for their own representative.

Strike Policy: May strike after mediation and factfinding; employer may seek injunction where there is a clear and present danger to public health, safety, and welfare; employee may not be paid for period of strike; court may punish violation of injunction with fines and imprisonment; employees other than those on strike who refuse to cross picket lines are deemed to be engaged in prohibited strike; ULP is not a defense to an illegal strike.

Note: The Pennsylvania State Education Association (PSEA) records an average of from 225 to 230 locals which bargain each year. Of these, the vast majority are settled either during the mediation process or subsequent to factfinding.

PSEA, and most public employee bargaining agents, feel that Act 195 is, has been, and will continue to be effective. The evidence of such acceptance can be seen in the fact that the law has withstood several attempts at modification ranging from amendment to time limits through abolition.

Generally, PSEA feels that the Act works well and needs little or no improvement. The areas that work exceptionally well are mediation and strike. The areas that work less exceptionally well are factfinding and voluntary binding arbitration. There are those organizations and individuals which feel the Act would be improved by providing for mandatory binding arbitration. PSEA has no official position espousing amending the Act to include binding arbitration. However, PSEA's position on the topic is that if the legislature amends the Act to impose harsher penalties upon bargaining agents for utilizing strikes, then the Act should be amended to provide for binding arbitration.

PENNSYLVANIA (Cont.)

The Pennsylvania School Boards Association (PSBA) feels the area that has caused the greatest amount of controversy has been the conflict between the collective bargaining law and existing school law. Pennsylvania has led the nation in strikes, both in number and in length, and this is partly the result of the conflict mentioned. Teachers in Pennsylvania can strike for 35-45 days and not lose any money because of a school code law that requires the scheduling of 180 student days. This is one example of some of the troubling problems experienced through Pennsylvania collective bargaining.

WISCONSIN

There are three public employee bargaining laws in the State of Wisconsin. One statute covers state employees, while the second law extends bargaining rights to municipal employees, including teachers. A third statute provides for arbitration of disputes concerning policemen and fire fighters.

TEACHERS

Authority: Wisconsin Statutes Annotated, Chapter 111, Section 111.70 et seq (1959) as last amended effective 1986.

Exclusions: Independent contractors; supervisors; confidential, managerial, or executive employees.

Administrative Agency: Wisconsin Employment Relations Commission (WERC).

Unit Determination: WERC.

Criteria for Unit Determination: Avoid fragmentation; separate units for professionals and non-professionals unless majority of professional employees vote for inclusion in non-professional unit; separate units from craft and non-craft employees unless majority of craft employees vote for inclusion; desires of employees.

Recognition: Exclusive; by election.

Bargaining Rights: Duty to bargain.

Scope of Bargaining: Wages, hours, and conditions of employment.

Grievance Procedure: Arbitration permitted.

Employee Rights: To organize, form, join, or assist unions; bargain; engage in lawful concerted activities; present grievances; refrain from doing so.

Union Security: Dues deduction mandatory; agency shop permitted; rescinded if less than majority of unit supports continuation in an election or if union refuses membership on basis of race, color, creed, or sex.

Unfair Labor Practices by Employer: Interfere with, restrain, or coerce employees; dominate unions; refusal to bargain; violate any collective bargaining agreement; deduct dues without authorization; discriminate on basis of membership in a union.

WISCONSIN (cont.)

Unfair Labor Practices by Union: Coerce or intimidate employees; coerce, intimidate, or induce employer to commit an unfair labor practice; refusal to bargain; violate any collective bargaining agreement; coerce or intimidate an independent contractor, supervisor, confidential, managerial, or executive employee to join union.

Impasse Procedure: Mediation - WERC or designee. Factfinding. Voluntary Impasse Resolution - Permissive subject of bargaining; may provide for strike by municipal employees; may provide for binding interest arbitration; Arbitration - Available upon reaching deadlock and if mediation and voluntary impasse resolution procedure, if any, have been exhausted; at request of either party or jointly; final offer; costs shared equally by parties.

Criteria for Arbitration Award: Lawful authority of the employer; stipulations, if any, of the parties; interest and welfare of the public; ability of employer to meet costs of award; comparison of wages, hours and conditions of employment of other private/public employees in comparable communities; cost of living; changes in circumstances during pendency of proceeding; other factors usually considered in wage and benefit determinations.

Strike Policy: Limited right to strike. Strike may be enjoined.

Note: Presentation of initial proposals along with supporting rationale shall be open to public; contract duration may not exceed three years.

Wisconsin was the first state to permit municipal employees (elementary and secondary public school teachers included under this definition) to organize and negotiate collectively under the Municipal Employment Relations Act (Wisconsin Statutes Section 111.70 to 111.77). Under the original provisions of the act, strikes were prohibited and bargaining impasses were resolved through mediation and non-binding factfinding by a neutral third party.

Chapter 178, Laws of 1977, established a new method of resolving bargaining impasses for most municipal employees. Under this act, the neutral third party was granted authority to resolve the bargaining impasse through binding arbitration if voluntary methods of settlement proved ineffective.

The 1985 Wisconsin Legislature enacted 1985 Wisconsin Act 318 which revised the dispute settlement procedures in collective bargaining units of local government employees by separating the binding and non-binding impasse resolution procedures under the law. It repealed the arbitrator's statutory duty to mediate disputes before proceeding to final and binding arbitration. This act also eliminates the sunset expiration date of July 1, 1991.

WISCONSIN (cont.)

Wisconsin Act 318 was the final product of the efforts of the Legislative Council's Special Committee on the Municipal Collective Bargaining Law, which had been appointed by the Legislative Council on May 4, 1984, to study the municipal employment mediation-arbitration law and to determine its effect on collective bargaining and local government employment. During the time period that this committee met, the staff prepared numerous background memoranda and reports. Following is a list of these reports. They may be obtained by contacting directly the address shown on the publication listing.

Legislation to grant University of Wisconsin System faculty and academic staff authorization to bargain collectively was considered in the current legislative session. 1985 Assembly Bill 229, which had been passed by both houses of the Legislature in slightly different forms, failed final passage because the Assembly did not consider a Senate amendment during the last hours of the final floor period. If Assembly Bill 229 had been enacted, more than 7,330 employees would have been able to form unions and bargain collectively with the Department of Employment Relations on wages, benefits and conditions of employment.

The law in its current format was adopted following a very long and bitter teachers strike. Strikes by municipal employees prior to 1978 were quite prevalent in all the different sectors, but the teachers strike in Hortonville was the catalyst for bringing municipal employees under the collective bargaining statute.

The following statistics apply to all municipal employees in Wisconsin from 1978 through 1983. The total number of contracts negotiated was 5,520. 2,983 (54%) were settled voluntarily prior to impasse; 2,113 (39%) were settled after impasse and before arbitration; and 424 (7%) were settled in arbitration.

Between 1971 and 1977 there were 90 teacher strikes in the state of Wisconsin. There have been no strikes since the implementation of arbitration in 1978. There are 432 school districts that bargain annually or biennially; the majority are bargained biennially.

From the standpoint of the Wisconsin Education Association the law has been very successful in providing labor peace. The absence of strikes has definitely been a benefit in helping to improve labor/management relationships within the public sector. There are some who would like to go back to the strike as the final alternative to bargaining. The State Legislature has reaffirmed the statute with only one dissenting vote in each chamber which clearly shows a preference to sound public policy that is fair to all.

DISTRICT OF COLUMBIA

There is one public employee bargaining statute in the District of Columbia. Covering all employees of the city government, the law includes provisions for bargaining over compensation and terms and conditions of employment.

PUBLIC EMPLOYEES

Authority: District of Columbia Code Annotated, Title 1, Chapter 6, Section 1-601.1 to 1-637.2.

Exclusions: Chief judges, associate judges, and nonjudicial personnel of the Superior Court and Court of Appeals; supervisors, management officials, or employees whose participation in a union would result in conflict of interest.

Administrative Agency: Public Employee Relations Board (PERB).
Office of Employee Appeals (OEA).

Unit Determination: PERB.

Criteria for Unit Determination: Community of interest; promotion of effective labor relations; efficiency of agency operations; skills, working conditions, common supervision, physical location, organizational structure, distinctiveness of functions performed, and existence of integrated work process; extent of organization; supervisors must be in separate units except with respect to fire fighters; no unit shall include confidential employees, employees engaged in personnel work other than in a clerical capacity, employees engaged in administering statute, and employees of the city council; professionals must vote for inclusion in nonprofessional unit; two or more units for which union holds exclusive recognition within agency may be consolidated into one larger unit.

Recognition: Exclusive; by voluntary designation or by election.

Bargaining Rights: Duty to bargain.

Scope of Bargaining: Compensation, union security, and terms and conditions of employment. Compensation includes salary, wages, health benefits, within-grade increases, overtime, education pay, shift differentials, premium pay, hours, and other compensation matters.

Grievance Procedure: Arbitration permitted.

Employee Rights: To organize, join, or assist unions; bargain collectively; refrain from doing so; present grievances.

DISTRICT OF COLUMBIA (Cont.)

Employer Rights: Direct employees; hire, promote, transfer, assign, and retain employees; suspend, demote, discharge, or take other disciplinary action against employees for just cause; relieve employees from duties because of lack of work; maintain efficiency; determine mission of agency, budget, number of employees; types and grades of positions of employees assigned to organization unit; determine technology of work and internal security practices; take whatever actions may be necessary to carry out mission in emergencies.

Union Security: Dues deduction mandatory; agency shop permitted.

Unfair Labor Practices by Employer: Interfere with, restrain, or coerce employees; dominate unions; discriminate on account of union membership or testimony; refusal to bargain in good faith.

Unfair Labor Practices by Union: Interfere with, restrain, or coerce employees; cause or attempt to cause management to coerce employees; refusal to bargain in good faith; participate in a strike or work stoppage; recognition strikes or secondary boycott.

Impasse Procedure (Compensation): Mediation - Any party may request and PERB may impose anytime if at impasse, after 180 days of bargaining, or 90 days before expiration of contract. Costs borne by moving party or shared by mutual request. Factfinding - Permitted by statute; costs borne by moving party or shared by mutual request. Arbitration - Any party may request after 30 days or less of mediation; final offer by package; award due within 20 days; costs shared equally by the parties.

Impasse Procedure (Terms and Conditions): May be invoked by either party or on application of PERB; PERB may impose procedures of its choice.

Criteria for Procedure: Existing laws, rules, and regulations; ability of city to comply with award; public safety, health and welfare; need to maintain fair, reasonable, and consistent personnel policies.

Strike Policy: Prohibited; union may be decertified.

Note: Impasse resolution machinery includes, but is not limited to (1) mediation, (2) factfinding, (3) advisory arbitration, (4) request for injunction, (5) binding arbitration, (6) final best offer binding arbitration, and (7) final best offer binding arbitration item by item on noncompensation matters. Bargaining sessions shall not be open to the public; factfinding proceedings shall be open to the public; no compensation agreement can be negotiated for fewer than three years.

The District of Columbia Board of Education, in the absence of prohibiting legislation, elected to recognize unions (and in this case it was the teachers' union) for purposes of collective bargaining as early as 1967.

DISTRICT OF COLUMBIA (Cont.)

Before the passage of the Comprehensive Merit Personnel Act (CMPA), the District of Columbia Board of Education (DCBE) experienced at least four teacher work stoppages. Since the passage of the CMPA, there have been no strikes. The CMPA provides for final and binding arbitration by a Board of Arbitration. A reasonable assumption, therefore, could be that final and binding arbitration by an impartial board of arbitrators is a deterrent to strike action and is regarded by the unions as a viable alternative to strike action. However, the school administration, while it recognizes the benefits of third party proceedings in the resolution of protracted interest arbitration, rejects the idea of relinquishing its policy making authority to an outside party.

To date, DCBE has been subject to one issue arbitration award - in compensation negotiations with the union representing their principals and supervisors - and this was in the Board's favor.

The DCBE did not support final and binding arbitration when the bill was being drafted and would like to see the law amended accordingly. They believe that policy making should be reserved to the employer or agency even if it means that they would have to deal with the threat of illegal strikes.

By law the DCBE is required to negotiate three year compensation agreements. The District of Columbia has three contracts covering educational employees: 12 month teachers; 9 month teachers; and 12 month school officers. Negotiations with these units vary. For example, negotiations with the teachers' union concluded five months after the expiration of the then current agreement, while negotiations with the officers' union are the subject of judicial proceeding. The most recent agreement with the teachers was negotiated, although six earlier negotiations resulted in a fair sprinkling of both negotiated and mediated settlements as well as factfinding recommendations. In the case of school officers, they did go to final and binding arbitration, and the award, favorable to the Board of Education, is being challenged in court by the school officers' union.

The DCBE has found that the collective bargaining law has facilitated the process by providing a structural framework which stipulates time lines for completing the various stages of the negotiation procedure. They have found that the mandated Personnel Salary and Benefits Committee has not been effective because of the lack of resources to collect compensation data in effect at the onset of negotiations. They have found that the CMPA provisions requiring separate impasse procedures for compensation and noncompensation items have been most cumbersome and, as a result, are in the process of recommending one impasse procedure for all unresolved items.

DISTRICT OF COLUMBIA (Cont.)

The District of Columbia Office of Labor Relations and Collective Bargaining is proposing to amend the provisions of the District of Columbia Merit Personnel Act to prohibit managers (i.e., authority to hire, transfer, suspend, promote, discharge, etc.) from the right to organize for collective bargaining purposes. They DCBE supports this proposed amendment unqualifiedly as it is contrary to the public interest to have principals in an educational setting functioning in an adversarial role. The DCBE does not support the concept of final and binding arbitration in interest arbitration. At the most, they would recommend advisory arbitration.

JAN 14 1992

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



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MEMORANDUM

TO: Members of the Legislature

FROM: Randy S. Welker *Randy*
Legislative Auditor

DATE: January 10, 1992

RE: Release of Audits

In accordance with AS 24.20.311, the following audit reports were approved for release by the Legislative Budget and Audit Committee to the Legislature and the public on December 2, 1991.

10/44 Impact of the Public Employment Relations Act on Local School Districts, November 8, 1991.

Department of Commerce and Economic Development, Department of Public Safety, Big Game Commercial Services Board, Consistency of Disciplinary Penalties, October 1, 1991.

Department of Revenue, Permanent Fund Dividend Division, Relocation of the Dividend Review Unit, November 21, 1991.

Enclosed for your convenience is a short digest covering the audits listed. Should you desire copies of the completed reports, they are available through our office (465-3830).

Enclosures

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member

ALASKA STATE LEGISLATURE

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

Division of Legislative Audit



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November 21, 1991

SUMMARY OF: A Report on the Impact of the Public Employment Relations Act on Local School Districts, November 8, 1991.

PURPOSE OF THE REPORT

In accordance with a Legislative Budget and Audit Committee special request and the provisions of Title 24 of the Alaska Statutes, we conducted a review of the effects of Senate Bill 15, Chapter 180, SLA 1990 on the State's local school districts. This legislation made public school employees subject to the provisions of the Public Employment Relations Act (PERA), AS 23.40, Article 2. Public school employees were classified as (a)(3) workers. Under PERA, class (a)(3) employees are given the legal right to strike; whereas, previously when public school employees were covered by Title 14, the Alaska Supreme Court determined that they had no legal right to strike.

REPORT CONCLUSIONS

Our review evaluated the impact of PERA on a variety of aspects of labor relations between public school employees and the State's 54 school districts. Our report conclusions are based on the information that was gathered through interviews with education organization groups, school district administrators, and members of local unions representing both certificated and noncertificated staff. We also relied on the results of a questionnaire we mailed to 51 school districts. We had a response from 38 or 75% of districts polled.

In summary, we conclude the following:

1. The length of time involved in negotiations has generally remained unchanged.
2. Legal service costs at the district level generally have not been affected.
3. Use of professional negotiators has remained about the same.

4. The major difference involving PERA are the issues being negotiated. With the passage of PERA, there is a lot of uncertainty on the part of both administrators and unions about what can be negotiated in collective bargaining.

The National Education Association of Alaska (NEA-Ak) say that they have no plan to push for reconsideration of the issues dealt with by the courts under Title 14. However, individual local unions told us that they were raising previously non-negotiable items in their contract talks. These reports were substantiated by school districts in their survey responses. The most commonly addressed previously non-negotiable item being discussed is class size.

5. The role of the Alaska Labor Relations Agency (ALRA) has not been as timely and has been less extensive than originally envisioned. ALRA has had lesser of a role than anticipated with education-related issues due primarily to two factors. One, the agency's current organization was formed only nine days after the effective date of Chapter 180, SLA 1990. Two, with a change in administrations, there was a change in the make-up of the board which contributed to further adjudicatory delays.
6. ALRA has received favorable comments for its advisory role and mediation function. In spite of the frustration over delays in issuing decisions on unfair labor practices (ULPs), there have been many positive comments about ALRA. Union members and school district administrators who have contacted ALRA report that there is a considerable body of knowledge about labor relations at the agency. They have found ALRA to be a reliable, unbiased source of information. The comment was also frequently made that despite the length of delay at ALRA, it is still a faster alternative than going to court to get a decision. It is significant to note that ULPs can be, and are being, filed by school districts almost as often as by unions.
7. ALRA's 15 education cases involve union certifications, regulations, and ULPs. The report contains a table summarizing ALRA's 15 education related cases.

FINDINGS AND RECOMMENDATIONS

1. Public school employees should remain under the provisions of the Public Employment Relations Act (PERA), classified as (a)(3) employees.
2. * If certificated public school employees remain subject to the provisions of PERA, the legislature should consider adopting legislation to clarify what issues are negotiable.

Audit Report

**IMPACT OF THE
PUBLIC EMPLOYMENT RELATIONS ACT
ON LOCAL SCHOOL DISTRICTS**

November 8, 1991



Audit Control Number:

05-4419-92

Division of Legislative Audit

P.O. Box W, Juneau, Alaska 99811-3300

LEGISLATIVE BUDGET AND AUDIT COMMITTEE

DIVISION OF LEGISLATIVE AUDIT

The Legislative Budget and Audit Committee is a permanent interim committee of the Alaska Legislature. The bipartisan committee is made up of five senators and five representatives, with one alternate from each legislative chamber. The chairmanship of the committee alternates between the two chambers every legislature.

The committee is responsible for providing the legislature with audits of state government agencies. The programs and activities of state government now cost more than \$4 billion a year. As legislators and administrators try increasingly to allocate state revenues effectively and make government work more efficiently, they need information to evaluate the work of governmental agencies. The audit work performed by the Division of Legislative Audit helps provide that information.

As a guide to all their work, the Division of Legislative Audit complies with generally accepted auditing standards established by the American Institute of Certified Public Accountants and with government auditing standards established by the U.S. General Accounting Office.

Audits are performed at the direction of the Legislative Budget and Audit Committee. Individual legislators or committees can submit requests for audits of specific programs or agencies to the committee for consideration. Copies of all completed audits are available from the Division of Legislative Audit's offices in either Anchorage or Juneau.

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ALASKA STATE LEGISLATURE

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November 22, 1991

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Title 24 of the Alaska Statutes, the attached report is submitted for your review.

A Report on the Impact of the Public Employment Relations Act on Local School Districts

November 8, 1991

Audit Control Number

(05-4419-92)

The audit reports on the impact that Chapter 180, SLA 1990 has had on labor relations between school employees and the State's local school districts. This legislation made public school employees subject to the provisions of the Public Employment Relations Act (PERA), AS 23.40, Article 2. The legislation also classified public school employees as (a)(3) workers under AS 23.40.200 which gave the school employees the legal right to strike. This was a right that they had previously not been granted.

The audit was conducted in accordance with generally accepted government auditing standards. We recommend in the report that legislation be passed that will continue to classify public school employees as (a)(3) employees under AS 23.40.200 and that they continue to be subject to the other provisions of PERA. We also recommend that the legislature consider passing legislation to clearly establish what items are negotiable between school district administrators and their employees. A further statement of our audit approach is included in the Objectives, Scope, and Methodology section of this report.

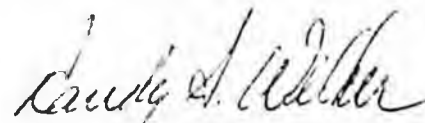

Randy S. Welker, CPA
Legislative Auditor

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OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with a Legislative Budget and Audit Committee special request and the provisions of Title 24 of the Alaska Statutes, we conducted a review of the effects of Chapter 180, SLA 1990 (Senate Bill 15) on the State's local school districts. This legislation made public school employees subject to the provisions of the Public Employment Relations Act (PERA), AS 23.40, Article 2. Public school employees were classified as (a)(3) workers. Under PERA, class (a)(3) employees are given the legal right to strike; whereas, previously when public school employees were covered by Title 14, the Alaska Supreme Court determined that they had no legal right to strike.

Objectives

The objective of the review was to gain an understanding of the effects of Chapter 180, SLA 1990 on labor relations between public school employees and their respective school districts. Specific objectives of the review were to:

1. Determine how the legislation affected the length of time needed to reach a negotiated settlement compared to negotiations conducted under Title 14.
2. Determine if there has been an increase in the costs of attorneys or other legal costs attributable to negotiations under PERA.
3. Determine whether under PERA there has been an increased cost to school districts attributable to contract negotiations.
4. Compare the settlement process between school districts and employees under Title 14 with PERA.
5. Assess the involvement of the Alaska Labor Relations Agency (ALRA) with public school employees and school districts.
6. Review and report on the number and content of Unfair Labor Practice (ULP) filings submitted to ALRA.
7. Report on the effect of PERA classification on the general attitudes of both labor and management towards each other during the negotiations process.

Scope

We focused our examination of education employee labor relations on the 54 school districts established in the State of Alaska. In our review, we placed additional emphasis on larger districts that have negotiated agreements or are currently negotiating under the provisions of PERA.

Methodology

Our evaluation of the effects of Chapter 180, SLA 1990 involved review and analysis of the following documents:

1. Alaska Statute 14.20, Article 6. Negotiation and Mediation.
2. Alaska Statute 23.40, Article 2. Public Employment Relations Act.
3. Information pertaining to 1989's Senate Bill 15 which eventually was passed as Chapter 180, SLA 1990, an act "Including, for two years, public school employees in the Public Employment Relations Act as class (a)(3) employees entitled to a right to strike; requiring advisory arbitration before public school employees exercise the right to strike; and providing for an effective date."
4. Information pertaining to 1988's House Bill 170 which eventually was passed as Chapter 95, SLA 1988, an act "Extending collective bargaining rights to noncertificated school district employees."
5. The Alaska Supreme Court decision regarding *Kenai Peninsula Borough School District v. Kenai Peninsula Education Association*, 572 P.2d 416 (Alaska 1977).
6. The Alaska Supreme Court decision regarding *Anchorage Education Association v. Anchorage School District*, 648 P.2d 993 (Alaska 1982).
7. Executive Order No. 77.
8. ALRA's 1990 Annual Report.
9. ALRA's ULP Case Management File.
10. ALRA's ULP Case Status Report.
11. Public Case Files at ALRA on filed education cases.

