REPORT TO THE

107th MAINE STATE LEGISLATURE

by the

JOINT SELECT COMMITTEE TO STUDY THE MUNICIPAL EMPLOYEES LABOR RELATIONS LAW

September, 1974

Foreword

This Committee was created by the 106th Legislature under the authority of Joint Order HP 1574

STATE OF MAINE
HOUSE OF REPRESENTATIVES
106th LEGISLATURE

JOINT ORDER

WHEREAS, legislation has been introduced at the 105th and 106th sessions of the Maine Legislature to clarify the scope of collective bargaining involving public employers and public employees; and

WHEREAS, legislative guidance is needed in differentiating between the statutory duties of public employers with respect to public policy and the working conditions of public employees; and

WHEREAS, the Maine Supreme Judicial Court has recently handed down its decision in the case of the City of Biddeford By Its Board of Education v. Biddeford Teachers Association; and

WHEREAS, the impact of that decision and other pertinent issues need further study in considering proposed amendments to the Municipal Public Employees Labor Relations Law; now, therefore, be it

ORDERED, the Senate concurring, that the Speaker of the House of Representatives and the President of the Senate appoint a Joint Select Committee consisting of 5 members of the House, appointed by the Speaker of the House and 3 members of the Senate, appointed by the President of the Senate; and be it further

ORDERED, that said committee is directed to undertake a comprehensive study of the Municipal Public Employees Labor Relations Law, to determine the desirability of amending said Municipal Public Employees Labor Relations Law in light of experience under this law and the recent decision of the Supreme Judicial Court, City of Biddeford By Its Board of Education v. Biddeford Teachers Association with specific attention to be given to the

scope of negotiations between teachers and public employers of teachers, and to the effect of binding and compulsory arbitration on the public interest, except that such committee shall not conduct any investigation into areas which are the specific subjects of any study which may be conducted by or under contract with the United States Department of Labor or any subagency thereof; and be it further

ORDERED, that within the area of its study, the committee shall report its findings and its recommendations to the next special or regular session as to how the best interests of the State would be served; and be it further

ORDERED, that the committee shall have the authority to seek input from qualified individuals who are knowledgeable and experienced in public sector collective bargaining and to employ clerical and competent professional assistance within the limits of funds provided; and be it further

ORDERED, that members of the committee shall be compensated for the time spent in the performance of their duties at the rate of $20 per day plus all actual expenses incurred; and be it further

ORDERED, that there is appropriated to the committee from the Legislative Account the sum of $5,000 to carry out the purposes of this Order.

NAME: Floyd M. Haskell

TOWN: Houlton

Reproduced and distributed under the direction of the Clerk of the House.
6/1/73

As noted in the order, a great deal of attention has been directed to the Municipal Employees Labor Relations Law since its enactment. The 105th Legislature did enact a revision which was subsequently vetoed by

the Governor. In his veto message the Governor endorsed the unanimous recommendation of his study group that the law be reviewed and added his opinion that it needed improvement. As will be seen, the Committee hearings developed a body of testimony that, although presented from different perspectives, indicates the need for consideration of modifications in the law.

I

BACKGROUND

In 1969 the 104th Legislature enacted the Municipal Public Employees Labor Relations Law (M.R.S., T. 26, Chapter 9-A), which created a mechanism for carrying out the policy, stated in the law, of promoting "...the improvement of the relationship between public employers and their employees by providing a uniform basis for recognizing the right of public employees to join labor organizations of their own choosing and to be represented by such organizations in collective bargaining for terms and conditions of employment." (M.R.S., T. 26, s961).

This law granted to certain employees of municipalities, towns or their subdivisions, and of school, water, sewer, and other districts, the right "to join, form and participate in activities of their own choosing for the purposes of representation and collective bargaining..." (M.R.S., T. 26, § 963).

The law also created the Public Employees Labor Relations Board within the Bureau of Labor and Industry, to administer the new law. Powers and duties of the Board are outlined in M.R.S., T. 26, §968. The law also outlines procedures to be followed in collective bargaining and those subjects upon which the parties are required to negotiate. Certain prohibited acts of public employers, public employees and public employee organizations are also established by the statute.