We also relied extensively on interviews with the following groups of individuals:

1. Organizations with an interest in education matters, which included the Alaska Association of School Boards (AASB), the Alaska Council of School Administrators (ACSA), and the National Education Association (NEA).
2. School district administrators, which included superintendents, personnel directors, and labor relations directors.

3. Presidents and members of negotiating teams for local teachers' unions.
4. Presidents and members of negotiating teams for local education support personnel unions.
5. ALRA's hearing examiner/administrator.

We prepared a questionnaire regarding the effects of placing public school employees under the provisions of PERA, which was mailed out to the presidents of local NEA-affiliated unions.

We also prepared a questionnaire regarding the effects of placing teachers under the provisions of PERA, which was mailed to the superintendents of 51 of the State's school districts. Because the questionnaire was designed based on their discussions, we did not mail the questionnaire to the superintendents of the three school districts we had interviewed in the survey phase of our audit work.

ORGANIZATION AND FUNCTION

Title 14 of the Alaska Statutes sets out the duties and organization of the Department of Education. The statutes establish a seven-member State Board of Education appointed by the Governor, which sets the policy for education in Alaska's public schools. The State Board appoints the Commissioner of the Department of Education to implement and carry out its policy decisions.

There are 471 public schools administered by 54 school districts in Alaska. The school districts include 21 Regional Education Attendance Areas (REAs) and 33 City and Boroughs. The REAs are created in politically unorganized areas in rural Alaska and the city and borough school districts serve politically-organized areas of the State.

Alaska education highly emphasizes the importance of local control. Each school district has a locally elected school board that works within the state guidelines to set policies for their respective districts. In 1990, there were about 108,000 students attending public school between preschool and twelfth grade. These students were taught by about 6,400 public school teachers.

Teachers and other school personnel were placed under Title 14 eighteen years apart

Certificated public school employees were given the right to bargain matters pertaining to their employment and the fulfillment of their professional duties in 1970. Chapter 18, SLA 1970 codified laws relating to school district labor relations under AS 14.20, Article 6 (commonly referred to as Title 14). Noncertificated public school employees were given the right to bargain matters of wages, hours, and other terms and conditions of employment in 1988 (Chapter 95, SLA 1988) when AS 14.20, Article 6 was amended.

In 1990 (Chapter 180, SLA 1990) public school employees were placed, for a two-year period, under the provisions of the Public Employment Relations Act (PERA) as class (a)(3) employees. An important aspect of labor relations under PERA is the role of the Alaska Labor Relations Agency (ALRA).

ALRA acts as referee and adjudicator for public employee labor relations

The present organization of ALRA was created on July 1, 1990 after the governor issued and the legislature approved Executive Order 77. The order consolidated three separate agencies into ALRA responsible for administering PERA and the Railroad Corporation Act. ALRA is composed of a board of three members who serve staggered three-year terms. The governor appoints and the legislature confirms the board members. No more than two board members may be from a single political party and all must have backgrounds in labor relations. One member is drawn from management, one from labor, and one from the general public.

ALRA employs a small staff of hearing officers and examiners to process and review various allegations and petitions within its jurisdiction. Perhaps the most visible aspect of ALRA's responsibilities is its resolution and adjudication of unfair labor practices (ULP).

The ALRA's process for resolving ULPs is as follows:

1. Preliminary review of allegation. The party filing a charge lays the issue out to a hearing officer/investigator. The hearing officer fills out a checklist to determine that all requirements for a charge have been met. Requirements include that the charge is sworn, that there are written addresses for the parties to the charge, and that the charge is dated. The hearing officer has 14 days to conduct an investigation, but in actuality it has been taking longer than 14 days.
2. Determination of jurisdiction. If the facts alleged appear to be true, then ALRA must decide if it has jurisdiction to hear the case. If it is determined that ALRA has jurisdiction, the facts of the charge are again examined prior to contacting witnesses on both sides. The hearing officer then forwards the case to the hearing examiner with a recommendation to dismiss or hear the case.
3. Informal Mediation or Resolution. If it is decided to hear the case, the hearing examiner attempts to bring the two parties together to have them conciliate the issues that separate them.
4. Hearing is held. If conciliation is not possible, then a hearing is held. An audio tape and written testimony is kept of each hearing. The case may be heard either by the ALRA's hearing examiner or the ALRA board may choose to hear the case as a board. When the board chooses to not be present at the hearing, the hearing examiner prepares a proposed decision for the board. When comments are received back from each board member and an agreement is reached on the wording of the decision, it becomes final. The final decision is written and is appealable in court.

BACKGROUND INFORMATION

1970 legislation first defined labor rights for teachers

In 1970, the terms and conditions by which teachers could collectively bargain were first established by the legislature in AS 14.20, Article 6. The statute sets out the negotiation and mediation processes to be followed for teachers (called certificated employees). Specifically, AS 14.20.550 requires that

Each city, borough and regional school board, shall negotiate with its certificated employees in good faith on matters pertaining to their employment and the fulfillment of their professional duties.

AS 14.20, Article 6 also set out procedures for school boards to follow in recognizing organizations to bargain on behalf of teachers (the statute refers to these organizations as bargaining agencies).

Noncertificated public school employees joined teachers in obtaining the right to bargain conditions of their employment in 1988, with the passage of Chapter 95, SLA 1988. This legislation amended AS 14.20, Article 6 to include noncertificated public school employees. Noncertificated employees were allowed to bargain matters of wages, hours, and other terms and conditions of employment.

Title 14 sets out procedure for union recognition and certification

The statutes required school boards to conduct secret ballot elections to select union representation for teachers. The school boards had to hold an election if 25% of the district's teachers so requested. After such an election, the statute required school boards to recognize the union with the most votes.

A Short Glossary of Terms Used in This Report

Advisory arbitration: An independent third party is called in to help settle a collective bargaining deadlock. After hearing both sides of the dispute, the arbitrator issues an advisory decision. Although the decision is not binding on either of the two sides, it often brings a realistic perspective to the negotiations.

Binding arbitration: As in advisory arbitration, a third party hears both sides, but then renders a decision that is binding on both parties.

Mediation: Involves third party intervention between conflicting parties. However, a mediator acts more informally than an arbitrator, often serving as a go-between for the two sides in order to promote reconciliation or compromise.

Deadlock: Point at which negotiations between two parties reaches a standstill. Often a mediator is brought in at this point to help the two sides to continue communicating and to mutually resolve differences.

Impasse: Point at which negotiations have broken down to the point that neither side to a dispute will concede on their issues. Impasse exists after a mediator and an advisory arbitrator have tried to resolve issues.

After recognition, school boards were required to negotiate within 20 days after receiving a written request from the union. Negotiation meetings were required to be open to the public unless both sides mutually agreed to have the meetings closed.

1970 legislation also provided for mediation then arbitration

The statute required mediation, in a prescribed manner, of labor negotiations if and when the two sides reached a deadlock. The United States Federal Mediation and Conciliation Service would serve as the agency to resolve the dispute. The mediator would chair the mediation meetings and attempt to resolve the differences between the two sides. The mediator would prepare a written report, which would be issued to both sides. If either side rejected the report in its entirety, the mediator could make changes and prepare a final report. If either side rejected that final report, the governor could appoint an advisory arbitrator to hear the issues.

The statute also required that negotiated agreements provide for a grievance procedure. When setting up a grievance procedure, the statute required that binding arbitration be used as the final procedural step. The statute did maintain that it was not designed to abrogate school boards' rights to have final decision-making authority on policy.

1972 legislation sets out public employee labor relations rights

Two years after teachers were given the right to bargain, public employees had their rights codified in AS 23.40, Article 2. The legislation, referred to as the Public Employment Relations Act (PERA), established three classes of public employees and gave specific bargaining rights to each class.

Class (a)(1) employees include police and fire protection employees and were designated as workers whose services cannot be suspended for any length of time. Class (a)(1) employees are not allowed to strike. However, if impasse is reached in negotiations even after mediation, then the bargaining parties must submit to binding arbitration.

Class (a)(2) employees, which include public school employees other than teachers or noncertificated employees, and public utility employees, were designated as workers whose services could be suspended for short intervals. Class (a)(2) employees are allowed to engage in a strike after unsuccessful mediation. But if either the employer or the State's labor relations agency can prove that the strike threatens health, safety, or the public welfare, they can apply for a court order to stop the strike. If the impasse continues after the suspended strike, the parties must submit to binding arbitration.

Class (a)(3) employees are those employees not specifically included in the two previous groups. Class (a)(3) employees are allowed to engage in a strike if a majority of the bargaining unit votes to do so by secret ballot.

PERA rights differ significantly from Title 14 provisions

The rights conveyed to employees covered by PERA differed significantly from rights conveyed to certificated public school employees in Title 14. These rights, as listed below, differ in areas ranging from union selection to mandatory payment of dues:

1. The selection of unions (or bargaining agencies) - A major difference between PERA and Title 14 is in the area of union certification. PERA involves the Alaska Labor Relations Agency (ALRA) in selecting and certifying union representation rather than local school boards. If there is a request for union representation; ALRA, not the school board, conducts an election by secret ballot.
2. Mediation - Another difference is the process of mediation. Under PERA, when labor and management negotiating teams reach a deadlock, they can mutually select a mediator or request that ALRA appoint a mediator. The mediator tries to work with the two parties to resolve any open issues.
3. Unfair Labor Practices (ULPs) - PERA also conveys additional rights that were not mentioned in Title 14. One right under PERA is that neither the public employer or public employees may engage in ULPs. PERA defines what constitutes a ULP and assigns ALRA with the responsibility of investigating and adjudicating ULP charges. ALRA can try to help resolve ULP issues between the two parties informally or can go through a formal hearing process in accordance with the Administrative Procedures Act. ALRA has the power to issue and serve orders to stop prohibited practices or to apply for an injunction from superior court. In order to reach its decision on ULPs, ALRA has the power to subpoena witnesses. ALRA can dismiss unfounded ULP allegations.
4. Dues deduction - PERA also conveys the right to employees to bargain for an agency shop and to have union dues deducted from employees' payroll and conveyed to the representative union.

PERA was not automatically made applicable to all employers. Under the 1972 legislation, political subdivisions were allowed to "opt out" of PERA and substitute their own labor relations provisions. Some subdivisions, most notably the Municipality of Anchorage, opted out of PERA.

Judicial decisions further define public school employees' rights

The requirements and application of Title 14 were further defined by two Alaska Supreme Court decisions. The first decision was in the case of the *Kenai Peninsula Borough School District v. Kenai Peninsula Education Association*, 572 P.2d 416 (Alaska 1977), commonly referred to as "Kenai '77" (see inset on page 11). In its decision, the court established what items were negotiable and what issues were non-negotiable in the collective bargaining process between teachers and school districts.

In the second case, *Anchorage Education Association v. Anchorage School District*, 648 P.2d 993 (Alaska 1982), referred to as the "Anchorage Strike Case" (see inset at right), the court ruled that teachers did not have the right to strike. These two court cases helped provide interpretation and guidance on items that had not been specifically addressed by the 1970 legislation.

Employees resent imposed contracts

Prior to 1990, public school employees were growing increasingly frustrated with their inability to bring closure or "finality" to the bargaining process. Under Title 14 and the accompanying court decisions, school districts had the right to impose a contract when collective bargaining impasse was reached. Public school employees had no formal means to respond to a contract imposition since they did not have a legal right to strike.

Despite not having the right to strike, teachers have been effective in using informal means to get imposed contracts lifted and have both sides return to the negotiations.

Informal means used by teachers have consisted of picketing their school district, filibustering school board meetings, taking votes to have an illegal strike, and working to their contract. When certificated staff work to their contract, they put in exactly their workday hours, but no more. This means that papers may not be graded and extracurricular activities for students may be curtailed. While effective, the informal means were long and drawn out and led to increasingly poor relations between the staff and school district.

ALASKA SUPREME COURT RULES TEACHERS HAVE NO RIGHT TO STRIKE

In 1979, school teachers in Anchorage went on strike. When they had not completed contract negotiations that year by the first day of school, they decided to walk out of classes. The strike lasted five days until the state superior court issued a temporary restraining order halting the walkout. The teachers then appealed the restraining order.

In the case, *Anchorage Education Association v. Anchorage School District*, 648 P.2d 993 (Alaska 1982) the supreme court ruled that the teachers did not have the legal right to strike. The court held that PERA did not pertain to teachers, even though AS 23.40.200 (d) lists public school employees as falling under its provisions.

The courts ruled that the statute referred to public school employees other than teachers, such as principals and counselors. The courts held that if the legislature had wanted PERA and its strike provisions to apply to teachers, it would have specifically so stated.

The decision went on to say, "No court has held that the common law permits public employees to legally strike in the absence of explicit statutory consent." Another reason cited by the court for their decision was the absence of an established oversight agency for the teachers, under the provisions of Title 14, which the court observed has historically contributed to the fairness of strikes.

Although the court admitted that teachers were not being treated the same as other public employees who were covered by PERA, it added that, *unequal treatment is permissible if it is substantially related to the legitimate purposes of the legislation.* The court observed in making its ruling that apparently the legislature felt Title 14 adequately provided cooperative labor relations for teachers.

KENAI '77 CASE DEFINES NEGOTIABLE ITEMS

In the mid 1970s, the Kenai School district filed suit against the local teachers union. The district sought a ruling from the courts regarding what items were negotiable and what items fell within the district's powers and responsibilities to make final decisions on policies. The school board claimed that while employment-related issues were subject to bargaining, items that affected educational policy should not be subject to bargaining. The union contended that district policy was a proper subject for collective bargaining.

In ruling on the case in 1977 [Kenai Peninsula Borough School District v. Kenai Peninsula Education Association, 572 P.2d 416 (Alaska 1977)], the Alaska Supreme Court observed that under the general law concerning bargaining between labor unions and private employers, the "scope of negotiable issues is broad." However, the court said that when the public employment sector is concerned, "and particularly education, the question of what is properly bargainable is thrown into more doubt." The courts expressed concern that the autonomy of school boards could be gradually eroded by the collective bargaining process over time.

In deciding the case, the Alaska Supreme Court quoted a passage from an United States Supreme Court decision that stated,

Whether a teachers' union is concerned with salaries and fringe benefits, teacher qualifications and in-house training, pupil-teacher ratios, length of schoolday, student discipline, or the content of the high school curriculum, its objective is to bring school board policy and decisions into harmony with its own views.

The court held that while school boards are required to negotiate in good faith, school boards are not required or permitted to delegate decision-making to unions. The court stated, "a matter is more susceptible to bargaining the more it deals with the economic interests of employees and the less it concerns professional goals and methods."

While observing that it would be helpful if the legislature would provide more specific guidance on what items may be negotiated (see Recommendation No. 2 in this report), the court made a decision of what collective bargaining items are negotiable and which are non-negotiable.

The court then went on to list more than 30 items that could be bargained by the union and then listed nine items that it felt were nonnegotiable policy items:

- 1) relief from non-professional chores,
- 2) class size and teacher load,
- 3) an Ombudsman for teachers,
- 4) evaluation of administrators,
- 5) use and number of Teacher Aides,
- 6) use and number of Para-Professionals,
- 7) pupil to teacher Ratio Formula,
- 8) use of specialists, and
- 9) the school year calendar.

Binding arbitration considered one method of achieving finality

Public school employees lobbied the legislature for a number of years to have a formal means to bring finality to their contract negotiations. The method preferred by the

employees was binding arbitration (see glossary on page 7 for definition of binding arbitration).

School district administrators and school boards adamantly opposed binding arbitration. Administrators are opposed to binding arbitration because they felt it contributes to escalating personnel costs in other states where it is used. Administrators have also found that in many instances where they have gone to advisory arbitration, they have been the losers in the financial decision, suggesting they would fare no better if the arbitrator's rulings became binding.

Currently many school districts feel that they are constrained in what they can pay to employees because revenues are limited under the State's school foundation program. The legislature, to some extent, has recognized the validity of this viewpoint. In 1991, they provided 15 single-site school districts a total of \$2,131,200 to supplement funding the districts under the foundation program.

School districts who have a taxing authority have found taxpayers unwilling to support additional property or sales taxes. While funding has not increased in recent years, costs for school districts have been rising. Some of the costs are uncontrollable, particularly rapidly increasing costs of the Teacher's Retirement System. School districts are concerned that if their employees have binding arbitration as the means to finality, salaries and benefits will be set at amounts that are impossible to fund.

1989's Senate Bill 15 attempts to resolve finality issue

In this background of public school employee frustration with the provisions of Title 14 and school district concerns about binding arbitration, Senate Bill 15 was introduced in January 1989. The original version of the bill made substantial changes to Title 14. It included giving the ALRA oversight responsibilities for union elections and a provision of "last-best-offer" mediated arbitration that would be binding on both parties. The bill was altered substantially as it moved through the Senate. The revisions continued as the bill moved from the Senate to the House for consideration. In one committee version of the bill, public school employees were placed under the provisions of PERA as class (a)(2) employees with a limited right to strike followed by binding arbitration.

To avoid having binding arbitration imposed, two organizations that represent school boards and school administrators, the Alaska Association of School Boards and the Alaska Council of School Administrators, respectively, agreed to drop their opposition to the bill. Their agreement was predicated on the bill containing a right to strike [or (a)(3) PERA status] for teachers and other school personnel rather than binding arbitration [(a)(1) or (a)(2) PERA status].

These two organizations and the National Education Association-Alaska (NEA-Ak), representing teachers and other school employees, reached an agreement on a bill that would classify public school employees under PERA as class (a)(3) employees. Such classification

would give them the right to strike. The House Finance Committee version of the bill reflected the agreement reached between the three interested organizations. However, the bill was changed when it reached the House Rules Committee.

House Rules Committee add a repeal date clause

The House Rules Committee passed out legislation that would make the reclassification of school district employees under PERA effective for only two years. At the end of the two-year period, the employees would again be subject to the provisions of Title 14 unless the legislature acted to extend their coverage under PERA. There was expressed intent for the two years to serve as a trial period. One representative stated that he viewed the "legislation as an experiment in finality in collective bargaining," and that he "hoped it would put a stop to the charges and counter charges seen on both sides of this issue." SB 15, as passed out of the House Rules Committee, placed public school employees under PERA as class (a)(3) workers for a two-year period.

SB 15 was then revised again on the floor of the House. An amendment, characterized as a "technical amendment" prohibited school districts from opting out of the bill. The amendment addressed concerns that since the original passage of PERA in 1972 allowed political subdivisions to "opt-out," school boards might argue that they should be entitled to the same option. The amendment was intended to clarify the intent of the legislature that the law would apply to all school districts. Senate Bill 15 as passed by the House and Senate, was signed into law by the Governor with an effective date of June 22, 1990.

REPORT CONCLUSIONS

The Legislative Budget and Audit Committee directed that we review and report on the impact of the Public Employment Relations Act (PERA) on various aspects of labor relations between public school employees and the State's 54 school districts. We based our report conclusions on the information that we gathered through interviews with education organization groups, school district administrators and members of local unions representing both certificated and noncertificated staff. We also relied on the results of a questionnaire we mailed to 51 school districts. We received a response from 38 or 75% of districts polled.

Length of time involved in negotiations has generally remained unchanged

There has been no significant consistent change in the length of time it takes to negotiate a contract under the provisions of PERA compared to Title 14. The issues being negotiated and the amount of available funding have more of an impact on the time spent bargaining than does the process used. Eighteen school districts responding to our survey reported that the length of time to negotiate a contract remained the same under PERA as it had under Title 14. Eleven districts reported that they either had not negotiated under PERA and therefore had no basis to form an opinion or that they simply had no opinion. Eight respondents felt that the length of time had increased while one respondent felt that the length of time had decreased.

Union members generally reported that the length of time to negotiate a contract had not changed much under PERA, but they felt that the productivity of negotiation meetings had been greatly enhanced. They attributed this change to the presence of the unfair labor practice (ULP) process which kept both union and management aware of the need to bargain honestly and in good faith.

Legal service costs at the district level generally not affected

Local unions reported that they have not experienced an increase in legal costs, while 27 (71%) of school districts also report no increase in legal costs. Local unions typically have not hired attorneys to either negotiate on their behalf or to act in legal disputes. Instead, any local union which is a party to an ULP charge or court case is assessed \$10.00 for each local member and the state branch of the union pays the balance of the legal cost. The National Education Association (NEA), which represents most education employees in Alaska, report that they have had only a minimal increase in legal costs due to ULPs.

We found a total of \$245,000 had been spent by school districts on legal costs in response to PERA; \$120,000 paid by Alaska Association of School Boards (AASB) and \$125,000 paid by individual school districts. AASB stated that they had just hired a \$120,000 labor relations attorney to assist their member school boards in labor matters. Among the 11 (29%) school district respondents who reported an increase in legal costs, eight reported the increase was due to negotiations and six reported the increase was due to preparations for

a ULP. We contacted the three school districts who had gone all the way to the hearing process with a ULP. One school district indicated they had hired their own in-house attorney in response to a ULP. They have budgeted \$100,000 for that position. The second school district would not offer an exact estimate but said the amount was immaterial. The third school district stated they had spent about \$9,000 in preparation for a ULP. In addition to school districts who had legal costs as a result of a ULP, another school district stated they had paid \$16,000 for an attorney-prepared presentation for their school board and in preparation of upcoming negotiations.

The Alaska Labor Relations Agency (ALRA) also has costs that are attributable to the time they spend investigating and hearing ULP charges. Since they do not have a system to keep track of the time spent on each case, we chose to allocate ALRA's FY 91 expenditures based on the number of education-related cases handled compared to the total number of cases filed with the agency. Based on this method, ALRA has spent an estimated \$35,000 to investigate and hear education ULP cases.

Use of professional negotiators has remained about the same

We did not find any increase in costs to school districts attributable to hiring a professional contract negotiator. Of the 38 school districts responding to our survey, 8 (21%) hire either a consultant or an attorney to negotiate on their behalf. Of those, three had not yet negotiated a contract under PERA, and one reported that their negotiation costs remained the same. Of the remaining four who use a hired consultant or attorney, one had already reported an increase in costs under the legal services previously discussed. The other three districts reported no increase in their negotiator's fees.

We found no school district which had decided to use a hired negotiator when it had not used one previously, as a result of being placed under the provisions of PERA. Since there has been no significant change in the length of time it takes to negotiate a contract under PERA, it seems reasonable that the costs to negotiate those contracts would not alter significantly. Also, many negotiators receive a fixed fee for their services irrespective of the length of time it takes to reach settlement or the results of the settlement.

The major difference with PERA are the issues being negotiated

The major difference in negotiations and contract settlement under PERA is the nature of the issues being negotiated. With the passage of PERA, there is a lot of uncertainty on the part of both administrators and unions about what can be negotiated in collective bargaining. Both parties are unsure if the items listed as non-negotiable in the Kenai '77 court decision still apply.

Some feel that the court case is now void since it pertained to Title 14. The National Education Association of Alaska (NEA-Ak) say that they have no plan to push for reconsideration of the issues dealt with in the Kenai '77 decision. However, individual local unions told us that they were raising previously non-negotiable items in their contract talks.

These reports were substantiated by six school districts which in their survey response related that previously non-negotiable items were being raised during bargaining. The most commonly addressed non-negotiable item being discussed is class size. Currently, ALRA is considering the negotiability of a specific issue whose status is unclear.

According to information provided by NEA-Ak, 31 negotiated contracts have been settled under the provisions of PERA. This total includes contracts for both certificated staff and support staff. Nine additional contracts are currently being negotiated and ten districts have not negotiated under the provisions of PERA. As of this time under PERA, there has been no contracts imposed on unions by the school districts nor have there been any union strikes against the school districts. Of the 37 school districts who responded to our questionnaire, only 3 (8%) said that they had gone as far as advisory arbitration to reach contract settlement.

Only 5 (13%) of our school district respondents felt they had conceded more in negotiations under PERA than they would have conceded under Title 14. When we contacted those school districts, we found that the concessions were in the way of contract language and the union classification of employees rather than of a direct financial nature.

When polled, only one school district said that being under PERA was an improvement over being under Title 14. The one district that preferred PERA thought the law provided more clearly defined ground rules for labor relations. There were 31 (82%) school districts who felt that being under PERA was a disadvantage because of increased bureaucracy. They also did not like the potential for ULPs and strikes.

ALRA role has involved delay and has been less extensive than originally envisioned

While ALRA has had some involvement in school district labor relations, the amount of contact has been less than what was originally anticipated by the ALRA hearing examiner. The hearing examiner said that while she had expected up to 50% of ALRA cases to involve education issues, in actuality, less than 25% of ALRA's cases have been education-related.

According to ALRA's administrative hearing examiner, the small percentage of education cases can be attributed to two factors. One factor is that not every school district has negotiated a contract under PERA; therefore, ALRA has had jurisdiction over only some of the State's 54 school districts. A second factor is that both education unions and school districts are just learning about PERA and how ALRA is available to answer questions and hear issues.

There has been some frustration expressed by the education unions and school district administrators over the length of time involved in the ALRA hearing process. Two of the education cases that have advanced to the hearing process have taken as long as eight months to one year for a decision from the ALRA board.

ALRA EDUCATION-RELATED CASES AND ISSUES			
Type of Action	Date of Filing	Parties to Case	Status as of 10/7/91
Unfair Labor Practice	7/20/90	<i>Konai Peninsula Borough School District v. Kenai Peninsula Educational Support Association</i>	Closed
Unfair Labor Practice	7/25/90	<i>Lower Kuskokwim Education Association v. Lower Kuskokwim School District</i>	Closed
Unfair Labor Practice	7/25/90	<i>Classified Employees Association v. Matanuska-Susitna Borough School District</i>	Closed
Unfair Labor Practice	7/27/90	<i>Yukon Flats School District v. Yukon Flats Education Association</i>	Open
Unfair Labor Practice	8/14/90	<i>Kenai Peninsula Education Association v. Kenai Peninsula Borough School District</i>	Closed
Unfair Labor Practice	8/20/90	<i>Anchorage Education Association/NEA-Alaska v. Anchorage School District</i>	Suspended
Unfair Labor Practice	11/26/90	<i>Kashunamiut School District v. Chevak Education Association</i>	Dismissed
Unfair Labor Practice	2/25/91	<i>Mid-Kuskokwim Education Association v. Kuspuq School District</i>	Open
Unit Clarification	4/16/91	<i>Classified Employees Association/NEA-Alaska v. Matanuska-Susitna Borough School District</i>	Closed
Amended Clarification	5/2/91	<i>Matanuska Susitna Education Association and Matanuska Susitna Nurses Association Merger</i>	Requires Posting
Representation Petition	5/24/91	<i>In re IBEW, petition for Decertification and Certification (Fairbanks North Star Borough School District)</i>	Closed
Regulatory	5/29/91	<i>Anchorage Education Association</i>	Added to project list
Unit Clarification	6/26/91	<i>Yakutat Education Association/NEA-Alaska v. Yakutat City School District</i>	Open
Representation Petition	8/7/91	<i>Teamsters Local 959 v. Fairbanks North Star Borough School District</i>	Prehearing Upcoming
Representation Petition	8/21/91	<i>Alaska Vocational Technical Teachers' Association v. State of Alaska</i>	No Action Necessary

One reason for the delay in case resolution is that ALRA, as it is currently organized, was formed only nine days after the effective date of Chapter 180, SLA 1990. And there has been a turnover of board members since that time. Executive Order No. 77 combined the labor relations functions of three separate entities under the one agency -- ALRA. There was a period immediately following this when offices were being moved, furnished, and staffed. Shortly after the agency was settled in and ready to work effectively, a new administration replaced the board members with new appointees. Because of these changes, ALRA has not had full opportunity to become as effective as originally envisioned by the legislature when they placed school employees under PERA.

ALRA has received favorable comments for its advisory role and mediation function

In spite of the frustration over delays in issuing decisions on ULPs, there have been many positive comments about ALRA. Union members and school district administrators who have contacted ALRA report that there is a considerable body of knowledge about labor relations at the agency. They have found ALRA to be a reliable, unbiased source of information. The comment was also frequently made that despite the length of delay at ALRA it is still a faster alternative than going to court to get a decision. It is significant to note that ULPs can be, and are being, filed by school districts almost as often as by unions.

ALRA's 15 education cases involve union certifications, regulations, and ULPs

The table on the opposite page summarizes ALRA's 15 education related cases. Eight of the cases involve ULP allegations (the sidebar on the right explains the types of cases filed at ALRA other than ULPs). Only three of the ULP allegations went to a final hearing. The other five ULP allegations either have been resolved by mutual consent of the two parties, dismissed by ALRA, or suspended pending completion of contract grievance procedures.

The one case that has gone to the hearing process and has had a decision rendered was a case filed by the *Classified Employees Association v. Matanuska-Susitna Borough School District*. This case is of particular interest because the school district raised the question, "When the terms of a collective bargaining agreement that pre-dates application of the PERA conflicts with the Act, does the agreement or the Act govern?" In this particular instance, the collective bargaining agreement that was being questioned had been negotiated under Title 14 and not under PERA. The school district believed that any definitions of confidential employees in PERA would not apply since it had a preexisting agreement. The classified employees association felt that the PERA definition was applicable.

In their decision based on the hearing, ALRA said they did not perceive any conflict between PERA and the agreement; therefore, ALRA could reach a decision on the case without addressing the question of which would apply in the event there was a conflict. After ALRA decided that they could determine whether certain employees were designated as confidential, the issue was subsequently converted to a unit clarification petition by mutual consent of the two parties.

**ALRA HANDLES OTHER CASES
BESIDES ULPs**

Union representation is the subject of three petitions filed at ALRA. Representation petitions are requests by unions that they be recognized as the bargaining agent for a group of employees.

Unit clarifications are the content of two of the cases filed at ALRA. Unit clarifications deal with which school district employees are considered confidential and therefore are prohibited from joining a union because of their access to management information.

Amendment to a unit certification is one case filed at ALRA. This case involves an agreement between two local unions and the school district regarding the merger of the two bargaining groups.

Regulatory request is one of the filed actions at ALRA. This case results from a petition from a local union requesting ALRA define in regulation their concept and approach of advisory arbitration.

ALRA is still considering two ULPs as of the date of this report. Both cases have gone to a hearing and a decision is pending; one case has been open for eight months and the other case has been open for a year and three months. The first case deals with a school district that refused to open negotiations with the certificated employees association when notice of intent to bargain was received one day late.

The second pending ALRA ULP case is of considerable interest because it deals with an item that was considered as negotiable in the "Kenai '77" court case. The school district filed the case against their local education association. The school district argued that while they have to bargain procedural requirements on voluntary transfers, they do not have to bargain substantive criteria. The education association responded that the wording in the contract that the district is questioning has been there for years and is clearly a permissible subject to bargain. When ALRA makes their decision on this case, it could be the first step in defining how the "Kenai '77" court case applies to PERA.

Unions feel that playing field is level, administrators prefer Title 14 process

The general attitude of public school employees is that while they would prefer to have binding arbitration as their means to finality, they find having the right to strike an acceptable alternative. Public school employees said there has been a perceptible change at the negotiating table now that they are under the provisions of PERA. There is a feeling that PERA has brought equality to the two sides and that more serious negotiations are now taking place. The phrase used most often by education personnel is that PERA "has levelled the playing field." Education personnel say that neither side has the upper hand in negotiations; school districts can impose and school personnel can strike. They also say that the knowledge of either side being able to file ULPs has made each side less likely to resort to "game-playing" in the negotiation process.

The general attitude of school district administrators is a great deal more mixed. On their responses to the questionnaire, only 3 (8%) of the administrators felt that it would become a common practice for teachers in their district to go on strike. Yet, 28 (74%) of the respondents said that they would prefer to have their employees return to Title 14, and 29 (76%) said they were opposed to having their employees remain in PERA with a class (a)(3) classification.

When questioned in person, the respondents had attitudes that were different than those reflected in the survey. Some school district administrators said that in public they will support the position expressed by the Commissioner of Education and by their individual school boards, but their personal feeling was different. Many school district administrators stated that it is acceptable to them if public school employees remain under the provisions of PERA as class (a)(3) employees. School administrators consistently remain strongly opposed to binding arbitration for their employees, but they find the right to strike an acceptable compromise.

AUDITOR COMMENTS

School district experience with PERA has been limited by two-year trial period

Because of the cyclical nature of school district contracts, not every district has had the opportunity to negotiate under the provisions of PERA during the eighteen months prior to the time of our review. Twenty percent of the school districts have not yet begun to negotiate a contract under the provisions of PERA.

Further, since the Alaska Labor Relations Agency (ALRA) was reorganized essentially at the same time that school district personnel came under PERA, that agency has not had the opportunity to fully demonstrate its effectiveness in overseeing school district labor relations. All unfair labor practice (ULP) charges must be settled before the two parties can proceed to the next step of the negotiation process. Since ULP charges for one district have been open for more than a year, contract negotiations have been stalled.

Despite the limited period involved, we believe PERA's impact on public school employees has been beneficial enough to warrant recommending that employees remain classified under AS 23.40.200 as (a)(3) employees (see Recommendation No. 1 in the Findings and Recommendation section of this report). However, if the legislature is still unsure about the benefits and impact of PERA, we would recommend extending the provisions of Chapter 180, SLA 1990 at least another three years and as many as six in order to provide more historical experience for setting public policy in this area.

A right to strike does not necessarily lead to strikes

Even though there has been no strikes since the Anchorage School District court decision, we were told that provisions of Title 14 should not be considered as having prevented strikes. Individuals experienced with school district labor relations in both Alaska and other parts of the United States, reported that statutory prohibitions against strikes did not necessarily prevent them from happening. One example cited was the State of Michigan, where teachers often strike illegally despite statutory prohibitions.

In our interviews with school employees, we were told that in the past illegal strikes were often a very real possibility in some communities. In several instances where a school district had imposed a contract on their employees, votes had been conducted for illegal strikes. We were told by different employee unions that conducted strike votes, that from 70% to 100% of their members had voted for illegal strikes in the past. In these instances, strikes had been avoided when the school district administration heard about the results of the strike vote and agreed to return to negotiations.

Just as not having a right to strike does not prevent strikes, having that right does not necessarily cause strikes. Strikes are caused by high labor expectations and low funding available to management and administrators to meet those expectations. We were told by

many individuals from both labor and management that strikes occur when the collective bargaining system breaks down. Nobody makes the decision to go on strike, lightly. Everyone acknowledges that strikes are very disruptive to a community.

In small, rural communities employees fear for their personal safety if they were to go on strike. According to labor representatives, having the right to strike actually forces them to weigh how serious they are about items under negotiation. They must continually evaluate if the issues involved are important enough to them that they would rather strike than settle. As disruptive as all strikes are, illegal strikes are potentially even more disruptive. Most often illegal strikes take place in situations where there is no labor relations oversight agency such as the ALRA to moderate and oversee the situation.

Major benefit of PERA is not the right to strike, but in changes of attitude

Since public school employees are neither more nor less likely to go on strike by having the right to strike, then the real benefit of being under PERA is the perceived attitude change. All public school employees who spoke to us felt they had been patronized when negotiating under AS 14.20.500. In their view, both sides now recognize that there is an equality of power at the negotiating table. Public school employees feel that being under PERA offers additional benefits, such as oversight by ALRA, a more clearly defined negotiating process, and the right to bargain for a standard assessment of dues and fees.

Public school employees includes more than teachers

It is important to note that Chapter 180, SLA 1990 affected not just certificated staff but also non-certificated personnel. Non-certificated staff includes secretaries, bookkeepers, maintenance workers, and other public school employees. Prior to 1990, when the definition section of PERA excluded teachers from the provisions of PERA, it also was interpreted as excluding all non-certificated staff.

FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

Public school employees should remain under the provisions of the Public Employment Relations Act (PERA), classified as (a)(3) employees.

Chapter 180, SLA 1990 contained an automatic repeal provision of two years. The effect of this repeal clause would be to again subject the labor relations for public school employees to the provisions of AS 14.20, Article 6, if no legislative action is taken.

In our view, the legislation should be enacted to lift the two-year repeal provision that was originally part of Chapter 180, SLA 1990. We further suggest that public school employees remain classified as (a)(3) employees, entitled to a right to strike after submitting to advisory arbitration, as provided for under PERA (AS 23.40).

Returning public school employees to the provisions of AS 14.20.550 would result in treating the largest public employment occupational group differently than all other public employees. In our view, this would be inconsistent with the legislature's previously established public policy in this area. AS 23.40.070 states in part that

*...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, ... 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.*

Other public employees covered by the provisions of PERA have the means to conclude negotiations through either binding arbitration or the right to strike. AS 14.20, Article 6, as currently written, does not provide public school employees such a method to achieve finality. Under this statute school districts had the right to, and did, impose employment contracts on teachers. In testimony before the Senate Labor and Commerce committee and in interviews with us, teachers reported that imposed contracts cause severe morale problems. In the past, imposed contracts have reduced wages and benefits and have pushed teachers to consider calling illegal strikes. Such circumstances do not suggest to us that AS 14.20, Article 6 promoted **harmonious and cooperative relations** between the school districts and its employees.

PERA has promoted harmonious and cooperative relations

As discussed in the Auditor Comments section, we recognize that two years has not provided an adequate trial period for all aspects of the legislation. However, we feel that it has been

a sufficient period to show that PERA has successfully worked for public school employees. Based on our interviews with school district personnel, administrators, and the responses to our survey, on balance we feel that the 1990 legislation did promote harmonious and cooperative relations between school district personnel and administration.

It was widely conceded that teachers have more bargaining power under PERA than under Title 14. However, few school districts that reached agreement under the statute's provisions reported that they felt they had made major financial concessions. Although almost all districts responded that they favored a return to Title 14, from our interviews we felt this was because the district's enjoyed the wide degree of discretion and latitude provided by the statute rather than out of concern that they were at a great negotiating disadvantage under PERA.

Presence of Alaska Labor Relations Agency also beneficial

In our view, another aspect of PERA that promotes both cooperative labor relations and good faith bargaining is the jurisdictional role of the Alaska Labor Relations Agency (ALRA). Although as we report in the Auditor Comments and Report Conclusion sections, ALRA has in some respects been slow to respond to the demands of the education community; we feel that its structure and approach are of great potential benefit. Placing public school employees back under the provisions of Title 14 as currently written, will eliminate this important benefit of PERA.

AS 14.20, Article 6 has not promoted harmony or cooperative relations between school districts and its employees. There had been a growing frustration on the part of employees, prior to the 1990 legislation, with the labor relation provisions of Title 14.

These employees had been lobbying the legislature for fifteen years for a means to resolve their dissatisfaction. PERA status and classification as (a)(3) employees under AS 23.40.200 does represent a compromise that, for the most part, has satisfied school district employees. We anticipate that if school district employees are returned to the labor relations provisions of AS 14.20, the lobbying effort will begin anew. In our view, the legislature made an important step towards settling public policy in this area with passage of Chapter 180, SLA 1990. To return public school employees to Title 14 after the two year trial period would not be in the State's best interests.

Laws applicable to school employees and other public employees should be more alike

In their ruling on the Anchorage strike case (see inset on page 10), a majority of the Alaska Supreme Court presumed that the legislature had a public policy purpose for classifying teachers differently than other public employees. The court felt that absence of an oversight agency, no specific mention of teachers in PERA, and a lack of a clear right to strike under Title 14 was indicative of the legislature's desire to treat teachers differently. However, in our view the placement of teachers in Title 14 compared with statutory declaration of policy contained in AS 23.40.070 is inconsistent. Besides the language of AS 23.40.070, we are

also persuaded by the observations of Chief Justice Rabinowitz, who wrote in a dissenting opinion in the Anchorage strike case that

If public school teachers are so essential to society that they must be denied the right to strike then they should also be given the right to compulsory arbitration. On the other hand, if teachers are not so essential as the 'critical' employees then they should enjoy the same limited strike rights given to other 'semi-critical' public employees.

In line with Chief Justice Rabinowitz's reasoning, we believe that retaining public school employees under PERA is in the best interests of the State and more consistent with previously established public policy in the area of public employee labor relations.

Recommendation No. 2

If certificated public school employees remain subject to the provisions of PERA, the legislature should consider adopting legislation to clarify what issues are negotiable.

When the legislature first developed labor relations statutes for teachers in 1970, it provided that nothing in the law be construed as an abrogation or delegation of the legal responsibilities, powers, and duties of the school board including its right to make final decisions on policy (AS 14.20.610). As observed by the courts in the Kenai '77 case, to a degree this statutory provision conflicts with the requirements of AS 14.20.550 that districts bargain with employees regarding their employment and professional duties.

Admittedly, in view of the emphasis that state public policy has traditionally placed on local control of schools, this conflict between employee rights and board prerogatives is difficult to resolve. As discussed on page 11, the Alaska Supreme Court made its distinctions about what they thought could be negotiated without abrogating the local board's legal authority over policy. However, the courts did so rather reluctantly, stating in their decision that *it would be helpful if the legislature, through future enactments, provided more specific guidance on a number of the items which the unions seek to negotiate.*

At the present time under PERA, there is even more uncertainty on the part of public school employees and administrators as to what issues are subject to negotiation. It is uncertain under PERA if the guidelines set down in the Kenai '77 case still apply. We suggest the legislature should assess this situation and consider legislation that sets out negotiable issues as compared to the policy prerogatives of local school boards. If the legislature does not address this issue, then it is most likely that future decisions regarding negotiable items will be made either by ALRA or again by the courts.

APPENDIX A

RESULTS OF SCHOOL DISTRICT SURVEY

Listed below are 20 questions on the topic of moving teachers into class (a)(3) of PERA. This classification change gave teachers the right-to-strike. This classification allows both teachers and school boards to file Unfair Labor Practice charges with the Alaska Labor Relations Agency. Another effect of this change is that the Alaska Labor Relations Agency certifies union elections.

Please circle the response to each question that reflects your school district's experience with Title 23. If you wish to offer additional comments, please feel free to attach a memorandum. Thank you for your time.

1. *Who negotiates on behalf of your school district?*

Superintendent	23
Personnel Director	4
Attorney	3
Hired Consultant	5
School Board Member(s)	17
Business Manager	3
School Principal	2
Labor Relations Director	1

2. *Do you feel that it costs more to negotiate a contract under Title 23 than it did to negotiate a contract under Title 14?*

Yes	13
No	12
No Opinion	13

3. *Under Title 23 as compared to Title 14 has the time involved in negotiating labor agreements with teachers:*

Not Applicable	11
Increased	8
Decreased	1
Remained the same	18

APPENDIX A

RESULTS OF SCHOOL DISTRICT SURVEY

(cont.)

4. *Do you feel that your district has conceded more in negotiations under Title 23 than it would have under Title 14?*

Not Applicable	16
Yes	5
No	17

5. *Do you feel that it will become a common practice for teachers in your district to go on strike?*

Yes	3
No	33
No Opinion	2

6. *Have you seen items that were non-bargainable under Title 14 now being addressed in negotiations under Title 23?*

Yes	6
No	19
No Opinion	13

7. *Have you filed an Unfair Labor Practice charge with the Alaska Labor Relations Agency against your teachers union?*

Yes	3
No	35

8. *Has the school district been charged with an Unfair Labor Practice?*

Yes	3
No	35

APPENDIX A

RESULTS OF SCHOOL DISTRICT SURVEY (cont.)

9. *Have you experienced any direct increase in legal services costs that was attributable to Title 23?*

Yes	11
No	27

10. *If your previous answer was "Yes", were the legal costs attributable to:*

Negotiations	8
Preparations for ULP charge	6

11. *Do you feel that the negotiations process is more clearly defined under Title 23 than under Title 14?*

Yes	2
No	32
No Opinion	4

12. *Under Title 14 did you ever impose a contract on your teachers?*

Yes	4
No	30
No Opinion	4

13. *Have you had any experience with the Alaska Labor Relations Agency certifying a union election?*

Yes	2
No	36

14. *Has being under Title 23 affected the way in which your administration deals with teachers?*

Yes	5
No	31
No Opinion	2

APPENDIX A

RESULTS OF SCHOOL DISTRICT SURVEY
(cont.)