Briefly, the collective bargaining process established by the Municipal Public Employees Labor Relations Law can be outlined as follows:

I. Determination of Bargaining Unit (M.R.S., T. 26, §966)

The public employer and public employees may decide on the

appropriateness of a bargaining unit, and upon the inclusion of certain positions in the unit. In case of a dispute, the Executive Director of the Public Employees Labor Relations Board (PELRB) decides on the appropriateness of the unit and whether the disputed positions are to be included. Standards for his decision are included.

II. Determination of Bargaining Agent (M.R.S., T. 26, §§967)

Upon request of a public employee organization, the public employer may grant voluntary recognition to the organization, if he is convinced that the organization represents a majority of employees in an appropriate unit. Otherwise, the public employer (or public employees) may request that the Executive Director of the PELRB conduct an election. After the election, the Director certifies as the bargaining agent the organization (if any) which receives the majority of votes of those voting. Election procedures are outlined in this section, as well as procedures for de-certification and a provision requiring that the certified organization represent all employees in the bargaining unit, not just members of the organization.

III. Obligation to Bargain (M.R.S., T. 26, §965)

Both the public employer and the bargaining agent are obligated to bargain collectively. To fulfill this obligation, both parties must:

A. Negotiate, which includes:
   1. meeting at reasonable times;
   2. meeting within 10 days after notice from other party, if no contract has been agreed upon;
   3. conferring and negotiating in good faith with respect to wages, hours and working conditions and contract grievance arbitration. Neither party is obligated to make concessions or agree to a proposal. Public employers of teachers are not required to "negotiate" with respect to "educational policies" (which specifically do not include wages, hours and working conditions) but must "meet and consult" on such policies;
   4. executing a contract in writing incorporating

any agreements arrived at. The term of duration of the contract is negotiable but may not extend beyond 3 years;

5. participating in good faith in the fact finding and arbitration procedures outlined in the statute;
6. if any matter under negotiation requires an appropriation of money by the municipality, notifying of the employer by the bargaining agent at least 120 days before the conclusion of the current fiscal operating budget.

B. Participating in mediation at any time prior to arbitration, at the request of either party or on motion of the PELRB or its Director. (Prior to October, 1973, the law required both parties to agree to mediation, and therefore it was not often utilized.) A Panel of Mediators is established in the law and mediation procedures outlined.

C. Participating in Fact Finding

If the parties, either with or without the services of a mediator, cannot settle a controversy, they may jointly agree on a fact finding procedure, or either party may request the Director of the PELRB to assign a fact finding panel. Procedures for fact finding are outlined.

D. Participating in binding arbitration

If after mediation (optional) and fact finding, the parties have not resolved their controversy they may jointly agree to an arbitration procedure which will result in a binding determination of their controversy, or either party may put into effect the arbitration procedure outlined in the statute. This procedure (and any procedure agreed to by the parties jointly) may lead to resolution of the controversy by the parties themselves, or to determinations by the arbitrators which are binding on the parties except that the arbitrators may only make recommendations, which are not binding, concerning salaries,

pensions and insurance. All determinations are subject to review by the Superior Court. Procedures for arbitration are outlined in the statute.

Since the enactment of the Municipal Public Employees Labor Relations Law, the procedures outlined above have been followed, and as is usual with the institution of a new procedural system, precise determination of the meaning of certain portions of the law has become necessary. In the case of this statute, some of the more important questions were considered and ruled on by the Supreme Judicial Court of Maine in the consolidated cases. City of Biddeford By Its Board of Education v. Biddeford Teachers Association et al. and Biddeford Teachers Association v. Board of Education of City of Biddeford et al., 304 A. 2d 387, 1973.