15. *Have you received any formal training about the provisions of Title 23?*

Yes	26
No	12

16. *Do you feel that being under Title 23 is an improvement over being under Title 14?*

Yes	1
No	32
No Opinion	5

17. *Have you gone to advisory arbitration under Title 23?*

Yes	3
No	35

18. *Would you prefer a return to Title 14 over remaining under Title 23?*

Yes	28
No	9
No Opinion	1

19. *Would you prefer that teachers be classed as (a)(1) or (a)(2) under Title 23, which would permit binding arbitration?*

Yes	2
No	33
No Opinion	3

20. *Would it be acceptable to you if the two-year repeal provision were lifted and teachers remained classified as (a)(3) employees under Title 23?*

Yes	8
No	29
No Opinion	3

APPENDIX B

RESULTS OF PUBLIC SCHOOL EMPLOYEES SURVEY

Listed below are 20 questions on the topic of moving public school employees into class (a)(3) of Title 23. This classification change gave public school employees the right to strike. This classification allows both public school employees and school boards to file Unfair Labor Practice charges with the Alaska Labor Relations Agency. Another effect of this change is that the Alaska Labor Relations Agency certifies union elections.

Please circle the response to each question that reflects your local union's experience with Title 23. If you wish to offer additional comments, please feel free to attach a memorandum. Thank you for your time.

1. *What local union are you filling out this survey on behalf of?*

Responses 38

2. *Do you feel that it costs your union more to negotiate a contract under Title 23 than it did to negotiate a contract under Title 14?*

Yes 0
No 34
No Opinion 4

3. *Under Title 23 as compared to Title 14 has the time involved in negotiating labor agreements:*

Not Applicable 14
Increased 1
Decreased 15
Remained the same 8

4. *Do you feel that your union has gained more in negotiated contract concessions under Title 23 than it would have under Title 14?*

Not Applicable 12
Yes 11
No 15

APPENDIX B

RESULTS OF PUBLIC SCHOOL EMPLOYEES SURVEY (cont.)

5. *Do you feel that it will become a common practice for your union members to go on strike?*

Yes	1
No	37

6. *Do you believe that the decision reached in the Kenai court decision on what items are bargainable and nonbargainable still applies now that public school employees are under the provisions of Title 23 rather than the provisions of Title 14?*

Yes	18
No	8
No Opinion	12

7. *Under Title 23, has your union addressed any items at the negotiating table that would not have been addressed under Title 14?*

Yes	5
No	28
Not Applicable	5

8. *Have you filed an Unfair Labor Practice charge with the Alaska Labor Relations Agency against your school district?*

Yes	6
No	32

9. *Has your local union been charged with an Unfair Labor Practice by the school district?*

Yes	2
No	36

APPENDIX B

RESULTS OF PUBLIC SCHOOL EMPLOYEES SURVEY
(cont.)

10. *Have you experienced any direct increase in legal services costs that was attributable to Title 23?*

Yes	1
No	37

11. *Under Title 14 did your union ever take a vote to hold an illegal strike?*

Yes	5
No	33

12. *Do you feel that the negotiations process is more clearly defined under Title 23 than under Title 14?*

Yes	34
No	3
No Opinion	1

13. *Under Title 14 was a contract ever imposed on your union?*

Yes	16
No	22

14. *Has a contract been imposed on your union now that you are under the provisions of Title 23?*

Yes	0
No	38

15. *Have you had any experience with the Alaska Labor Relations Agency certifying a union election?*

Yes	3
No	35

APPENDIX B

RESULTS OF PUBLIC SCHOOL EMPLOYEES SURVEY (cont.)

16. *Have you received any formal training about the provisions of Title 23?*

Yes	24
No	14

17. *Do you feel that being under Title 23 is an improvement over being under Title 14?*

Yes	36
No	1
No Opinion	1

18. *Would you prefer a return to Title 14 over remaining under Title 23?*

Yes	0
No	37
No Opinion	1

19. *Would you prefer being classed as (a)(1) or (a)(2) under Title 23, which would permit binding arbitration?*

Yes	32
No	3
No Opinion	3

20. *Would it be acceptable to you if the two-year repeal provision were lifted and you remained classified as (a)(3) employees under Title 23?*

Yes	36
No	0
No Opinion	2

WALTER J. HICKEL, GOVERNOR

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DEPARTMENT OF EDUCATION

OFFICE OF THE COMMISSIONER

January 7, 1992

Randy S. Welker
Division of Legislative Audit
P.O. Box W
Juneau, AK 99811-3300

RECEIVED
JAN 7 1992

LEGISLATIVE AUDIT

RE: Audit Control Number 05-4419-92

Dear Mr. Welker:

This is a reply to your preliminary audit report, "Impact of the Public Employment Relations Act on Local School Districts", dated November 8, 1991. The Department has reviewed the findings and recommendations and provides the following response:

Recommendation No. 1

Public school employees should remain under the provisions of the Public Employment Relations Act (PERA), classified as (a)(3) employees.

The Department does not concur with Recommendation No. 1. Clear direction for negotiations between local school boards and unions was established by Title 14 and further defined by two Alaska Supreme Court decisions as referenced in the audit report. Placement of public school employees under PERA (AS23.40) has the effect of re-opening issues previously set by past practice and the court decisions. Having a right to strike does not necessarily cause strikes. Under any circumstance, teacher strikes are not good for students.

Local school boards have lost their authority to negotiate evenly with unions under Title 23, and prefer, as evidenced by your report, to negotiate under Title 14. Yet the "opt out" provision which applies to municipalities is denied to school districts. Teachers have achieved and maintained the highest average teacher salaries in the nation under Title 14, and as such have not suffered at the hands of local boards. According to the September 1991, Institute of Social and Economic Research (ISER) report to the legislature, "salaries for many Alaska teachers remain substantially higher than national averages". In fact, "The average fiscal year 1989 teacher's salary and benefits cost the school district \$50,000 in Anchorage, \$53,000 in Fairbanks, and \$58,000 in Juneau. Using ISER Anchorage/U.S. and McDowell's (1988) within Alaska differentials, these salaries are 22 percent, 24 percent, and 37 percent higher, respectively, than the U.S. average of \$36,000." The report does indicate that teacher salary schedules and total compensation varies throughout the State. However, due to local control, "the difference reflects to some extent different attitudes about encouraging teachers to remain and make a commitment to the community."

SB 15 should be allowed to sunset in order to return to a system which has overwhelming local support and interpretation and guidance established by the court.

Randy S. Welker
Page 2
January 7, 1992

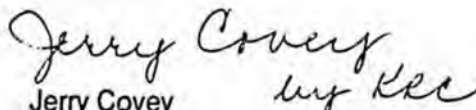
Recommendation No. 2

If certificated Public School Employees remain subject to the provisions of PERA, the Legislature should consider adopting legislation to clarify what issues are negotiable.

The Department does not concur with Recommendation No. 2. SB 15 should sunset due to the many uncertainties associated with public school employees remaining under PERA as (a)(3) employees.

Other provisions such as 2-year tenure, rehire, dismissal, non-retention, and teacher retirement which are related to total compensation and employment security are already provided for under Title 14 or have been granted by the Legislature.

Sincerely,


Jerry Covey
Commissioner

cc: Duane Guiley, Director, EFSS
Mike Maher, Special Assistant



NEA-ALASKA

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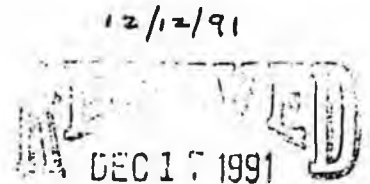
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LEGISLATIVE AUDIT

Dear Mr. Welker:

Thank you for providing NEA-Alaska with a copy of the "CONFIDENTIAL" PRELIMINARY REPORT ON:

"IMPACT OF THE PUBLIC EMPLOYMENT RELATIONS ACT ON LOCAL SCHOOL DISTRICTS."

We find the Report extremely comprehensive, thorough, and precise in its attention to the detail which pertains to the various nuances of the public school district collective bargaining process. LB & A staff are to be commended for this energetic effort.

We are also gratified to learn that LB & A intends to supplement the Report with a survey of public school employee bargaining agent union presidents, similar to the survey of superintendents. The results of this particular survey will bring more balance and broadened insights.

It is appropriate to provide some brief comments on some components of the Report before responding to the specific recommendations.

- > On page 5, in the third paragraph, the number of public school teachers in Alaska is probably understated by 700+.
- > On page 7, it may be more accurate to say that impasse "may" exist after a mediator and advisory arbitrator have tried to resolve issues; and, is probably more accurately described when both parties acknowledge that they are unwilling to make further modification of their positions on the issues in dispute.
- > On page 8, in the second paragraph, seldom, if ever, was an actual written report produced by the mediator under AS 14.20.550.
- > On page 9, from our perspective, it is also appropriate to emphasize that PERA contains provision for finality through right to strike or binding arbitration as one of its significant differences from AS 14.20.550.
- > On page 10, the conclusion in the third paragraph is somewhat general in nature and while it may be true in some instances, it is certainly not accurate to all districts and/or each round of negotiations in a district.
- > On page 12, in the paragraph relative to school district taxing authority it may be more accurate to say there "may be a reluctance" rather than an "unwillingness" to support additional property taxes.

- Recent national polls in fact show that the general public is willing to pay more taxes for public schools and the recent school bond vote in Anchorage is indicative of their willingness to support the operation of schools.
- In the same paragraph, it should also be noted that teachers contribute 8.65% of their pay to the retirement system and that part of that cost increase is due to benefit improvements and the RIP.
- > On page 21, in the second paragraph, settlement of a pending ULP is not necessarily a prerequisite for continuation of negotiations. Naturally, resolution of ULPs is desirable for the successful potential of the negotiations process.
- > In the last paragraph on page 21 the reasons given for causing strikes are not the exclusive reasons although they are certainly contributing ones. The presence of unresolved ULPs and provocative and offensive conduct are frequently major contributing factors when employees strike.

RECOMMENDATION # 1: Public School Employees Should Remain Under the Provisions of the Public Employment Relations Act (PERA), Classified as (a) (3) Employees.

NEA-Alaska agrees with this recommendation and will be working aggressively in the legislative process for the removal of the "sunset" provision from the current legislation. We will continue training programs for our members in better understanding of their rights and responsibilities under the PERA. We will seek its full implementation on behalf of all employees covered by it with a minimum of conflict and confrontation.

We will continue to work closely with the ALRA to facilitate their procedures and seek resolutions to problems and conflicts at the earliest administrative levels.

We will seek the opportunity for joint training and seminars with AASB and ACSA on our common concerns under the PERA. Pilot efforts in this regard in Anchorage and Fairbanks in the fall of 1990 were moderately successful.

RECOMMENDATION # 2: If Certificated School Employees Remain Subject to the Provisions of the PERA, the Legislature Should Consider Adopting Legislation to Clarify What Issues are Negotiable.

It is desirable to have clarity on the scope of negotiations and which issues are mandatory or permissive topics of negotiations. NEA-Alaska is confident that the "Kenai" decision will continue to provide a general frame of reference for the parties. However, over the extended period of time both circumstances and dynamics of process change.

The diversity and the magnitude of differences in public education in Alaska school districts may in fact require some flexibility in the articulation of mandatory and permissive subjects of negotiations. The policy responsibilities of school boards as employers will continue to provide sufficient guidance on disputes pertaining to negotiability.

There are two examples from the Kenai decision which may serve to emphasize the need for some flexibility in definition over the extended period and because of changing circumstances.

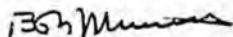
The Kenai decision makes class size a non-mandatory topic for negotiations because it is more in line with policy than with the economic interests of employees. However, increasing student enrollments, limited funding, reductions to student programs and services are just a few components which all contribute to significantly increasing class sizes, especially in urban areas. Administrators, school boards, employees and the general public are all interested in finding viable solutions to the problem.

Because a solution has not been found and because the problems continue to exacerbate it is becoming one of a "condition of employment" as well. Increasing class sizes increase negligence and liability potential, contribute to the possibility of increasing student discipline problems, mean more out of pocket employee expenses for classroom supplies and materials, contribute to an increased workload in homework, tests, preparation, and may constrain one's ability to achieve annual performance goals thereby contributing to possible negative annual evaluations. There is a point where the class size problem becomes a condition of employment and should be negotiable.

A similar scenario exists on the issue of employee workload, especially for rural secondary teachers who may be required to teach subjects out of their areas of certification. Again, adverse impacts on employee evaluations can be the direct result and a similar conclusion on negotiability is valid.

Thank you again for the opportunity to respond to the Preliminary Audit Report. I hope that our comments and recommendations are helpful to your process.

Respectfully submitted:



Bob Manners
Executive Director

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hearing officer and holding that university acted improperly in changing minimum hours. *State v. P. Employment Rel.* A.D.2d 710, 457 1.

14. Persons entitled

Widow of an employee who has a valid contract with the state. *Secretary of State v. [redacted]* showed that a valid binding contract was in existence between union and state, that contract reaffirmed the basic right of all employees to work in a safe envi-

ronment, and that employee would have enjoyed an immediate direct benefit by not being subjected to a condition that took his life. *Civil Service Employees* 1985, 130 Misc.2d 833, 497

15. Injunction

Injunction against police officers to submit to examination pending outcome of arbitration with State Public Employment Relations Board. *Schenectady Police Benev. Ass'n v. City of Schenectady*, 1990, ___ A.D.2d ___, 651 N.Y.S.2d 613.

§ 210. Prohibition of strikes

[See main volume for text of 1, 2(a) to (d)]

(c) Notice. The chief executive officer shall forthwith notify each employee that he has been found to have committed such violation, the date or dates thereof and of his right to object to such determination pursuant to paragraph (g) of this subdivision; he shall also notify the chief fiscal officer of the names of all such employees and of the total number of days, or part thereof, on which it has been determined that such violation occurred. Notice to each employee shall be by personal service or by certified mail to his last address filed by him with his employer.

(f) Payroll deductions. Not earlier than thirty nor later than ninety days following the date of such determination, the chief fiscal officer of the government involved shall deduct from the compensation of each such public employee an amount equal to twice his daily rate of pay for each day or part thereof that it was determined that he had violated this subdivision; such rate of pay to be computed as of the time of such violation. In computing such deduction, credit shall be allowed for amounts already withheld from such employee's compensation on account of his absence from work or other withholding of services on such day or days. In computing the aforesaid thirty to ninety day period of time following the determination of a violation pursuant to subdivision (d) of paragraph two of this section and where the employee's annual compensation is paid over a period of time which is less than fifty-two weeks, that period of time between the last day of the last payroll period of the employment term in which the violation occurred and the first day of the first payroll period of the next succeeding employment term shall be disregarded and not counted.

(g) Objections and restoration. Any employee determined to have violated this subdivision may object to such determination by filing with the chief executive officer, (within twenty days of the date on which notice was served or mailed to him pursuant to paragraph (c) of this subdivision) his sworn affidavit, supported by available documentary proof, containing a short and plain statement of the facts upon which he relies to show that such determination was incorrect. Such affidavit shall be subject to the penalties of perjury. If the chief executive officer shall determine that the affidavit and supporting proof establishes that the employee did not violate this subdivision, he shall sustain the objection. If the chief executive officer shall determine that the affidavit and supporting proof fails to

establish that the employee did not violate this subdivision, he shall dismiss the objection and so notify the employee. If the chief executive officer shall determine that the affidavit and supporting proof raises a question of fact which, if resolved in favor of the employee, would establish that the employee did not violate this subdivision, he shall appoint a hearing officer to determine whether in fact the employee did violate this subdivision after a hearing at which such employee shall bear the burden of proof. If the hearing officer shall determine that the employee failed to establish that he did not violate this subdivision, the chief executive officer shall so notify the employee. If the chief executive officer sustains an objection or the hearing officer determines on a preponderance of the evidence that such employee did not violate this subdivision, the chief executive officer shall forthwith notify the chief fiscal officer who shall thereupon cease all further deductions and refund any deductions previously made pursuant to this subdivision. The determinations provided in this paragraph shall be reviewable pursuant to article seventy-eight of the civil practice law and rules.

[(h) Redesignated (g)]

[See main volume for text of 3 and 4]

(As amended L.1983, c. 254, §§ 2, 3.)

Historical and Statutory Notes

1983 Amendment. Subd. 2, par. (c). L.1983, c. 254, § 2, eff. June 8, 1983, in sentence beginning "The chief executive", substituted "(g)" for "(h)" following "pursuant to paragraph".

Subd. 2, par. (f). L.1983, c. 254, § 3, eff. June 8, 1983, redesignated former par. (g) as (f).

Subd. 2, par. (g). L.1983, c. 254, § 3, eff. June 8, 1983, redesignated former par. (h) as (g) and former par. (g) as (f), and, in par. (g) as redesignated, in sentence beginning "If the chief executive officer sustains" deleted "restore to the employee the tenure suspended pursuant to par. (f) of this subdivision, and" following "officer shall forthwith".

Subd. 2, par. (h). L.1983, c. 254, § 3, eff. June 8, 1983, redesignated former par. (h) as (g).

Strikes by Certain Transit Employees. Section 34 of L.1986, c. 929, eff. Dec. 31, 1986, and to expire as provided by section 45 of L.1986, c. 929 [set out as

a note under section 209], provided: "For the purposes of subdivision three of section two hundred ten of the civil service law and section seven hundred fifty-one of the judiciary law, any public employer as defined in subdivision five of section two hundred nine of the civil service law whose public employee organizations are covered by such subdivision shall be deemed to be a government exempt from certain provisions of article fourteen of the civil service law pursuant to section two hundred twelve of such law. Where an employee organization is determined by the court in the exercise of its authority under section seven hundred fifty-one of the judiciary law to have violated the provisions of subdivision one of section two hundred ten of the civil service law, the court shall apply the provisions set forth in subdivision three of such section two hundred ten."

West's McKinney's Forms

The following forms appear in Selected Consolidated Laws Forms under section 210 of the Civil Service Law:

- Order to Show Cause in Article 78 Proceeding to Annual Determination of Public Employment Relations Board that Union Condoned Illegal Strike, see Form 3.
- Petition in Article 78 Proceeding to Annual Determination of Public Employment Relations Board that Union Condoned Illegal Strike, see Form 4.

Law Review Commentaries

Interest arbitration: The alternative to the strike. Arvid Anderson and Loren A. Krause. 76 Fordham L.Rev. 163 (1987).

New directions for the regulation of public employee strikes. *Dripps*, 60 N.Y.U.L. Rev. 690 (1986).

Notes of Decisions

Law governing in

1. Constitutionality—Generally

Provision of the Taylor Law, section 200 et seq., by which the chief executive officer of the governmental unit involved is empowered to determine whether an illegal strike has occurred and which employees have participated, and which empowers the chief executive officer to evaluate objections to his determination, and provides for judicial review of his final determination, did not deny due process by making the chief executive officer the judge in his own case. *Wolkenstein v. Reville*, C.A.N.Y. 1982, 694 F.2d 95, certiorari denied 103 S.Ct. 2462, 462 U.S. 1105, 77 L.Ed.2d 1332.

1a. Law governing

Railway Labor Act, 46 U.S.C.A. § 151, preempted application of anti-strike provisions of this section to employees of rapid transit operating authority. *Staten Island Rapid Transit Operating Authority v. I.C.C.*, C.A.N.Y. 1983, 718 F.2d 633.

4. Employees within section

United Transp. Union v. Long Island R. Co., 634 F.2d 19 (main volume) reversed 102 S.Ct. 1349, 456 U.S. 678, 71 L.Ed.2d 647.

New York State Inspection, Sec. and Law Enforcement Emp., Dist. Council 82, AFSCME, AFL-CIO v. State, 448 N.Y.S.2d 524 (main volume) affirmed 67 N.Y.2d 505, 357 N.Y.S.2d 210, 448 N.E.2d 464.

5. Prohibition of strikes in general

Absent a finding by the superintendent of schools that a board member who is an employee in another district has engaged in a strike, there is no basis in either law or fact to conclude the board member has violated this section. *Matter of Cahill*, 1981, 20 Educ. Dept. Rep. 550.

6. Private right of action

Taylor Law, this article, does not give rise to private cause of action against the union and officials for damages arising out of illegal public employee strike. *Burns Jackson Miller Summit & Spitzer*

v. Lindner, 1983, 69 N.Y.2d 314, 464 N.Y.S.2d 712, 461 N.E.2d 469.

Economic loss suffered by law firms as result of illegal strike by public transit workers was not recoverable in private action for public nuisance because class included all members of public who were affected by strike. *Id.*

Interference with law firms' business as result of illegal strike by city transit employees was but incidental result of defendants' conduct and, although conduct was in violation of Taylor Law, there was no common-law cause of action for such incidental interference when legislature had, in establishing otherwise comprehensive labor plan for governance of public employer-employee relations, failed to do so. *Id.*

21. Generally

Where reliance on sudden concern for overly meticulous and abnormal observance of statutory commands is purely a subterfuge, incidental circumstances that continued performance of duties in normal manner might entail violation of statute does not legally preclude finding that there has been "strike." *McKinney's Civil Service Law § 209*, Local 262, Transport Workers Union of America, AFL-CIO v. New York State Public Employment Relations Bd., 1978, 68 N.Y.2d 354, 461 N.Y.S.2d 262, 448 N.E.2d 116.

26. Payroll deductions—Generally

School district which divided annual salary of teachers by 200 and doubled amount in order to arrive at amount deductible from compensation of teachers for each day teachers had violated Taylor Law by participating in strike complied with statute allowing deduction equal to twice daily rate of pay for each day or part thereof in which public employees participated in strike; teachers were required to work only 180 days during school year. *Barner v. Jeffersonville-Youngville Cent. School Dist.*, 1986, 117 A.D.2d 162, 602 N.Y.S.2d 286.

Where there were more than 20 working school days in October 1980, during which month certain teachers engaged in an eight-day illegal strike, and these teachers all worked more than half of the required working days, Commissioner of Education properly determined

that Education Law § 8101 must be interpreted to require a deduction of 1/200 of a teacher's annual salary for each of the days of unauthorized absence as a penalty. *Board of Educ. of Gluckstown Cent. School Dist. v. Ambach*, 1983, 97 A.D.2d 188, 470 N.Y.S.2d 779, affirmed 53 N.Y.2d 780, 481 N.Y.S.2d 72, 470 N.E.2d 870.

29. — Thirty to ninety day period

For purposes of determining validity of payroll deductions made by school board as penalty for teachers' act of engaging in illegal strikes, measurement of 90 to 90-day time period within which payroll deductions could be taken did not commence until employees concerned had been notified individually of determination that they had committed a violation. *Plainview-Old Bethpage Congress of Teachers v. Board of Educ. of Plainview-Old Bethpage Central School Dist.*, 1984, 63 N.Y.2d 921, 483 N.Y.S.2d 677, 473 N.E.2d 29, reargument denied 64 N.Y.2d 765, 485 N.Y.S.2d 1031, 475 N.E.2d 472.

This section providing that statutory penalty imposed on public employees found to have participated in an illegal strike must be collected not earlier than 30 nor later than 90 days following date of a determination barred State from resuming payroll penalty deductions after expiration of 90-day period to adjust for inadvertent errors in calculating the amount of penalty originally deducted from employees' wages, since time requirements imposed by this section were related to the essence and substance of this section, and could not be viewed as merely directory. *King v. Carey*, 1982, 67 N.Y.2d 605, 467 N.Y.S.2d 216, 448 N.E.2d 464.

Where all challenged payroll deductions from school district employees' paychecks were made less than 90 days from sending of notification of strike determination, deductions were made in violation of this section governing payroll deductions for participation in illegal strikes. *Plainview-Old Bethpage Congress of Teachers v. Board of Educ. of Plainview-Old Bethpage Cent. School Dist.*, 1984, 100 A.D.2d 849, 474 N.Y.S.2d 93, affirmed 63 N.Y.2d 921, 483 N.Y.S.2d 677, 478 N.E.2d 29, reargument denied 64 N.Y.2d 765, 485 N.Y.S.2d 1031, 475 N.E.2d 472.

Time limitations contained in this section, stating that all penalties deducted from a striking employee's paycheck

shall be deducted no earlier than 30 days and no later than 90 days after the date of the determination that the strike was illegal, are mandatory rather than directory. *Swital v. Board of Educ. of Day Shore Union Free School Dist.*, 1983, 99 A.D.2d 839, 461 N.Y.S.2d 62.

In regard to this section, stating that all penalties deducted by a public employer from a striking employee's paycheck shall be deducted no earlier than 30 days and no later than 90 days after the date of determination that the strike was illegal compliance with the 90 day statutory time period is measured as of the date paycheck is issued, not the date it is delivered. *Id.*

30. — Refunds

Where public employees who had twice their pay deducted from salary for each day they were presumed to have engaged in illegal strike by virtue of failure to work on date of strike were subsequently exonerated, none of amount deducted could be retained by state as an ordinary deduction for time not worked. *Buttler v. Carey*, 1983, 91 A.D.2d 1116, 458 N.Y.S.2d 338.

31. Objections to determination of chief executive officer—Generally

Determinations that teachers had violated Taylor Law by participating in strike were not invalid on ground that they had been prepared by district superintendent rather than by superintendent of schools, who was directed by statute to prepare such determinations. *Barner v. Jeffersonville-Youngville Cent. School Dist.*, 1986, 117 A.D.2d 162, 602 N.Y.S.2d 285.

34. — Hearing and hearing officer

Both provisional and probationary employees, who were discharged or had their probationary periods extended for allegedly violating Taylor Law during labor dispute with public hospital, by participating in sickout, were entitled to hearing to determine whether each had a valid excuse for not being present on day in question, due to stigma of being labeled law breaker by participating in the sickout, even though provisional employees would not be automatically entitled to reinstatement. *New York City Health and Hospitals Corp. v. Local 2607 of Dist. Council 37 of American Federation of State, County and Mun. Employees*, 1988, 189 Misc.2d 876, 626 N.Y.S.2d 1002.

64. Determination of public employment relations board

Conclusion of Public Employment Relations Board that union's invoking reference to provisions of Vehicle and Traffic Law in order to justify drivers refusing to drive buses which violated requirements of law was merely pretext for concerted refusal of drivers to operate buses was amply supported in record. Local 252, Transport Workers Union of America, AFL-CIO v. New York State Public Employment Relations Bd., 1983, 58 N.Y.2d 354, 461 N.Y.S.2d 262, 448 N.E.2d 116.

Public Employment Relations Board's finding that strike occurred when bus drivers refused to drive buses which violated requirements of Vehicle and Traffic Law was supported by substantial evidence, including evidence that union was responsible for job action, job action was timed to occur immediately following expiration of interim impasse arrangement and only violations posing no imminent danger to safety of public or drivers were involved in charge. *Id.*

67. Forfeiture of dues checkoff privileges

Although there was no direct proof that union representing employees in

county's highway and infirmary departments encouraged strike, there was ample circumstantial evidence to provide a rational basis for determination that union encouraged, participated in and condoned the strike and was subject to penalty of one year forfeiture of dues checkoff privileges. *Egan v. Newman*, 1983, 92 A.D.2d 1007, 461 N.Y.S.2d 464.

Although this section under which Public Employment Relations Board imposed forfeiture of union dues checkoff privileges because union encouraged and condoned unlawful strike does not contain the word "potential" the Board is not limited to considering only actual impact of strike on public health, safety and welfare. *Id.*

Imposing forfeiture of dues checkoff privileges for one year for public employee's union's encouraging and condoning unlawful strike was not too severe a penalty where no regular highway maintenance duties were performed during the strike and infirmary was left grossly understaffed and only volunteer effort allowed it to provide minimal services and union officers directly participated in the strike even after restraining orders had been served. *Id.*

§ 211. Application for injunctive relief

Notes of Decisions

Collateral estoppel 14
Contempt proceedings
Jurisdiction 8a
Res judicata 13

1984, 62 N.Y.2d 11, 476 N.Y.S.2d 817, 464 N.E.2d 121, reargument denied 62 N.Y.2d 676, 479 N.Y.S.2d 1028, 463 N.E.2d 712.

8a. — Jurisdiction

Trial court had jurisdiction to punish association of civil service employees for contempt for failure to obey temporary restraining orders, where agents of the association were served with orders to show cause containing the restraining orders. *Rockland County v. Civil Service Employees Ass'n, Inc.*, 1984, 62 N.Y.2d 11, 476 N.Y.S.2d 817, 464 N.E.2d 121.

13. Res judicata

One union's opportunity to intervene in state court litigation in which it was determined that employees of rapid transit operating authority could be enjoined from striking did not bind union to state court judgment so as to preclude district court from determining that authority was "carrier" within meaning of Railway Labor Act, 45 U.S.C.A. § 161, and,

8. Contempt proceedings—Generally

In action against association of civil service employees in which county sought to punish the association for criminal contempt for failure to obey temporary restraining orders, evidence, including proof that the association was moving force behind the strike, provided all the financial support for the strike, assisted in the organization and managing of the strike, and proof that without the support and assistance of the association, the local organization, of which the association was the parent, could not have carried out work stoppage, was sufficient to establish beyond a reasonable doubt that the association itself participated in the strike in violation of the restraining orders. *Rockland County v. Civil Service Employees Ass'n, Inc.*,

thus, that its employees were exempt from anti-strike provisions of § 210. *Staten Island Rapid Transit Operating Authority v. I.C.C.*, C.A.N.Y.1983, 718 F.2d 539.

Prior state court adjudication that employees of rapid transit operating authority could be enjoined from striking under New York law did not preclude district court from determining that authority which operated strip of railroad was "carrier" within meaning of, 46 U.S.C.A. § 161, so that its employees were exempt from anti-strike provisions of § 210. *Staten Island Rapid Transit Operating Authority v. I.C.C.*, C.A.N.Y. 1983, 718 F.2d 539.

§ 212. Local government procedures

Historical and Statutory Notes

Strikes by Certain Transit Employees. See section 34 of L.1986, c. 929, set out on a note under section 210.

§ 213. Judicial review and enforcement

(a) Final orders of the board made pursuant to this article shall be conclusive against all parties to its proceedings and persons who have had an opportunity to be parties to its proceedings unless reversed or modified in proceedings for enforcement or judicial review as hereinafter provided. Final orders shall be (i) reviewable under article seventy-eight of the civil practice law and rules upon petition filed by an aggrieved party within thirty days after service by registered or certified mail of a copy of such order upon such party, and (ii) enforceable in a special proceeding, upon petition of such board, by the supreme court, provided, however, that an order of the board which determines whether an employer or employee is subject to this article may be deemed final when made.

[See main volume for text of (b) to (c)]

(As amended L.1989, c. 64, § 1.)

Historical and Statutory Notes

1989 Amendment. Subd. (a). L.1989, c. 64, § 1, substituted references to final orders for references to orders, and provided that orders which determine whether an employer or employee is subject to this article may be deemed final when made.

Effective Date of Amendment by L.1989, c. 64: Applicability. Section 2 of L.1989, c. 64, provided: "This act [amending this section] shall take effect immediately [April 21, 1989] and shall only apply to any proceeding commenced on or after such effective date."

Notes of Decisions

Final orders; 2a

Sanctions 14

2a. Final orders

Order of Public Employment Relations Board determining that State Insurance

Note 12

he wishes to form, join or participate in a union, agency shop proposal requiring under threat of dismissal a teacher to either join or pay dues to association was illegal and Board did not act in arbitrary manner when it held that board of education did not commit an unfair labor practice by refusing to negotiate agency shop proposal. *F. Helshy, 1977, 68 Misc.2d 9, 340 N.Y.S.2d 30, affirmed 42 A.2d 1009, 340 N.Y.S.2d 30.*

If a party to negotiations another with consulting and practice by failing to bargain obviously unconstitutional condition of employment, direct board to bargain on that item would be erroneous, and an order by the board directing party to bargain concerning obviously illegal item would be erroneous. *Id.*

13. Teachers, nontenured or probationary

Non-tenured teacher may be refused tenure and dismissed without reason being given therefor, except where it has been established that dismissal was for constitutionally impermissible reasons or in violation of statutory prescription, including the Taylor Law. *City School Dist., Perkasie v. Perkasie Faculty Ass'n, 1977, 59 A.D.2d 729, 398 N.Y.S.2d 681.*

A public employer may terminate a probationary teacher for good reasons or bad reasons, so long as it

does not do so for an illegal reason, such as the exercise of rights protected by this article. *Sag Harbor Union Free School Dist. v. Helshy, 1976, 51 A.D.2d 377, 398 N.Y.S.2d 635.*

and to discipline without explanation a license for rights due of Chautauque v. Chautauque Teachers Ass'n, N.Y.S.2d 600.

non-tenured teacher's employment was terminated solely as retaliation for his activities as member of teachers' association. *Port Jervis City School Dist. v. New York State Public Employment Relations, 1972, 68 Misc.2d 1065, 328 N.Y.S.2d 760.*

Board had jurisdiction to hear an improper practice charge that non-tenured teacher's employment was terminated solely as retaliation for his activities as member of teachers' association. *Brentwood Bd. of Ed. v. Helshy, 1971, 68 Misc.2d 739, 327 N.Y.S.2d 881.*

Board lacked jurisdiction to consider dismissal of probationary teachers because of their activities in support of teachers' association. *Board of Ed. Central School Dist. No. 1 of Town of Grand Island, Erie County v. Helshy, 1970, 61 Misc.2d 473, 314 N.Y.S.2d 941.*

§ 210. Prohibition of strikes

1. No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.

2. Violations and penalties; presumption; prohibition against consent to strike; determination; notice; probation; payroll deductions; objections; and restoration. (a) Violations and penalties. A public employee shall violate this subdivision by engaging in a strike or violating paragraph (c) of this subdivision and shall be liable as provided in this subdivision pursuant to the procedures contained herein. In addition, any public employee who violates subdivision one of this section may be

subject to removal or other disciplinary action provided by law for misconduct.

(b) Presumption. For purposes of this subdivision an employee who is absent from work without permission, or who abstains wholly or in part from the full performance of his duties in his normal manner without permission, on the date or dates when a strike occurs, shall be presumed to have engaged in such strike on such date or dates.

(c) Prohibition against consent to strike. No person exercising on behalf of any public employer any authority, supervision or direction over any public employee shall have the power to authorize, approve, condone or consent to a strike, or the engaging in a strike, by one or more public employees, and such person shall not authorize, approve, condone or consent to such strike or engagement.

(d) Determination. In the event that it appears that a violation of this subdivision may have occurred, the chief executive officer of the government involved shall, on the basis of such investigation and affidavits as he may deem appropriate, determine whether or not such violation has occurred and the date or dates of such violation. If the chief executive officer determines that such violation has occurred, he shall further determine, on the basis of such further investigation and affidavits as he may deem appropriate, the names of employees who committed such violation and the date or dates thereof. Such determination shall not be deemed to be final until the completion of the procedures provided for in this subdivision.

(e) Notice. The chief executive officer shall forthwith notify each employee that he has been found to have committed such violation the date or dates thereof and of his right to object to such determination pursuant to paragraph (h) of this subdivision; he shall also notify the chief fiscal officer of the names of all such employees and of the total number of days, or part thereof, on which it has been determined that such violation occurred. Notice to each employee shall be by personal service or by certified mail to his last address filed by him with his employer.

[(f). Repealed]

(g) Payroll deductions. Not earlier than thirty nor later than ninety days following the date of such determination, the chief fiscal officer of the government involved shall deduct from the compensation of each such public employee an amount equal

to twice his daily rate of pay for each day or part thereof that it was determined that he had violated this subdivision; such rate of pay to be computed as of the time of such violation. In computing such deduction, credit shall be allowed for amounts already withheld from such employee's compensation on account of his absence from work or other withholding of services on such day or days. In computing the aforesaid thirty to ninety day period of time following the termination of a violation pursuant to subdivision (d) of paragraph two of this section and where the employee's annual compensation is paid over a period of time which is less than fifty-two weeks, that period of time between the last day of the last payroll period of the employment term in which the violation occurred and the first day of the first payroll period of the next succeeding employment term shall be disregarded and not counted.

(h) **Objections and restoration.** Any employee determined to have violated this subdivision may object to such determination by filing with the chief executive officer, (within twenty days of the date on which notice was served or mailed to him pursuant to paragraph (e) of this subdivision) his sworn affidavit, supported by available documentary proof, containing a short and plain statement of the facts upon which he relies to show that such determination was incorrect. Such affidavit shall be subject to the penalties of perjury. If the chief executive officer shall determine that the affidavit and supporting proof establishes that the employee did not violate this subdivision, he shall sustain the objection. If the chief executive officer shall determine that the affidavit and supporting proof fails to establish that the employee did not violate this subdivision, he shall dismiss the objection and so notify the employee. If the chief executive officer shall determine that the affidavit and supporting proof raises a question of fact which, if resolved in favor of the employee, would establish that the employee did not violate this subdivision, he shall appoint a hearing officer to determine whether in fact the employee did violate this subdivision after a hearing at which such employee shall bear the burden of proof. If the hearing officer shall determine that the employee failed to establish that he did not violate this subdivision, the chief executive officer shall so notify the employee. If the chief executive officer sustains an objection or the hearing officer determines on a preponderance of the evidence that such employee did not violate this subdivision, the chief executive officer shall forthwith restore to the employee the tenure suspended pursuant to

paragraph (f) of this subdivision, and notify the chief fiscal officer who shall thereupon cease all further deductions and refund any deductions previously made pursuant to this subdivision. The determinations provided in this paragraph shall be reviewable pursuant to article seventy-eight of the civil practice law and rules.

3. (a) An employee organization which is determined by the board to have violated the provisions of subdivision one of this section shall, in accordance with the provisions of this section, lose the rights granted pursuant to the provisions of paragraph (b) of subdivision one of section two hundred eight of this chapter.

(b) In the event that it appears that a violation of subdivision one of this section may have occurred, it shall be the duty of the chief executive officer of the public employer involved (i) forthwith to so notify the board and the chief legal officer of the government involved, and (ii) to provide the board and such chief legal officer with such facilities, assistance and data as will enable the board and such chief legal officer to carry out their duties under this section.

(c) In the event that it appears that a violation of subdivision one of this section may have occurred, the chief legal officer of the government involved, or the board on its own motion, shall forthwith institute proceedings before the board to determine whether such employee organization has violated the provisions of subdivision one of this section.

(d) Proceedings against an employee organization under this section shall be commenced by service upon it of a written notice, together with a copy of the charges. A copy of such notice and charges shall also be served, for their information, upon the appropriate government officials who recognize such employee organization and grant to it the rights accompanying such recognition. The employee organization shall have eight days within which to serve its written answer to such charges. The board's hearing shall be held promptly thereafter and at such hearing, the parties shall be permitted to be represented by counsel and to summon witnesses in their behalf. Compliance with the technical rules of evidence shall not be required.

(e) In determining whether an employee organization has violated subdivision one of this section, the board shall consider (i) whether the employee organization called the strike or tried to prevent it, and (ii) whether the employee organization made or was making good faith efforts to terminate the strike.

(f) If the board determines that an employee organization has violated the provisions of subdivision one of this section, the board shall order forfeiture of the rights granted pursuant to the provisions of paragraph (b) of subdivision one, and subdivision three of section two hundred eight of this chapter, for such specified period of time as the board shall determine, or, in the discretion of the board, for an indefinite period of time subject to restoration upon application, with notice to all interested parties, supported by proof of good faith compliance with the requirements of subdivision one of this section since the date of such violation, such proof to include, for example, the successful negotiation, without a violation of subdivision one of this section, of a contract covering the employees in the unit affected by such violation; provided, however, that where a fine imposed on an employee organization pursuant to subdivision two of section seven hundred fifty-one of the judiciary law remains wholly or partly unpaid, after the exhaustion of the cash and securities of the employee organization, the board shall direct that, notwithstanding such forfeiture, such membership dues deduction shall be continued to the extent necessary to pay such fine and such public employer shall transmit such moneys to the court. In fixing the duration of the forfeiture, the board shall consider all the relevant facts and circumstances, including but not limited to: (i) the extent of any wilful defiance of subdivision one of this section (ii) the impact of the strike on the public health, safety, and welfare of the community and (iii) the financial resources of the employee organization; and the board may consider (i) the refusal of the employee organization or the appropriate public employer or the representative thereof, to submit to the mediation and fact-finding procedures provided in section two hundred nine and (ii) whether, if so alleged by the employee organization, the appropriate public employer or its representatives engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike. In determining the financial resources of the employee organization, the board shall consider both the income and the assets of such employee organization. In the event membership dues are collected by the public employer as provided in paragraph (b) of subdivision one of section two hundred eight of this chapter, the books and records of such public employer shall be prima facie evidence of the amount so collected.

(g) An employee organization whose rights granted pursuant to the provisions of paragraph (b) of subdivision one, and subdivision three of section two hundred eight of this article have

been ordered forfeited pursuant to this section may be granted such rights after the termination of such forfeiture only after complying with the provisions of clause (b) of subdivision three of section two hundred seven of this article.

(h) No compensation shall be paid by a public employer to a public employee with respect to any day or part thereof when such employee is engaged in a strike against such employer. The chief fiscal officer of the government involved shall withhold such compensation upon receipt of the notice provided by paragraph (e) of subdivision two of section two hundred ten; notwithstanding the failure to have received such notice, no public employee or officer having knowledge that such employee has so engaged in such a strike shall deliver or caused¹ to be delivered to such employee any cash, check or payment which, in whole or in part, represents such compensation.

4. Within sixty days of the termination of a strike, the chief executive officer of the government involved shall prepare and make public a report in writing, which shall contain the following information: (a) the circumstances surrounding the commencement of the strike, (b) the efforts used to terminate the strike, (c) the names of those public employees whom the public officer or body had reason to believe were responsible for causing, instigating or encouraging the strike and (d) related to the varying degrees of individual responsibility, the sanctions imposed or proceedings pending against each such individual public employee.

Added L.1967, c. 392, § 2; amended L.1969, c. 24, § 8; L.1969, c. 492, § 1; L.1971, c. 503, §§ 10-14; L.1977, c. 677, § 4; L.1978, c. 465, § 1.

¹ So in original. Probably should read "cause".

Historical Note

1978 Amendment. Subd. 2, par. (f). L.1978, c. 465, § 1, eff. July 5, 1978, repealed par. (f), which related to a probationary period for certain public employees who have been determined to have violated this subdivision.

1977 Amendment. Subd. 3, pars. (f) and (g). L.1977, c. 677, § 4, inserted "and subdivision three" in pars. (f) and (g).

1971 Amendment. Subd. 2. L.1971, c. 503, § 10, eff. June 17, 1971, in par. (c), inserted "and of his right to object to such determination pursuant to paragraph (h) of this subdivision"

following "the date or dates thereof" and, in par. (g), added sentence beginning "In computing the aforesaid."

Subd. 3, par. (a). L.1971, c. 503, § 11, eff. June 17, 1971, added "of subdivision one" following "of paragraph (b)."

Subd. 3, par. (f). L.1971, c. 503, § 12, eff. June 17, 1971, inserted "of subdivision one" following "of paragraph (b)" in two instances.

Subd. 3, par. (g). L.1971, c. 503, § 12, eff. June 17, 1971, inserted "of subdivision one" following "of paragraph (b)."

Subd. 4. L.1971, c. 503, § 14, eff. June 17, 1971, renumbered former subd. 5 in 4. Former subd. 4 was renumbered section 217.

Subd. 5. L.1971, c. 503, § 14, eff. June 17, 1971, renumbered subd. 6 as 4.

1969 Amendments. Subd. 1. L. 1969, c. 24, § 8, eff. Apr. 1, 1969, inserted "public employee or."

Subd. 2. L.1969, c. 392, § 1, eff. May 10, 1969, in par. (f), added provision relating to the effect of probation with regard to teachers and others subject to the education law.

Subd. 3, pars. (b) and (c). L.1969, c. 24, § 8, eff. Apr. 1, 1969, substituted "that it appears that" for "of" and inserted "may have occurred" in both pars.

Subd. 3, par. (e). L.1969, c. 24, § 8, eff. Apr. 1, 1969, deleted clause (iii) relating to probation by the public employer.

Subd. 3, par. (f). L.1969, c. 24, § 8, eff. Apr. 1, 1969, among other changes substituted "or, in the discretion of the board, for an indefinite period of time subject to restoration upon application, with notice to all interested parties, supported by proof of good faith compliance with the requirements of subdivision one of this section since the date of such violation, such proof to include, for example, the successful negotiation, with-

out a violation of subdivision one of this section, of a contract covering the employees in the unit affected by such violation" for "but in no event to exceed eighteen months", and added sentences beginning "In fixing the duration of the forfeiture", "In determining the financial resources", and "In the event membership dues."