The Biddeford cases were complex in nature and are difficult to summarize as are the opinions written by two Justices of the Supreme Judicial Court. Perhaps the briefest possible summary is that contained in the Maine Reporter:

> "Consolidated actions in which teachers' association sought to compel board and superintendent to comply with determination of arbitration panel under the Municipal Employees Labor Relations Law and board challenged validity of Arbitrators' decision. The actions were reported. The Supreme Judicial Court, Weatherbee, J., held, in Part I, that provisions in Municipal Employees Labor Relations Law for arbitration in event of failure of negotiations in attempt to effect teachers' contract and providing that arbitrators shall recommend terms of settlement as to salaries, pensions, or insurance but would render binding determinations in other matters is not an unconstitutional delegation of authority to arbitrators. The Court also held that the attempt to arbitrators binding determination of labor disputes was not void for lack of standards."
>
> 304 22d, 387, 387-88.

It should be added that the decision that the statute was a constitutional delegation of authority was unanimous, but the decision that the delegation of this power was not void because of a lack of

standards for the arbitrators to use in making decisions was the result of an even split of the Justices on the question. Such a split results in the upholding of constitutionality, but nevertheless indicates serious reservations on the part of those Justices who felt the standards were inadequate. It should be noted that these cases relate to the statute only as it applies to teachers.

In light of this decision, and also as the result of several years of experience in collective bargaining under this law which have enabled those working under it to see how it might be improved, the 106th Legislature ordered that a Joint Select Committee be appointed to consider the broad question of whether the Municipal Public Employees Labor Relations Law should be amended. More specifically, the committee was ordered to give attention to the question of scope of negotiations between teachers and public employers of teachers, and to the effect of binding and compulsory arbitration on the public interest.

II

COMMITTEE PROCEDURE

The first meeting of the Select Committee on Municipal Public Employees Bargaining Laws was held on September 5, 1973. At that meeting the Committee decided, after review of the Order authorizing the Committee and directing the Study, to direct its attention to three topics at its next meeting, and the staff assistant to the Committee was instructed to proceed accordingly. Topics outlined for consideration included:

1. Discussion of the Biddeford decision;
2. Discussion of comparable statutes in other states;
3. Discussion of the opinions of persons and associations who have actively participated in the municipal employees

collective bargaining process as to the possible scope of the study and changes in the statutes which they would recommend.

Accordingly, each Committee member was sent a copy of the Biddeford decision and copies of selected state statutes on public employees collective bargaining. In addition, the following persons and associations were contacted and requested to submit to the Committee in writing opinions concerning the possible scope of the study, problem areas of the law, and other questions which might profitably be considered by the Committee:

1. Maine Teachers Association
2. Maine School Management Association
3. Maine Municipal Association
4. American Federated State and County Municipal Employees
5. International Association of Firefighters
6. Maine State Federated Labor Council
7. Miss Marion Martin, former Director of the Bureau of Labor
8. Parker Denaco, Esquire, Executive Director of the Public Employees Labor Relations Board
9. Walter Corey, Esquire, Chairman of the Public Employees Labor Relations Board
10. Dean Stanley Deveno, Arbitrator
11. Sumner Goffin, Esquire, Arbitrator
12. Joseph Chandler, Arbitrator
13. Roger Snow, Arbitrator
14. Paul Frinsko, Esquire

Also, arrangements were made to discuss the Biddeford decision with two attorneys--Frank Chapman, Esquire, and Hugh McMahon, Esquire, who were involved with the case.

The second meeting of the Committee was held on September 27, 1973. At the morning session of that meeting, the Committee discussed with Mr. Chapman and Mr. McMahon the Biddeford decision, and heard

recommendations from the two attorneys on possible changes in the law. At the afternoon session, the Committee discussed with the staff assistant the summary of laws from other states and correspondence from those contacted by the Committee.

After this discussion, the Committee decided to invite several persons to the next meeting of the Committee to discuss several subjects which most of those persons and associations contacted seemed to feel should be addressed by the Committee as a part of their study.