Subd. 3, par. (g). L.1969, c. 24, § 8, eff. Apr. 1, 1969, substituted "article" for "chapter" where first appearing.

Subd. 3, par. (h). L.1969, c. 24, § 8, eff. Apr. 1, 1969, added par. (h).

Subd. 5. L.1969, c. 24, § 8, eff. Apr. 1, 1969, added subd. 5 (subsequently renumbered 4).

Effective Date of 1971 Amendment; Preservation of Existing Benefits or Rights. See note under section 208.

Effective Date of Section. Section 1 of L.1967, c. 392, provided that this section was effective Sept. 1, 1967.

Termination of Probation or Tenure Penalty. L.1978, c. 466, § 2, eff. July 5, 1978, provided: "Notwithstanding any inconsistent provision of law, the probationary period of any public employee or loss of tenure imposed pursuant to the provisions of former paragraph (f) of subdivision two of section two hundred ten of the civil service law, repealed by this act (L.1978, c. 466), is hereby terminated."

Cross References

Contempt by employer organization, punishment. see Judiciary Law § 761.

New York Codes, Rules and Regulations

Strikes against public employers, see 4 NYCRR Part 206, set out in the Appendix to this book.

Forms

The following forms appear in West's McKinney's Selected Consolidated Laws Forms under section 210 of the Civil Service Law:

Order to Show Cause in Article 78 Proceeding to Annul Determination that Employee of School District Had Participated in Strike and for Refund of Money Deducted from Salary Pursuant to Civil Service Law, see Form 1.

Petition in Article 78 Proceeding to Annul Determination that Employee of School District Had Participated in Strike and for Refund of Money Deducted from Salary Pursuant to Civil Service Law, see Form 2.

Law Review Commentaries

Forging a strategy to combat sympathy strikes. 29 Syracuse L.Rev. 317 (1978).

Injunctions against sympathy strikes: In defense of Buffalo Forge. 54 N.Y.L.Rev. 289 (1979).

Legality and propriety of agreements to arbitrate major and minor disputes in public employment. 64 Cornell L.Rev. 129 (1968).

Public employee strikes--A survey of the Condon-Wadlin Act. 12 N.Y. L.F. 69 (1967).

The Charleston hospital dispute: Organizing public employees and the right to strike. 45 St. John's L.Rev. 264 (1970).

The Taylor law: A critical examination of its virtues and defects. 20 Syracuse L.Rev. 181 (1968).

Library References

Labor Relations §291.
States §52.

C.J.S. Labor Relations § 274.
C.J.S. States §§ 93, 94, 96, 98 to 102.

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I. GENERALLY

Subdivision Index

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1. Constitutionality—Generally

Withholding of paychecks under this article after striking teachers returned to work following illegal strike did not constitute involuntary servitude under U.S.C.A.Const. Amend. 13. *Tepper v. Galloway*, D.C.N.Y.1979, 491 F.Supp. 1211.

Public school teachers failed to establish that this article's procedures were unconstitutional based upon bias on the part of chief executive officer arising out of alleged pecuniary interest. *Id.*

Public Employment Relations Board's opinion on the overall fairness or effectiveness of the Taylor Law, which prohibits strikes by public employees is a policy decision not specifically relevant to the question of the constitutionality of a provision of the Law. *Civil Service Employees Ass'n v. Helsby*, D.C.N.Y.1977, 439 F. Supp. 1272.

This section's prohibition against strikes by public employees or their representative organizations is not violative of the equal protection clause of either the United States or the New York State Constitution. *City of New York v. De Lury*, 1969, 23 N.Y.2d 176, 295 N.Y.S.2d 901, 213 N.E.2d 128, application denied 23 N.Y.2d 700, 296 N.Y.S.2d 658, 244 N.E.2d 472, appeal dismissed 89 S.Ct. 1223, 394 U.S. 455, 22 L.Ed.2d 414, rehearing denied 90 S.Ct. 37, 396 U.S. 872, 24 L.Ed.2d 120.

This article mandating that public employees shall not strike and that labor organizations representing them shall not cause or encourage a strike is reasonably designed to effectuate a valid state policy in an area where it has authority to act, and does not offend due process requirements of State or Federal Constitution. *Id.*

Subdivision 1 of this section mandating that public employees shall not strike and that labor organizations representing them shall not cause or encourage a strike is reasonably designed to effectuate a valid state policy in an area where it has authority to act, and does not offend due process requirements of State or Federal Constitution. *Id.*

Former section 108 prohibiting strikes by public employees was not unconstitutional as a bill of attainder or as imposing excessive fines and inflicting cruel and unusual punishment. *Di Maggio v. Brown*, 1967, 19 N.Y.2d 283, 279 N.Y.S.2d 191, 225 N.E.2d 871.

More nonenforcement of former section 108 was insufficient to disclose denial of equal protection, absent showing that provisions of said section were enforced as against ferocious officers, and not enforced as to others over 20-year period of this section, pursuant to an intentional and invidious plan of discrimination by Department of Marine and Aviation or by City of New York. *Id.*

This section prohibiting strikes by public employees does not violate Constitutions of either New York or the United States. *St. Pierre v. Board of Ed. of Central School Dist. No. 1, Town of Milton, et al., Saratoga County*, 1912, 40 A.D.2d 71, 337 N.Y.S.2d 700.

This section prohibiting public employees' strikes and imposing administrative sanctions in form of salary

Note 2

reductions to constitutional. *Lawson v. Board of Ed. of Vestal Central School Dist. No. 1, Town of Vestal*, 1970, 35 A.D.2d 878, 315 N.Y.S.2d 877, appeal dismissed 92 S.Ct. 230, 404 U.S. 907, 30 L.Ed.2d 100.

This section forbidding strikes by public employees did not violate due process on ground that Board acted as both prosecutor and hearing officer. *Buffalo Teachers' Federation, Inc. v. Helsby*, 1970, 35 A.D.2d 318, 316 N.Y.S.2d 125.

Prohibition against strikes by public employees or employee organizations does not violate equal protection. *Id.*

Provisions of this section setting forth procedures applicable to strikes by public employees and employee organizations were not overbroad and vague. *Id.*

Public employees may be prohibited from striking without violating either State or Federal Constitutions. *Case v. Kady*, 1971, 37 Misc.2d 703, 321 N.Y.S.2d 712, affirmed 38 A.D.2d 691, 328 N.Y.S.2d 615.

Penalty provisions of this section prohibiting public employees or employer organizations from engaging in a strike does not violate either New York Constitution or United States Constitution. *Chillo v. Board of Ed. of City School Dist. of City of Niagara Falls*, 1971, 66 Misc.2d 749, 321 N.Y.S.2d 952.

This section prohibiting strikes by public employees is constitutional. *Board of Ed. of City of New York v. Shanker*, 1967, 64 Misc.2d 611, 293 N.Y.S.2d 432, affirmed 29 A.D.2d 634, 296 N.Y.S.2d 453.

Former section 108 prohibiting strikes by public employees was constitutional as applied to municipal welfare department employees. *City of New York v. Social Service Emp. Union*, 1965, 48 Misc.2d 120, 266 N.Y.S.2d 277, affirmed 25 A.D.2d 653, 271 N.Y.S.2d 585, motion granted 18 N.Y.2d 675, 273 N.Y.S.2d 421, 219 N.E.2d 871.

Subdivision 2 of former section 22-a, which prohibited public em-

ployees including those in service of any authority, from striking was constitutional as applied to rapid transit motormen as well as other public employees. *New York City Transit Authority v. Jones*, 1969, 2 Misc.2d 733, 154 N.Y.S.2d 269, affirmed 3 A.D.2d 710, 161 N.Y.S.2d 501.

2. — Forfeiture of dues checkoff

This section providing that Public Employment Relations Board was required to order forfeiture of dues checkoff privilege for teachers federations found to have engaged in unauthorized strikes but granting discretion to local boards to impose forfeiture penalty was not unconstitutional as violation of U.S.C.A.Const. Amend. 14 where this section had rational basis in fostering harmonious labor relations, procedures employed by boards were substantially equivalent, and penalty was not applied in discriminatory fashion. *Buffalo Teachers Federation, Inc. v. Helsby*, C.A.N.Y.1982, 676 F.2d 28.

Issues raised in challenge to the dues check-off suspension procedures provided by this article were within the sphere of economic affairs were a "rational basis" is sufficient to uphold this section. *Civil Service Employees Ass'n v. Helsby*, D.C.N.Y. 1977, 439 F.Supp. 1272.

Sanction, for violation by teachers collective bargaining representative of this section prohibiting strikes by public employees, of suspending the representative's right to dues check-off for six months, while at same time ordering school district to cease and desist from refusing to negotiate in good faith with the representative, did not constitute denial of equal protection of the laws on theory harsher penalty was imposed upon the representative than upon the school district which had also been responsible for the strike, in view of fact that sanctions imposed could reflect difference between law violations by public employer and law violations by private employee organization. *Greenburgh No. 11 Federation of Teachers, Local 1552, Am. Federation of Teachers, AFL-CIO v. Hel-*

Note 2

by, 1973, 41 A.D.2d 320, 342 N.Y.S.2d 698.

J. Construction

Arbitration of dispute concerning deduction of extracurricular activity pay as part of penalty following teachers' strike to determine whether after-school activities had been struck and had in fact been suspended during strike would violate public policy, since no-strike provisions of this section are mandatory and exclusive, at least as respects administrative discipline. *Mincola Union Free School Dist. v. Mincola Teachers Ass'n*, 1978, 63 A.D.2d 1065, 495 N.Y.S.2d 603.

Where literal reading of this section would give result plainly unintended by legislature, construction which would give effect to legislative intent and would not be unjust or inequitable upon petitioners would be adopted. *Wilson v. Board of Ed., Union Free School Dist. No. 23, Town of Oyster Bay, Nassau County*, 1972, 30 A.D.2d 965, 333 N.Y.S.2d 898.

This section providing time period within which payroll deductions are to be made following date of determination of violation of no-strike law is to be given a strict construction. *St. Pierre v. Board of Ed. of Central School Dist. No. 1, Town of Milton et al., Saratoga County*, 1971, 66 Misc.2d 631, 321 N.Y.S.2d 905, modified on other grounds 40 A.D.2d 71, 337 N.Y.S.2d 706.

4. Employees within section

Employees of state-owned rail common carrier serving five counties within metropolitan New York City area were subject to provision of this section prohibiting strikes by public employees rather than provision in the Railway Labor Act, 45 U.S.C.A. § 151 et seq., allowing for such self-help since operation of the service was an "integral governmental function" and federal interest in operation of the service, which derived a small percentage of its revenue from interchange of freight with interstate rail carriers, was not "demonstrably greater" than that of the state.

United Transp. Union v. Long Island R. Co., C.A.N.Y.1980, 631 F.2d 10.

This section which prohibits strikes by public employees is applicable to nonjudicial employees of unified court system. *McFoy v. Helsby*, 1960, 31 A.D.2d 262, 311 N.Y.S.2d 60, affirmed 28 N.Y.2d 790, 321 N.Y.S.2d 902, 270 N.E.2d 722.

County employees receiving benefits from county employment and training administration, a separate agency of county government which is federally funded, were subject to this section prohibiting strikes. *Mronella v. Mills*, 1977, 89 Misc.2d 1062, 393 N.Y.S.2d 162.

5. Prohibition of strikes in general

The state, in governing its internal affairs, has power to prohibit any strike if the prohibition is reasonably calculated to achieve a valid state policy in an area which is open to state regulation. *City of New York v. De Lory*, 1968, 29 N.Y.2d 175, 295 N.Y.S.2d 961, 213 N.E.2d 128, application denied 23 N.Y.2d 755, 298 N.Y.S.2d 958, 244 N.E.2d 472, appeal dismissed 89 S.Ct. 1223, 391 U.S. 455, 22 L.Ed.2d 413, rehearing denied 89 S.Ct. 37, 396 U.S. 872, 24 L.Ed.2d 126.

This article, in prohibiting striking, imposes a concomitant obligation on part of employer to bargain in good faith. *City of New York v. Viazul*, 1975, 49 A.D.2d 163, 373 N.Y.S.2d 577.

Inasmuch as strike of union representing employees of public authority was illegal, it was not relevant whether union president complied with bylaws in seeking to terminate it; furthermore, even if president violated bylaws, court could not direct that strike lawfully continue. *Blair v. Local 100 of Transport Workers Union of America, INC.*, 196 Misc.2d 1018, 416 N.Y.S.2d 912.

Proscriptions of this article apply to all public employees (respective of whether they render "critical" services). *New York City Off-Track Betting Corp. v. Local 2021 of Dist. Council 37, Am. Federation of State, County and Municipal Emp.*

("ASMICE"), *AFI-CIO*, 1970, 69 Misc.2d 606, 410 N.Y.S.2d 974.

Failure of board of education and city to bargain with teachers in good faith would not give teachers a right to strike in violation of this section. *Kuntz v. Newburgh Teachers Ass'n*, 1973, 75 Misc.2d 360, 347 N.Y.S.2d 605.

This section forbidding concerted work stoppages could not be intentionally violated, legally or morally, on the theory that it was being "tested." *Id.*

Strike by public employees is illegal even in absence of statute prohibiting the same. *Cano v. Kata*, 1971, 67 Misc.2d 793, 321 N.Y.S.2d 712, affirmed 30 A.D.2d 691, 328 N.Y.S.2d 816.

Ability of employees to strike is not essential to right of association and is subordinate to right of state to prohibit such activity among state employees. *Zeluck v. Board of Ed. of City School Dist. of City of New Rochelle*, 1970, 62 Misc.2d 1061, 307 N.Y.S.2d 329, affirmed 36 A.D.2d 416, 329 N.Y.S.2d 409.

It is within state's power to determine that all strikes by public employees are harmful without distinguishing between them as to degree. *Id.*

6. Private right of action

Existence of the Taylor Law does not preclude private plaintiff from recovering damages from union and officials incurred as a result of illegal public employee strike under traditional common law precepts. *Burns Jackson Miller Summit & Spitzer v. Lindo v.*, 1982, 88 A.D.2d 56, 452 N.Y.S.2d 50.

The Taylor Law does not give rise to existence of private cause of action against union and officials for damages arising out of illegal public employee strike. *Id.*

Court was not persuaded by mechanical application of concept of "standing to sue" to deny rights of plaintiff public officials to bring action against defendant union officials

for having allegedly conspired and caused unlawful acts of work stoppage and coercion at city pollution control plants. *Caso v. Gotham*, 1971, 67 Misc.2d 205, 323 N.Y.S.2d 742, reversed on other grounds 30 A.D.2d 965, 333 N.Y.S.2d 607.

Unions' violation of former section 109 prohibiting strikes by public employees did not grant corporate plaintiffs a cause of action against unions based on an illegal strike. *Amur Productions Corp. v. Quill*, 1965, 61 Misc.2d 640, 273 N.Y.S.2d 318.

Unions' actions in causing strike of public service employees in violation of former section 109 and in defiance of injunction did not give rise to a cause of action, founded on theory of prima facie tort, to plaintiff corporation and others who had no direct contractual relationship with defendants and whose damages were no different in character from those sustained by the public generally. *Id.*

7. Criminal prosecution

A strike by firemen may be the subject of a criminal prosecution given the existence of a statute which can be said to define the crime. *People v. Viazul*, 1974, 78 Misc.2d 1030, 359 N.Y.S.2d 143.

This article, which authorizes collective bargaining for public employees, does not provide the exclusive remedy for public employees strikes, despite contention of union officials that law precludes application of criminal penalties to public employees strikes since it did not specifically provide for criminal sanctions. *Id.*

A strike by firemen may properly be the subject of a prosecution for reckless endangerment notwithstanding contention that reckless endangerment, Penal Law §§ 120.20 and 145.25, were not intended to apply to conduct not involving the performance of a physical act. *Id.*

Although this article authorizing collective bargaining for public employees does not provide criminal penalty, when criminal liability would otherwise attach to conduct, a

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crime has been committed notwithstanding fact that conduct is termed a "strike." *Id.*

11. EMPLOYEE VIOLATIONS

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21. Generally

Even if strike by employees of New York City Off-Track Betting Corporation was preceded by "lock out," strike was not justified under this section, in view of fact that this section contained no such defense and that, if there had been improper conduct on the part of the Off-Track

Betting Corporation, the employees' rights could have been vindicated under remedies provided by this article. *New York City Off-Track Betting Corp. v. Local 2021 of Dist. Council 37, Am. Federation of State, County and Municipal Emp. ("AFSCME"), AFL-CIO, 1979, 59 Misc.2d 688, 410 N.Y.S.2d 974.*

Public school employees, including school teachers, who participated in four-day strike and who were appropriately penalized under this section were not required to make up their absences by working an additional four days for no compensation; thus, employees could not be required to render services, without additional compensation, on the two contingency days which were placed in the school calendar to guard against possibility that the schools would be closed by weather or other contingencies, notwithstanding that employees would in fact be working two days less than the 180 days set forth in the teachers' contract. *Plainville-Old Bethpage Congress of Teachers, Local 1101, AFT, AFL-CIO v. Board of Ed., Central School Dist. No. 4, Plainville, 1973, 78 Misc.2d 975, 383 N.Y.S.2d 136.*

Determinations as to legality of work stoppage by public employees are administrative determinations. *Kierman v. Armstrong, 1973, 73 Misc.2d 929, 342 N.Y.S.2d 977.*

College teachers could not justify strike in violation of this section prohibiting strikes by public employees by charging administration with unfair labor practices, since federal labor laws were not applicable. *Case v. Katz, 1971, 67 Misc.2d 703, 324 N.Y.S.2d 712, affirmed 33 A.D.2d 691, 328 N.Y.S.2d 615.*

22. Due process in general

It appears without question that an employee charged with violation is assured his due process rights at some stage, although perhaps not always prior to the imposition of Taylor Law penalties against him. If found guilty of a violation as a matter of law he is entitled to a judicial review long held appropriate to ex-

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amine such a determination. If the finding of guilt is based on evidence introduced at a hearing, he is assured of his due process rights at such hearing and thereafter a judicial review thereof in order to examine that determination. Additionally, in the event of his exoneration in consequence of the hearing, the statute expressly assures the employee that any penalties imposed shall cease forthwith and any payroll deductions shall be refunded. *Sanford v. Rockefeller, 1974, 36 N.Y.2d 547, 304 N.Y.S.2d 450, 324 N.E.2d 113, appeal dismissed 95 S.Ct. 1972, 421 U.S. 913, 44 S.Ct.2d 461, 465.*

Due process entitlements of public employees are fully protected by this article, notwithstanding the absence of a prepenalty hearing, since an individual's case and the administrator's reaction to it remain open to judicial review, specifically by an Article 78 proceeding, since the sanctions of this section are reversible in both monetary terms and in status, since the persons affected are not imprisoned or unemployed, and since, on the government's side, there is a grave condition when a mass strike by public employees is contemplated. *Board of Ed. of City School Dist. of City of New York v. United Federation of Teachers, Local No. 2, AFT, AFL-CIO, 1979, 40 N.Y.2d 1018, 410 N.Y.S.2d 536, 389 N.E.2d 1057.*

Procedures contained in this section prohibiting strikes relating to notice, hearing, penalties and review are adequate as affording required degree of due process. *Hurke v. Carey, 1981, 82 A.D.2d 953, 410 N.Y.S.2d 773.*

Failure to afford adversary hearing before imposition of penalties upon public employees who engaged in illegal strike did not deny due process in view of right to object after determination of culpability and imposition of penalties and opportunity for review of any adverse determination by special proceeding. *Kierman v. Bronstein, 1973, 73 Misc.2d 929, 342 N.Y.S.2d 977.*

23. Probation, former provisions relating to

Subd. 2, par. (f), which related to probation for a term of one year following determination of violation, was repealed by L.1978, c. 465, § 1, eff. July 5, 1978.

Suspension of tenure rights during probation, which was a sanction available against plaintiff school supervisors although subsequently deleted from this section did not represent a cruel and unusual punishment. *O'Brien v. Board of Ed. of City School Dist. of City of New York, D.C.N.Y.1980, 408 F.Supp. 1003.*

Probation provision of this section requires court to substitute for minimal protections of section 3012 of the Education Law the more elaborate rights during penalty probation which other non-teaching civil service employees receive; applicable protections are set forth in classified service rule. *Toller v. Central School Dist. No. 1 of Town of Conkling, 81 A.1, 1976, 40 N.Y.2d 487, 387 N.Y.S.2d 87, 354 N.E.2d 820.*

The probation period under this section has no maximum or minimum term of length; it lasts for precisely one year and is not fashioned, as was classified service rule, to enable employer to arrange for flexible periods of probation such as are available for proper evaluation of new employees. *Id.*

Under this section providing that teachers who have been placed on probation for engaging in illegal strike are entitled to pretermination rights of nonteacher probationary public employees, where tenured teacher had been placed on probation and school board decided to terminate his employment because he had pled guilty to charge of disorderly conduct, board should have waited until completion of probationary term, and, having acted 24 days before end of one-year probationary period, board should have conducted hearing. *Heis v. Gaskon, 1978, 81 A.D.2d 1042, 403 N.Y.S.2d 291.*

Decisive date for commencement of probationary period for public em-

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players who have engaged in illegal strike in time when public employee is notified that he has been determined that he has participated in strike in violation of this section. *Balsack v. Dutchess County*, 1970, 56 A.D.2d 317, 389 N.Y.S.2d 391.

Teacher, who was discharged more than six months prior to effective date of 1978 amendment of this section which terminated probation and restored tenure to those teachers who were on probation on effective date of said legislation but which was not intended to restore to tenured positions those teachers who had been placed on probation and discharged prior to its effective date, was not within this section's coverage. *Hoffman v. Board of Ed. of New York City School Dist.*, 1979, 88 Misc.2d 847, 414 N.Y.S.2d 931.

This section to effect that probationary period of public employee or loss of tenure would be terminated would not be retroactively applied to former teacher who was terminated before the legislation became effective. *Marland v. Ambach*, 1978, 68 Misc.2d 844, 409 N.Y.S.2d 528.

This section to effect that probationary period of public employee or loss of tenure imposed pursuant to subdivision of this section would be terminated has no retroactive effect but only prospective application in case of individuals who are presently serving on probationary status as a result of strike activity. *Id.*

Under this section providing that an employee who has engaged in an unlawful strike shall be on probation for a term of one year during which period he shall serve without tenure, tenured period is not discretionary and does not have minimum and maximum periods such as are allowed in initial appointments, and thus absent extension of term of probation, any probationer whose probationary term ends without his discharge acquires tenure. *Schender v. Trianborough Bridge and Tunnel Authority*, 1978, 83 Misc.2d 1099, 403 N.Y.S.2d 1002.

Legislature did not intend by enacting the section providing that em-

ployee engaging in unlawful strike shall be on one-year term of probation to allow extension of probation for but 12 weeks to employees under State Civil Service Commission jurisdiction and as long as six months under New York City Civil Service Commission jurisdiction, but rather Legislature intended that any employee engaging in any illegal strike would be placed on probation for term of but one year irrespective of portion of state in which he was employed, and thus bridge and tunnel authority was not entitled, even with consent of employees placed on such probation, to extend term of probation for six months or at all. *Id.*

Provisions of collective bargaining agreement relative to probationary service did not apply to teachers placed on probation for violating the Taylor Law by participating in a strike. *Marland v. Ambach*, 1978, 83 Misc.2d 323, 402 N.Y.S.2d 755, reargument denied 86 Misc.2d 611, 409 N.Y.S.2d 586.

Record amply supported decision of the Commissioner of Education to affirm former teacher's appeal from decision of city school district chancellor to deny the teacher at the end of a one-year probationary period which had been imposed on the teacher as a result of her participation in a strike. *Id.*

Probationary status resulting from a violation of the prohibition against strikes by public employees is the equivalent of probationary status on original appointment. 1978 Op.Atty. Gen. 33.

A hearing is not required when a teacher is discharged at the end of a Taylor Law, Civil Service Law § 200 et seq., probationary period. 1978, 37 Misc.Rept. 270.

24. Determination by chief executive officer—Generally

"An initial determination is made by the chief executive officer of the government involved on the basis of such investigation and affidavits as he may deem appropriate". He may determine either that there has been no violation or that a violation has

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occurred. If it be the latter, he then determines, 'on the basis of such further investigation and affidavits as he may deem appropriate', the names of the employees and the dates of violation. Notice in person or by certified mail is then given to each employee charged, together with advice of his right to object to the initial determination. Within 20 days thereafter each employee charged may file a written objection with the chief executive officer. Such objection shall consist of the employee's sworn affidavit containing a short and plain statement of the facts on which he relies to show that such determination was incorrect, supported by available documentary proof." *Sanford v. Rockefeller*, 1974, 35 N.Y.2d 547, 364 N.Y.S.2d 450, 324 N.E.2d 113, appeal dismissed 95 S.Ct. 1972, 421 U.S. 973, 44 L.Ed.2d 461, 465.

Under this article, date of strike "determination" is fixed at the date on which notices are sent to affected employees. *Tepper v. Galloway, D. C.N.Y.* 1979, 481 F.Supp. 1211.

Determination that Long Island state parkway police officer, who allegedly was ill with bronchitis during three-day strike, who was somewhat vague as to when he obtained note from his doctor and who testified that he normally paid the doctor by check but who was unable to produce any canceled checks relating to treatment for bronchitis attack, had engaged in the strike was not arbitrary or unreasonable. *Marlin v. Osterman*, 1975, 49 A.D.2d 973, 373 N.Y.S.2d 894.

Record did not establish that superintendent of schools made a determination required by this section, that the teachers had violated the no-strike law until notice was given to them by letter mailed less than 10 days prior to payroll deductions based on violations. *St. Pierre v. Board of Ed. of Central School Dist. No. 1, Town of Milton et al., Saratoga County*, 1971, 66 Misc.2d 634, 321 N.Y.S.2d 905, modified on other grounds 40 A.D.2d 71, 337 N.Y.S.2d 703.

25. — Notice to employees

Board of education employees were not entitled to reimbursement for deductions made from their salaries absent showing that they did not receive notice forthwith following determination that they violated this article. *Genovese v. Anker*, 1978, 84 A.D.2d 884, 408 N.Y.S.2d 820.

Provision of this section for service upon civil service employees by certified mail of notice of determination of strike participation is not unconstitutional where it provides means reasonably calculated to notify employees of determination affecting their rights. *Civil Service Emp. Ass'n, Inc. v. Walach*, 1975, 48 A.D.2d 923, 369 N.Y.S.2d 510.

Notice to civil service employees of determination of strike participation was not constitutionally or statutorily deficient because of minor mispelling of names or fact that addressing of notices was performed with surname followed by Christian name without intervening comma. *Id.*

Notice sent to teachers to effect that they had been found to have committed violation of statutory prohibition against strikes and that compensation would be withheld was sufficient to constitute compliance with this section requiring that such notice be given by chief executive officer of school district. *Lawson v. Board of Ed. of Vestal Central School Dist. No. 1, Town of Vestal*, 1970, 35 A.D.2d 878, 315 N.Y.S.2d 377, appeal dismissed 92 S.Ct. 230, 404 U.S. 907, 30 L.Ed.2d 180.

In respect to provision of this section stating that payroll deductions are to be made not earlier than 30 nor later than 50 days following the date of a determination by the school district's chief executive officer of a violation of the no-strike law, the determination was made when notification, by certified mail, was given the teachers, not when the district's chief executive officer informed the clerk of the district that, based on his information and observations, a strike was in effect over a certain period and that approximately 650 teachers

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deducted from their paychecks within 30 to 90 days of determination that strike was illegal is a statute of limitations which barred payroll deductions made against employees who engaged in an illegal strike after expiration of the 90-day period. *May v. State*, 1982, 80 A.D.2d 898, 418 N.Y.S.2d 627.

Subdivision 2(g) of this section to effect that deductions from compensation of employees who engage in an illegal strike should occur not earlier than 30 nor later than 90 days following the date of the determination of the violation is a time limitation binding upon the State which bars payroll deduction after its expiration. *New York State Inspection, Ser. and Law Enforcement Emp., Dist. Council 52, AFSCME, AFL-CIO v. State*, 1982, 81 A.D.2d 419, 418 N.Y.S.2d 524.

Thirty to 90 day period for deduction of mandatory strike penalties from strikers' paycheck pursuant to this section commenced with notification to strikers affected that strike determination had been made and that penalties would be deducted, and inasmuch as notices were served on all identified strikers between February 11 and March 5, 1979, penalty deduction of May 11, 1979 was within 90-day limitation. *House v. New York City Health and Hospitals Corp.*, 1981, 80 A.D.2d 807, 437 N.Y.S.2d 109.

Deduction from staff officers' paycheck which took place on March 2 and March 10, 1979, was not an ordinary one for "time not worked," but was a strike penalty deduction and was timely in that it was made within 14 days of its earliest notification to strikers and was premature in that it occurred before expiration of 20-day period in which employee served with violation notice may file objections to employer's finding of violation. *Id.*

For purposes of subd. 2(g) of this section providing that no earlier than 30 days or later than 90 days following date of determination that public employees have engaged in an illegal strike, chief fiscal officer of govern-

ment involved shall deduct from compensation of each such public employee an amount equal to twice his daily rate of pay for each day of unlawful activity, date of determination should be date of formal notification. *St. Pierre v. Board of Ed. of Central School Dist. No. 1, Town of Milton, et al., Saratoga County*, 1972, 40 A.D.2d 71, 337 N.Y.S.2d 705.

With respect to this section providing that no earlier than 30 days nor later than 90 days following date of determination that public employees have engaged in an illegal strike, the fiscal officer of government involved shall deduct from compensation of employee an amount equal to twice his daily rate of pay for each day of unlawful activity, continuance of strike past 29th day of determination does not toll commencement of 30-90 day calendar period as prescribed by this section, nor is it mandated that deduction be made at earliest possible poststrike date. *Topper v. Wyandutch Union Free School Dist.*, 1980, 100 Misc.2d 959, 494 N.Y.S.2d 685.

Legislature in providing for payroll deductions from compensation of employees participating in unlawful strike made deliberate use of word "deduct" and did not intend it to be synonymous with "dediver," and where checks for employees reflecting fines called for by subd. 2(g) of this section were printed on last day of 90-day period in which fine could be imposed, there was timely deduction though checks were not delivered until later. *Fenney v. Rockefeller*, 1972, 71 Misc.2d 613, 336 N.Y.S.2d 312.

Even though subd. 2(g) of this section precluded payroll deductions sooner than 30 days and later than 90 days following date when superintendent made findings required by subd. 2(d) of this section, on May 26, 1970, and in that period there would occur no payroll payments from which deductions could be made, because teaching staff was paid on basis of ten calendar months excluding July and August, "final determination" issued on August 10, 1970, in

effort to update termination of May 26, 1970, was ineffective to extend limitation period prescribed in subd. 2(g), and payroll deductions could not be made, even though teachers had absented themselves from their teaching duties from May 7 through May 21 and thereby subjected themselves to penalties prescribed by this section. *Wilson v. Board of Ed., Union Free School Dist. No. 23, Town of Oyster Bay, Nassau County*, 1971, 60 Misc.2d 130, 319 N.Y.S.2d 721.

Deductions from salaries that are imposed as penalties for violating this article should be taken no earlier than 30 days nor later than 90 days from the date the chief executive officer of the local government involved gives notice to employees that they have been determined to have engaged in a strike. *Id.*

30. — Refunds

Uncontroverted documentary proof of illness of school district employee and testimony of doctor whom he produced at supplemental hearing overcame presumption under subd. 2(b) that employee was absent by reason of strike and entitled employee to refund of money deducted from his salary by the board of education. *Pasare v. Board of Ed., Union Free School Dist. No. 8 (Monseville), Town of Hempstead*, 1971, 46 A.D.2d 922, 362 N.Y.S.2d 611.

Article 78 review invoked by civilian employees of Correction Department who demanded refund of salary withheld following a strike for each of the days wherein director of Governor's Office of Employee Relations had determined that they had not engaged in strike was exclusive remedy of employees, and thus state officials' invocation of procedures set forth in the applicable union contracts was of no avail where this section provided for Article 78 review of a determination to refund deductions made subsequent to a strike, and where such review was approved as the constitutional safeguard of prehearing monetary seizure under this article. *Betzler v. Carey*, 1981, 100 Misc.2d 881, 441 N.Y.S.2d 200.

Civilian employees of Correction Department who had twice their daily rate of pay withheld for period during which strike took place at correction facility were entitled to an immediate refund of the penalty, twice the daily rate of pay withheld, rather than only the single daily rate of pay actually refunded for the days for which they were determined by director of Governor's Office of Employee Relations not to have been on strike, in that state officials could not utilize the mechanism afforded under structure of this section to determine whether each employee was otherwise illegally absent without regard to the strike considerations which bring this section into play, but, rather, since penalty imposed under this section for engaging in the strike was twice the daily rate of pay, such penalty had to be immediately restored to nonstrikers. *Id.*

Civilian employees of State Correction Department were not improperly joined together in their actions demanding refund of salary withheld following a strike for each of the days wherein director of Governor's Office of Employee Relations had determined that they had not engaged in strike, in that employees presented a common question of law as to whether they were entitled to refund of the salary withheld for the days on which determinations had been made they were not on strike, and the individual fact questions were not pertinent to the issue of law presented. *Id.*

Where none of six school teachers before court either in his individual capacity, or on whose behalf a class action was sought to be maintained, had filed an objection and demand for hearing within 20 days, as provided in this section prohibiting public employees from striking, on uniform factual situation that existed as to 687 school teachers who engaged in strike, Article 78 proceedings seeking return of payroll monies deducted was maintainable as class action to avoid multiplicity of suits. *Crillo v. Board of Ed. of City School Dist. of City of Niagara Falls*, 1971, 60 Misc.2d 710, 321 N.Y.S.2d 952.

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31. Objections to determination of chief executive officer—Generally

This section requires that written charges be served upon employee found by chief executive officer to have engaged in strike and permits employee to object to determination by filing with chief executive officer an affidavit and supporting proof. *Zeluck v. Board of Ed. of City School Dist. of City of New Rochelle*, 1970, 62 Misc.2d 274, 307 N.Y.S.2d 320, affirmed 30 A.D. 615, 319 N.Y.S.2d 109.

32. — Affidavits of employees

Affidavit of civil service employee, which stated that he telephoned his location to find out if he should report to work and was told that plant was not operating as result of strike, was sufficient to entitle employee to a hearing to determine whether he engaged in unlawful strike in violation of this article. *Zarella v. Koch*, 1980, 71 A.D.2d 749, 425 N.Y.S.2d 692.

City manager did not act arbitrarily and capriciously in determining, without a hearing, that police officers had engaged in a strike in violation of this section where officers' affidavits did not refute charges in such a manner as to raise a question of fact. *Dowling v. Bowen*, 1970, 53 A.D.2d 862, 395 N.Y.S.2d 355.

Affidavit submitted by teachers, who were notified by superintendent of schools of determination of their violation of this section, was sufficient to raise a question of fact requiring hearing. *St. Pierre v. Board of Ed. of Central School Dist. No. 1, Town of Milton, et al., Saratoga County*, 1972, 40 A.D.2d 71, 337 N.Y.S.2d 706.

School teachers were not unreasonably denied public hearing at which to present facts in opposition to school officials' determination that school teachers were engaged in illegal strike on dates they were absent without permission where petitioners made no factual statements in their affidavits of objection to officials' determinations and did not make any statements in Article 78 petition ex-

cluding their absence from school on dates at issue. *Smyle v. Savitt*, 1973, 73 Misc.2d 259, 312 N.Y.S.2d 101.

Acting superintendent of schools did not act arbitrarily in dismissing school teachers' objection to superintendent's determination that school teachers had violated this section by absence from work without permission where teachers' affidavits in opposition did not contain any factual statements or documentary proof overcoming statutory presumption that an employee who is absent from work without permission on date when a strike occurs was engaged in such strike. *Id.*

Affidavits submitted by teachers, who were notified by superintendent of schools of determination of their violation of no-strike law, were sufficient to require superintendent to appoint a hearing officer to determine if the teachers had in fact violated this section. *St. Pierre v. Board of Ed. of Central School Dist. No. 1, Town of Milton et al., Saratoga County*, 1971, 60 Misc.2d 634, 321 N.Y.S.2d 905, modified on other grounds 40 A.D.2d 71, 337 N.Y.S.2d 706.

33. — Determination of objections by chief executive officer

After an employee files written objections, the chief executive officer to then presented with three options: (1) If he determines that the proof establishes that the employee did not violate subdivision two of this section, he shall sustain the objection; (2) If he determines that beyond any question of fact the proof fails to establish that the employee did not violate the subdivision he shall dismiss the objection and so notify the employee; or (3) If he determines that the proof raises a question of fact which if resolved in favor of the employee, would establish that the employee did not violate the subdivision he shall appoint a hearing officer to determine in fact whether there was a violation. *Sanford v. Rockefeller*, 1974, 35 N.Y.S.2d 617, 301 N.Y.S.2d 450, 324 N.E.2d 113, appeal dismissed 95 S.Ct. 1072, 421 U.S. 973, 44 L.Ed.2d 464, 465.

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34. — Hearing and hearing officer

The hearing officer shall conduct a hearing which will serve as the vehicle for making his determination. Although the statute does not make explicit provision with respect thereto, this would be an evidentiary hearing at which the employee would be accorded all his due process rights, following which the hearing officer determines whether there has been a violation. The burden of proof at such hearing shall be borne by the employee and a determination in his favor must be based on a preponderance of the evidence. *Sanford v. Rockefeller*, 1974, 35 N.Y.S.2d 617, 301 N.Y.S.2d 450, 324 N.E.2d 113, appeal dismissed 95 S.Ct. 1072, 421 U.S. 973, 44 L.Ed.2d 464, 465.

Public employees who engaged in a strike contrary to the injunctive provisions of this section were not entitled to a prepenalty hearing. *Id.*

Hearing officer in proceeding for dismissal of maintenance workers and teachers at correctional facility for violation of Taylor Law, section 200 et seq. of this chapter, was not able to judge by observation of demeanor and otherwise the credibility and probative worth properly to be accorded testimony of witnesses, particularly where ultimate issue was subjective state of mind of witnesses. *Vitek v. Terribilo*, 1981, 63 N.Y.S.2d 1603, 412 N.Y.S.2d 474, 425 N.E.2d 802.

Specification charging individual civil service employees with nonperformance of their work duties, rather than with immorally or dishonestly, did not deprive them of "liberty" or "property" so as to require that employees be given due process hearing prior to discharge; charges of insubordination, however, carried sufficient stigma so as to require due process hearing even for probationary employees. *Civil Service Emp. Ass'n, Inc. v. Wallach*, 1975, 48 A.D.2d 923, 369 N.Y.S.2d 610.

35. — Judicial review

After the hearing officer determines there has been a violation, the

employee, if necessary and if he be so advised, becomes entitled to a full-blown Article 78 judicial review of the hearing officer's determination. On the one hand, if the chief executive officer has determined that without question of fact the employee is guilty of the violation charged, that determination may be called up for review. No evidentiary hearing having been had, the issue will be whether the chief officer proceeded without or in excess of jurisdiction, whether his determination was made in violation of lawful procedure, or whether it was affected by an error of law (CPLR 7803, subds 2, 3). On the other hand, if the adverse determination has been made by a hearing officer following a hearing, in addition to the three foregoing issues, the employee may also question whether the hearing officer's determination is, on the entire record, supported by substantial evidence (CPLR 7803, subd. 4). *Sanford v. Rockefeller*, 1974, 35 N.Y.S.2d 617, 301 N.Y.S.2d 450, 324 N.E.2d 113, appeal dismissed 95 S.Ct. 1072, 421 U.S. 973, 44 L.Ed.2d 464, 465.

To the argument that subdivision 2 of this section nevertheless remains defective because there is no definite provision for a hearing at any stage; that a postpenalty hearing will only be held at the unfettered discretion of the reviewing officer, the short answer is that the officer's discretion is, rather, open to review; his determination summarily rejecting the excuses contained in the employee's affidavit is subject to Article 78 review as specifically provided for in paragraph (b) of subdivision 2. *Id.*

Employees who alleged in petition that they were arbitrarily and illegally denied hearings pursuant to subd. (2)(b) of this section on their objection to determination that they had been absent from work without authorization during period of strike at correctional facilities raised triable issue of fact on theory that, during strike, various employees were at work, on duty with National Guard, or on workers' compensation leave

Note 35

or on personal leave which would render determination contrary to law. *Linke v. Carey*, 1981, 82 A.D.2d 933, 410 N.Y.S.2d 771.

Penalty imposed under this section prohibiting strikes by public employees and providing for penalties applies only employee and not employee organization, and right of review belongs to individual employee and not to employee organization, and employer organization is thus not proper party to commence proceeding for review of imposition of such penalty. *Nassau Educational Chapter Civil Service Emp. Ass'n, Inc. v. Board of Ed. of Farmingdale Union Free School Dist.*, 1978, 61 A.D.2d 1019, 409 N.Y.S.2d 113.

To extent that public employee organization was aggrieved because actions of school board might have violated collective bargaining agreement, employee organization was required to pursue grievance procedures afforded by agreement, rather than proceeding for review of imposition of penalties against individual employees. *Id.*

Teacher, who sought review of determinations of superintendent of schools, the first stating that she had engaged in strike and imposing penalties and, second transferring her to "Permanent Substitute Pool" status, was deprived of due process in that she was not given a full hearing where she was not afforded opportunity to confront and cross-examine witnesses, sworn statements were not taken, stenographic minutes were not taken at hearing and findings of fact were not made, and appropriate remedy was a new hearing at which her rights would be safeguarded. *Rendell v. Alioto*, 1973, 42 A.D.2d 397, 334 N.Y.S.2d 725.

System of review by objection provided by this section allowing for administrative review of initial determination that an employee of school district has violated this section proscribing teachers' strikes and expressly providing for review by the courts is not necessarily inadequate

to satisfy requirements of due process. *Lawson v. Board of Ed. of Vestal Central School Dist. No. 1, Town of Vestal*, 1970, 35 A.D.2d 878, 316 N.Y.S.2d 877, appeal dismissed 92 S.Ct. 230, 404 U.S. 861, 30 L.Ed.2d 180.

Failure of teachers, who were found by school district to have participated in strike in violation of this section, to seek administrative review of that determination as provided by this section foreclosed any consideration in Appellate Division of Supreme Court as to whether or not there had been any strike and whether or not individual teachers given notice of violation had participated therein, so as to warrant payroll deductions. *Id.*

Claim of dismissed employees of bridge and tunnel authority that they were coerced into accepting without objection determination that they had engaged in strike in violation of this section did not entitle them to relief, inasmuch as authority properly raised defense of statute of limitations and more than four months had elapsed since such determination became final. *Schender v. Triborough Bridge and Tunnel Authority*, 1978, 93 Misc.2d 1009, 909 N.Y.S.2d 1002.

Article 78 proceeding challenging deductions from teachers' salaries as result of alleged strike was not available to those teachers who did not file a protest within 20 days from service of notice of determination. *Mashloff v. Central School Dist. No. 1 of Town of Wappinger, Poughkeepsie, Fishkill, La Grange, Dutchess County*, 1971, 67 Misc.2d 149, 323 N.Y.S.2d 1005.

Where affidavits have been filed in opposition to a determination that a public employee has violated this section prohibiting public employees from engaging in strikes, because of various defenses advanced, the aggrieved employees must maintain individual Article 78 proceeding. *Giriblu v. Board of Ed. of City School Dist. of City of Niagara Falls*, 1971, 60 Misc.2d 749, 321 N.Y.S.2d 952.

Note 36

36. Presumption of violation by employee

In light of both the rebuttable presumption of this section that employee who abstains wholly or in part from full performance of duties when strike occurs shall be presumed to have engaged in such strike and testimony in record with inferences reasonably to be drawn therefrom, there was substantial evidence to support determination of hearing officer that maintenance workers and teachers at correctional facility violated Taylor Law, section 200 et seq. *Ylask v. Termello*, 1981, 63 N.Y.2d 1009, 442 N.Y.S.2d 474, 426 N.E.2d 502.

The statutory presumption, clearly rebuttable, in the practical realities of a strike situation does have a "supporting foundation in the probabilities". *Hanford v. Rockefeller*, 1974, 35 N.Y.2d 517, 301 N.Y.S.2d 450, 324 N.E.2d 113, appeal dismissed 95 S.Ct. 1972, 421 U.S. 973, 41 L.Ed.2d 461, 465.