The third meeting of the Committee was held on November 20, 1973. At the morning session of the meeting the Committee discussed with the speakers invited the following subjects:

1. The right to strike vs. binding arbitration
2. Possible changes in the statute to provide that the PELRB be more closely patterned after the National Labor Relations Board.
3. Setting up a Fair Employment Practices section under Title 20, Education Laws.
4. Providing statutory guidelines for arbitration
5. Fiscal autonomy for School Boards
6. Reduction of the post-impasse process to mediation only
7. Making mediation mandatory before fact-finding
8. Following the recommendations of the Advisory Committee on Intergovernmental Relations related to Collective Bargaining for Public Employees.

The speakers were:

1. Dr. Carroll McGary, Commissioner of Educational and Cultural Services, State of Maine
2. Dr. John H. Marvin, Maine Teachers Association
3. Mr. James Vickerson, Maine School Management Association
4. Stephan Sunenblick, Esquire, attorney for AFSCME
5. Miss Marion Martin, former Director of the Bureau of Labor
6. Mr. Parker Denaco, Esecutive Director, PELRB
7. Mr. Donald Sipe. Superintendent of Schools, S.A.D. #17

8. Paul Frinsko, Esquire

9. Mr. Walter Corey, Chairman, PELRB

Summaries of this testimony are as follows: (Although this meeting was informal, with each speaker summarizing his views and responding to the statements of others and questions from Committee members, this summary of views is being grouped according to subject.)

1. <u>The right to strike vs. binding arbitration</u>

Dr. Marvin: MTA has always preferred the right to strike as a means of resolving unresolved labor-management problems in the public sector. However, the public is not ready to accept this. Therefore, there should be binding arbitration in all areas.

Mr. Sunenblick: AFSCME favors the right to strike very strongly, but does not object to binding arbitration as well.

Miss Martin: Except for teachers, it would be futile for municipal employees to strike because their skills are not so unusual that they could be replaced. The right to strike is, however, a useful weapon in the negotiation process because the threat of strike gives a serious import to the negotiations such that when both parties feel thwarted the negotiations may last. I personally think the right to strike is better than binding arbitration. If there is an amendment it should protect the health and safety of the community.

Mr. Denaco: The people of Maine would be alarmed if they heard that the Legislature is considering the right to strike. That alarm would be intensified by the unemployment, which has been excessive. I would recommend that you look at the formulas of several states which have considered this problem.

Binding arbitration serves a good purpose in causing the parties involved in impasse situations to be serious in their endeavors. Wisconsin has enacted a law which replaces straight binding arbitration with a "last best offer" in order that the arbitrators may pick from a reasonable list and both sides go as far as they can to achieve acceptability.

Mr. Frinsko: Strike vs. arbitration - strikes are harmful to the public. I think we should direct our attention to what kinds of actions are inherently harmful to the public sector.

Mr. Corey: On right to strike vs. binding arbitration - you could modify legislation so as to provide arbitrators who are called in under the act should be Maine people. I suggest that you look at model legislation that has been tried and is working well. The Canadian Legislature has given the Board the right to determine whether the particular strike is adverse to the public health and safety and if it is, the agency can enjoin the strike and force the employees to work. You could also consider the "final best offer" within final arbitration.

2. Possible changes in the statute to provide that the PELRB be more closely patterned after the National Labor Relations Board (NLRB).

Dr. Marvin: We would like to see the PELRB patterned after the NLRB in terms of its jurisdictional scope. The PELRB is a body specializing in the field of labor relations and would be the body best qualified to make the determination of what is negotiable.

Mr. Sunenblick: The inability to reach a quick resolution to the problem is a most pressing problem. The aspects of how to get a quick resolution or how to impose some sort of restraints on a municipality's activity I'd consider a pressing problem. Need to assign resolution to the problems to PELRB. The Board needs some power to enforce its decision.

Mr. Denaco: I think you should look carefully at the 7-day limitation. In §964 there are prohibitive practices which could be so precipitous that it would not be in the public interest to have to wait 7 days to hold a hearing on the matter.