Although, under this section, the absence of a public employee from work without permission during a general work stoppage is presumed to be violative of this section, such shifting of the normal burden of proof is not a denial of due process under the circumstances, considering, inter alia, that the public employee would otherwise be required to establish a negative proposition, that there was no legitimate excuse for the employee's absence, and would be required to do so under considerable practical handicaps regarding access to relevant evidence. *Id.*

This section prohibiting strikes creates statutory presumption that strike occurred, and that presumption must then be overcome by parties seeking to overturn determination of unlawful strike by substantial evidence. *Smith v. Bloom*, 1981, 51 A.D.2d 899, 445 N.Y.S.2d 46.

Presumption that an employee who is absent from work without permission or who abstains wholly or in part from full performance of his duties in his normal manner without

permission on a date when a strike occurs is presumed to have engaged in such strike is rebuttable. *Zarelli v. Koch*, 1990, 74 A.D.2d 719, 426 N.Y.S.2d 582.

Substantial evidence supported determination of hearing officer that certain civil service employees failed to rebut statutory presumption that they engaged in unlawful strike in violation of this article. *Id.*

Notwithstanding contention that petitioner correctional officer's failure to perform her duties during illegal work stoppage created a presumption under this section that was not rebutted by her that she participated in it, evidence was introduced by petitioner of Article 78 proceeding to show that she, in fact, was assigned to an in-service training class which was cancelled on morning of illegal work stoppage, and respondent Director of Employee Relations thus had burden of going forward with further proof to contradict that assertion, but he failed to meet that burden. *McNeil v. Wolcott*, 1979, 67 A.D.2d 699, 412 N.Y.S.2d 403.

Absent submission of sufficient evidence to refute statutory presumption that teachers were engaged in a strike, there was no burden on the employer to offer evidence to the contrary. *Anderson v. Kluhner*, 1976, 51 A.D.2d 1015, 381 N.Y.S.2d 116.

Presumption under subd. 2(b) of this section that petitioner, a school district employee, was absent from work on the days in question without permission was amply refuted by him, and, since there was absolutely no evidence offered to the contrary, the school district's determination that he had participated in a strike and should be docked therefor was arbitrary, capricious and properly annulled. *Zarelli v. Savitt*, 1974, 46 A.D.2d 788, 361 N.Y.S.2d 30.

Question upon review of determination in disciplinary case that teacher participated in strike is sufficiency of rebuttal evidence, in essence, whether there is substantial evidence upon record to support determination that teacher did not

overcome statutory presumption that teacher absent when strike occurred participated in it. *Kaplan v. Kinzler*, 1674, 77 Misc.2d 607, 353 N.Y.S.2d 613.

Presumption pursuant to subd. 2(b) of this section that "an employee who is absent from work without permission or who abstains wholly or in part from the full performance of his duties in his normal manner without permission on the date or dates when a strike occurs, shall be presumed to have engaged in such strike on such date or dates" did not deny due process in view of opportunity for rebuttal. *Kernan v. Bronstein*, 1973, 73 Misc.2d 629, 342 N.Y.S.2d 977.

37. Conduct of employer constituting strike—Generally

Public employees' temporary working conditions were not so extreme as to justify their refusal to work in place assigned or tasks assigned to them and, even though employees were engaged in other work of their own choosing, their refusal to perform their duties except on their own terms justified finding by the Director of Office of Employee Relations that they had engaged in a strike in violation of this section. *Acosta v. Wollett*, 1980, 77 A.D.2d 769, 430 N.Y.S.2d 899, affirmed 65 N.Y.2d 761, 417 N.Y.S.2d 241, 431 N.E.2d 980.

Failure to accept out-of-office assignments because of a bona fide fear of personal injury and/or future reprisals is not a violation of this section. *Van Vlack v. Ternullo*, 1980, 74 A.D.2d 827, 425 N.Y.S.2d 347, reversed on other grounds 53 N.Y.2d 863, 442 N.Y.S.2d 471, 425 N.E.2d 862.

Police officers who stopped city buses, sanitation trucks and sewer maintenance vehicles, detained them for long and time-consuming inspections, issued summonses and ordered drivers back to their garages, which conduct occurred over a three-day period and was commensurate with a campaign to induce city to rescind an order which had demoted certain high-ranking police officials for

budgetary reasons, and who had concomitantly abstained from performance of other duties necessary to the effective functioning of the police, engaged in a "strike" within meaning of this section. *Dowling v. Bowen*, 1976, 53 A.D.2d 862, 385 N.Y.S.2d 356.

Evidence was insufficient to support determinations of acting city manager and city manager of city of Yonkers that employees of the city by failure to report for work on certain days went on strike in violation of former section 22-a. Application of *Hagot*, 1950, 276 App.Div. 1014, 95 N.Y.S.2d 500.

Failure of teachers to attend "Back-to-School Night" for parents as they were required to do constituted a strike. *Baltimore-Merrick Central High School Dist., Town of Hempstead, Nassau County v. Baltimore-Merrick United Secondary Teachers, Inc.*, 1975, 85 Misc.2d 282, 378 N.Y.S.2d 981.

College teachers who had taught 12 classroom hours last academic year, whose collective bargaining agreement thereafter expired, and who were refusing to teach three additional classroom hours in the current academic year were engaged in "strike" in violation of this section prohibiting strikes by public employees. *Caso v. Katz*, 1971, 67 Misc.2d 793, 321 N.Y.S.2d 712, affirmed 38 A.D.2d 691, 328 N.Y.S.2d 675.

Where none of 40,000 purported "resignations" by teachers were individually executed or transmitted to Board of Education but were delivered to teachers' union, teachers did not resign, but engaged in a "strike" against the Board of Education, in violation of this section. *Board of Ed. of City of New York v. Shanker*, 1907, 51 Misc.2d 941, 283 N.Y.S.2d 518.

38. — Absence from work as

School teacher who chooses to remain absent from work to avoid the pressures preceding an impending strike and to avoid deciding which side to support effectively yielded to

interests of the strikers and, consequently, whether presumed to be engaged in strike or whether simply condoning strike by his absence, petitioner was in violation of this section. *Zauer v. Board of Ed. of Farudogah Union Free School Dist.*, No. 22, 1980, 76 A.D.2d 929, 429 N.Y.S.2d 725.

Absenteeism, in such, could constitute basis for finding of "strike" under this section prohibiting strikes by public employees. *Civil Service Emp. Ass'n v. Heblly*, 1970, 33 A.D.2d 339, 308 N.Y.S.2d 223.

Eighty-one municipal employees who absented themselves from work en masse to attend hearing on application for increased compensation and who did so because they in good faith believed that they had to go to a judicial tribunal as witnesses rather than because they sought to induce betterment in their employment did not violate this section prohibiting strikes by public employees. *Rosenberger v. Sullary Dist. No. 6, Town of Hempstead*, 1967, 28 A.D.2d 892, 282 N.Y.S.2d 579, affirmed 22 N.Y.2d 815, 292 N.Y.S.2d 911, 259 N.E.2d 652.

No-strike provisions of this section may apply to a concerted refusal by public employees to perform work even though the work is not a bargained-for condition of employment under collective bargaining agreement and is thus voluntary. *Baltimore-Merrick Central High School Dist., Town of Hempstead, Nassau County v. Baltimore-Merrick United Secondary Teachers, Inc.*, 1975, 85 Misc.2d 282, 378 N.Y.S.2d 981.

Absence en masse of teachers for an unfulfilled period of time to consult with and petition members of state legislature in attempt to bring about changes in conditions of employment or compensation would constitute a violation of former section 16R prohibiting strikes by public employees. *Prozior v. Board of Ed. of City of New York*, 1960, 25 Misc.2d 945, 209 N.Y.S.2d 960, affirmed 12 A.D.2d 923, 215 N.Y.S.2d 718, affirmed 9 N.Y.2d 911, 217 N.Y.S.2d 80, 176 N.E.2d 96.

39. — Evidence sufficient

In proceeding to mount determination of the State Director of Employee Relations that petitioners engaged in an illegal strike when they refused to work in a temporary office building because of allegedly hazardous and uncomfortable working conditions, findings that petitioners engaged in an unjustified "concerted stoppage of work or slow down" in violation of this section was supported by substantial evidence. *Accata v. Wollett*, 1981, 65 N.Y.2d 761, 447 N.Y.S.2d 241, 431 N.E.2d 986.

Substantial evidence supported findings of hearing officer, adopted by Commissioner of Department of Marine and Aviation of City of New York, that ferryboat officers, appointed to their respective job titles pursuant to this section and employed on ferries operated by Department of Marine and Aviation of City of New York, were engaged in a "strike" within former section 16R. *Di Maggio v. Brown*, 1967, 10 N.Y.2d 289, 270 N.Y.S.2d 169, 226 N.E.2d 871.

Substantial evidence supported conclusion that custodians employed by school district participated in strike, thereby violating this section. *Smith v. Bloom*, 1981, 94 A.D.2d 890, 416 14 N.Y.S.2d 46.

Hearing examiner's finding that petitioner failed to overcome by a preponderance of the credible evidence the presumption that he had engaged in an illegal strike, justifying city manager's deduction from petitioner's salary six days' pay, was supported by the record, since doctor's note that petitioner was ill on such days, though uncontroverted, was clearly hearsay, and the hearing examiner was free not to accept petitioner's testimony as credible. *Mynarski v. Rayo*, 1979, 72 A.D.2d 741, 421 N.Y.S.2d 251.

Evidence, including evidence of abnormally high absence rate of teachers on the days in question, sustained finding that strike of teachers had in fact taken place, thus authorizing deductions from their salaries thereafter.

Andreoni v. Kinader, 1976, 51 A.D.2d 1015, 381 N.Y.S.2d 116.

Evidence required conclusion that activities of striking members of Westchester County Department of Public Welfare were designed to and did interfere with the function of the Department. *Westchester County v. Arduano*, 1967, 53 Misc.2d 612, 279 N.Y.S.2d 457.

III. EMPLOYEE ORGANIZATION VIOLATIONS

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61. Generally

Showing by school teacher organizations, which had been charged by the public employment relations board with engaging in an illegal strike, and which in that proceeding had raised affirmative defense that public employer had refused to negotiate in good faith, was insufficient to entitle them to injunction prohibiting the board from conducting further proceedings during pendency of criminal contempt proceedings against certain witnesses, whose testimony was allegedly essential to their affirmative defense, on ground that compelling them to participate in administrative proceeding with witnesses who would allegedly invoke their privilege against self-incrimination would operate as a denial of due process against them. *Hudson Teachers Ass'n v. Helsby*, 1972, 30 A.D.2d 1012, 313 N.Y.S.2d 577.

Determination of chief executive officer of employer of teachers that teachers did not engage in a strike was an administrative decision, without a hearing, and was not binding

on Public Employment Relations Board in a proceeding against an employee organization. *Buffalo Teachers' Federation, Inc. v. Helsby*, 1970, 35 A.D.2d 318, 316 N.Y.S.2d 125.

Where specifications against misclassification of civil service employees stated charges relating to strike of public employees, no penalty could be imposed without proof of strike. *Civil Service Emp. Ass'n v. Helsby*, 1970, 33 A.D.2d 339, 308 N.Y.S.2d 221.

Where disciplinary proceedings against individual employees alleged violating prohibition of this section against strike were determined in their favor, association of civil service employees could not equitably be punished for alleged violation of such prohibition. *Id.*

62. Jurisdiction of public employment relations board

Teachers' federation was not denied equal protection by being subject to Public Employment Relations Board with authority to suspend federation's right to have membership dues deducted from members' paychecks as penalty for violating ban on strikes while other public employees within the city mayor's office were subject to checkoff forfeiture only upon judicial finding of criminal contempt where separate procedures bore rational relation to legitimate state interest in fostering harmonious labor relations between public employers and employees and in protecting public by assuring uninterrupted government operations and where legislature simply recognized particularized needs of city by creating different mechanisms for forfeiture. *Shanker v. Helsby*, C.A.N.Y.1962, 670 F.2d 31.

Jurisdictional dispute did not exist between the State Labor Relations Board and the Public Employment Relations Board, in action for judgment declaring the rights of union and its member employees with respect to employer's deducting two days' pay for one day strike, so as to preclude the Public Employment Relations Board from conducting procedures against the union and its members to determine whether there was

a strike and, if so, whether the union's right to dues check-off by the employer should be forfeited to any extent. *Local 930, Am. Federation of State, County and Municipal Emp., AFL-CIO v. Erie County Water Authority*, 1972, 38 A.D.2d 487, 336 N.Y.S.2d 695.

Public Employment Relations Board has no responsibility with respect to violations of this section by individual public employees, but it is authorized to institute proceedings on its own motion to determine whether an employee organization has violated this section. *Buffalo Teachers' Federation, Inc. v. Helsby*, 1970, 35 A.D.2d 318, 316 N.Y.S.2d 125.

63. Notification to employee organization

Due process did not require personal service on employee organization of charges arising out of alleged violation of public employees' no strike law, and where this section did not expressly mandate such service Public Employment Relations Board had implied power to adopt rule authorizing service by mail. *Buffalo Teachers' Federation, Inc. v. Helsby*, 1970, 35 A.D.2d 318, 316 N.Y.S.2d 125.

Scope of punishment or penalty proceeding before administrative board is limited to charges and specifications as served upon alleged wrongdoer prior to hearing. *Civil Service Emp. Ass'n v. Helsby*, 1970, 33 A.D.2d 339, 308 N.Y.S.2d 223.

64. Determination of public employment relations board

Substantial evidence supported determination of Public Employment Relations Board that police officer's union violated this section by instigating, encouraging, or condoning two strikes by policemen. *Police Benev. Ass'n of City of Yonkers, Inc. v. New York State Public Employment Relations Bd.*, 1980, 51 N.Y.2d 770, 432 N.Y.S.2d 695, 112 N.E.2d 382.

Determination of Public Employment Relations Board that union engaged in a strike during a specified time period was not in accord with the evidence. *Local 252, Transport*

Workers Union of America, AFL-CIO v. New York State Public Employment Relations Bd., 1982, 89 A.D.2d 551, 461 N.Y.S.2d 17.

Speculation by the Public Employment Relations Board that union could have done more to end public transit strike in less than the day and a half of its duration, viewed in context of whole hearing record, did not rise to level of "substantial evidence" to support its determination that union condoned the illegal strike. *Amalgamated Transit Union, Division 1342 v. Newman*, 1980, 73 A.D.2d 105, 431 N.Y.S.2d 292.

Evidence that teachers' union had voted to strike on specified date if its demands were not fully met and that strike followed on appointed day when board of education failed to accede to union's demands sustained determination that strike threat and strike had been purposely utilized in negotiating weapons by union, in violation of this article and were not precipitated by acts of the board. *Yonkers Federation of Teachers, Local 900, Am. Federation of Teachers, AFL-CIO v. Helsby*, 1974, 48 A.D.2d 132, 357 N.Y.S.2d 111.

Record on review of public employment relations board's determination that association of civil service employees had violated provision against strike failed to establish participation by officials of association, either by instigating or condoning abettors. *Civil Service Emp. Ass'n v. Helsby*, 1970, 33 A.D.2d 339, 308 N.Y.S.2d 223.

65. Provocation by public employer

New York Public Employment Relations Board may not impose any forfeiture of dues checkoff on an employee organization when extreme employer provocation causes a union-sanctioned illegal strike. *Shanker v. Helsby*, D.C.N.Y.1981, 515 F. Supp. 874.

Although city failed to make constructive offers of settlement until the eleventh hour of negotiations with firemen's collective bargaining agents, provocation was not so extreme as to warrant a strike in view

Note 65

of the disastrous impact strike would have on the well-being of the population of the city. *City of New York v. Vizzini*, 1975, 49 A.D.2d 873, 373 N.Y.S.2d 577.

65. Wildcat strikes

Public Employment Relations Board will not penalize public employee organization if its members have staged a "wildcat" strike. *Buffalo Teachers Federation, Inc. v. Helshy*, D.C.N.Y.1981, 516 F.Supp. 215.

67. Forfeiture of dues checkoff privileges

For constitutionality of provisions for forfeiture of dues checkoff privileges, see annotations under note number 2, *supra*.

Union president, by voicing opposition to binding arbitration provisions of New York ordinance setting forth procedures for enforcement of this article, thus resulting in an amendment which precluded board of education from electing coverage under the city office of collective bargaining and instead required it to remain subject to the state Public Employment Relations Board, did not estop teachers' union from challenging, on equal protection grounds, the differences between state board and city board procedures with respect to forfeiture of dues checkoff privileges for union which engages in an illegal strike. *Shanker v. Helshy*, D.C.N.Y. 1981, 515 F.Supp. 571.

Local boards created by public employer to enforce this article in their jurisdiction are free to devise their own "substantially equivalent" procedures for revocation of dues checkoff privilege for a union which engages in an illegal strike. *Id.*

Statutory scheme for punishing illegal public employee strikes, by revocation of employee organization's dues checkoff privilege, does not violate equal protection clause in applying mandatory standard for imposing penalty under jurisdiction of Public Employment Relations Board and permissive standard under jurisdic-

tion of local public employment boards or New York City office of collective bargaining, where scheme is rationally related to furthering legitimate state interest in harmonious public labor relations and their local control. *Buffalo Teachers Federation, Inc. v. Helshy*, D.C.N.Y.1981, 516 F.Supp. 215.

Since this section which grants Public Employment Relations Board power to impose dues checkoff forfeiture is not listed among sections of this article that remain applicable to public employers creating sub-1981's, such local boards are free to devise their own "substantially equivalent" procedures to revoke dues checkoff privilege. *Id.*

Public employer that initiates contempt proceeding in jurisdiction of local public employment board may request court to impose forfeiture of dues checkoff privilege in lieu of initiating administrative proceedings, and court may impose that penalty in addition to levying a fine. *Id.*

Public Employment Relations Board did not abuse its discretion in imposing on union a forfeiture of dues checkoff privileges for period of three months because of public employees' strike, in light of union's willful defiance of this section, impact of strike on health, safety and welfare of community, finances of employee organization, and prosecution of public employer. *Dutchess County Emp. Union, Dutchess County Chapter, Civil Service Emp. Ass'n, Inc. v. Helshy*, 1978, 62 A.D.2d 1089, 493 N.Y.S.2d 823.

Under this section there is no limit on amount the employee union may be fined and there is no limit on period that the union may be deprived of its "dues check-off"; since the legislature apparently found that fiscal constraints were appropriate to punish union transgressions, the form, whether fines or damages, is not a controlling distinction. *Case v. District Council 37, Am. Federation of State, County and Municipal Emp.*, APL-C10, 1973, 43 A.D.2d 159, 350 N.Y.S.2d 173.

Note 2

§ 211. Application for injunctive relief

Notwithstanding the provisions of section eight hundred seven of the labor law, where it appears that public employees or an employee organization threaten or are about to do, or are doing, an act in violation of section two hundred ten of this article, the chief executive officer of the government involved shall (a) forthwith notify the chief legal officer of the government involved, and (b) provide such chief legal officer with such facilities, assistance and data as will enable the chief legal officer to carry out his duties under this section, and, notwithstanding the failure or refusal of the chief executive officer to act as aforesaid, the chief legal officer of the government involved shall forthwith apply to the supreme court for an injunction against such violation. If an order of the court enjoining or restraining such violation does not receive compliance, such chief legal officer shall forthwith apply to the supreme court to punish such violation under section seven hundred fifty of the judiciary law.

Added L.1967, c. 392, § 2.

Historical Note

Effective Date. Section 4 of L. 1967, c. 392, provided that this section was effective Sept. 1, 1967.

Library References

Labor Relations § 791 et seq. C.J.R. Labor Relations § 781 et seq.

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1. Construction
- This section directing that when public employees strike an applica-
- tion be made by the chief legal officer of the governmental agency involved to punish employees for criminal contempt is mandatory and governmental agency involved may neither decide whether to so apply nor does agency have authority to alter, modify, ignore or forgive any determination made by trial court with respect to such application. *Board of Ed. of City of New York v. Shanker*, 1967, 51 Misc.2d 911, 283 N.Y.S.2d 538.
2. Law governing
- County's application for injunctive relief against strike of employees was governed by this section rather than by the Labor Law § 807. *Orange County v. Civil Service Emp. Ass'n, Inc.*, 1970, 51 A.D.2d 1031, 381 N.Y.S.2d 313.

COLLECTIVE BARGAINING IN THE PUBLIC SCHOOLS: REASSESSING LABOR POLICY IN AN ERA OF REFORM

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Recent calls for educational reform have sometimes presupposed that the spread of collective bargaining among teachers has contributed to the malaise in America's public schools. Binding arbitration, in particular, has been criticized as producing inflationary wage settlements and undermining the managerial discretion of local school boards. Critics such as Professors Wellington and Winter, however, have often applied to teachers' unions a general theory of the inordinate political power of public employee unions which fails to consider both the American tradition of local control of public schools and the growing body of empirical research into school labor relations. The authors draw on such research and introduce findings from their own study of Connecticut's public schools to refute the charge that collective bargaining has shifted the balance in school labor relations in favor of unionized teachers. While binding arbitration may be correlated with a wage effect mildly favorable to teachers, arbitration is an essentially conservative process closely following established salary trends. Moreover, arbitration has failed to have any significant effect on school governance or educational policy.

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"[U]ntil we pay teachers at least as well as the middle echelon of executives we cannot expect the profession to attract its full share of the available range of talents. Salaries must be raised immediately and substantially. Almost as important as the level of pay is the fact that promotional policy for most school systems is routine and depends much more on seniority than on merit."

—*The Pursuit of Excellence: Education and the Future of America*.¹

At last count, there were more than a dozen reports on the quality of public education in America.² A certain readiness for

1. ROCKEFELLER REPORT, *THE PURSUIT OF EXCELLENCE: EDUCATION AND THE FUTURE OF AMERICA* 26 (1958) (hereinafter cited as ROCKEFELLER REPORT).

2. See, e.g., E. BOYER, *HIGH SCHOOL: A REPORT ON SECONDARY EDUCATION IN AMERICA* (1983) (hereinafter cited as CARNegie REPORT); J. COLEMAN, T. HOFFER & S. KILGROVE, *HIGH SCHOOL ACHIEVEMENT: PUBLIC, CATHOLIC, AND PRIVATE SCHOOLS COMPARED* (1982); J. GOODLAD, *A PLACE CALLED SCHOOL: PROSPECTS FOR THE FUTURE* (1984); NATIONAL COMM'N ON EXCELLENCE IN EDUCATION, *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983) (hereinafter cited as NATION AT RISK);