Mr. Frinsko: It is my feeling that the Maine Board, under the present law, has enforcement powers equivalent to the NLRB, the one difference being that the right of the Board to seek an injunction against a prohibitive practice against some substantial showing and request a temporary restraining order prior to a hearing is not specifically spelled out. I think it is there. Maybe in the absence of legislation the Board is reluctant to take this step. Perhaps you could insert words similar to the NLRB Act.

The Board has the power to determine negotiability now and should be the source or rulings. It seems terrible to have a Board funded so weakly. To expand this Board to function efficiently would require a minimum of recording personnel, library services and additional staff.

3. Setting up a Fair Employment Practices section under Title 20, Education Laws.

Dr. Carroll McGary, Commissioner of Educational and Cultural Services, proposed this topic for consideration by the Committee in his written response to the Committee's request for suggestions. Briefly, the outlined proposal is that for teachers the areas of authority to employ, procedure for dismissal, and procedural rights of the probationary teacher should be kept in the Department of Education as a matter of expertise in the field of teaching. He proposes that these matters be removed from the Collective Bargaining process completely, but suggests some type of state-wide appeals board to review dismissals, with appeal to the Courts.

Responses to this proposal:

Dr. Marvin: The decision to employ or not to employ has to do with local standards. I'm not sure that we can achieve uniform statewide standards of employment any more than we can achieve state-wide standards of education. The resolution of who shall be employed must be done on a local basis, and presumably by a private justice rather than public.

Mr. Denaco: Opposed to teacher dismissal under educational law.

Mr. Frinsko: My personal thought would be to repeal the Fair Employment Practices, Title 20, completely.

Mr. Sipe: Maine has one of the best laws in the country concerning teachers provisions for dismissal.

4. Providing statutory guidelines for arbitration.

Dr. Marvin: One general position is that it is virtually impossible to get a satisfactory definition of what constitutes working conditions.

It is our definite feeling that in the bulk of the cases (140 contracts presently) as expertise is acquired in this field, the questions of what is negotiable becomes less and less of an issue. People are settling down to business. The original impact of the question of what is negotiable stems largely from inexperience and uncertainty in the field of labor relations. As that has been solved on both school management and our part it has become less and less of a major issue.

Mr. Vickerson: I will address my remarks to the area of educational policy. Our primary concern with

respect to the work of this committee and legislation filed is guidelines to educational policy. In our mind it was clearly the intent of the 104th Legislature to eliminate the area of educational policy from the negotiations process and put it into a meet and consult frame.

There is a strong feeling that there are no statutory guidelines on what the term "negotiability" relates to. Teachers want to govern themselves.

I would hope that this committee will establish new guidelines for educational policy so that those persons or Boards who will make decisions under negotiability of issues will have the same kind of standards to follow that they now have with respect to public employees and the definition of prohibitive practices.

Miss Martin: It would be unfortunate to set standard rules because they might not fit the situation. The effect of the arbitration decision would be spelled out and give some penalties for failure to agree on the issues that were binding. The Biddeford decision went way beyond the issues presented to the Court.

Mr. Denaco: The Biddeford decision should be studied in light of the need for more standards for arbitrators. We do have in Title 14 provisions for a uniform arbitration act. Public interest would be better served if there were enabling legislation that there should be standards set by the Board rather than putting them into the law itself. We wouldn't want to have to go through the legislative process to change these from time to time.

Mr. Frinsko: You could eliminate many problems by redefining the scope of bargaining to wages, hours and terms and conditions of employment, not mentioning educational policy, and place a mandate in the section dealing with prohibitive practices, that the Board in making its determinations must consider the unique characteristics of public employment.

Mr. Sipe: The Board I represent doesn't feel that this bill on the books has accomplished any of the purposes or improved the relationship between employers and employees. The Legislature passed a bill that has told us in essence that someone other than local boards will eventually determine what the purpose of that organization will be. You have taken out of the hands of boards any restriction in the determination of public purpose, public mission, public function, as far as negotiations are concerned.

Mr. Sipe(Cont'd):
You should consider local negotiations in the same sense as you are considering state negotiations. You should decide whether local governments, boards of education, town councils, etc., should give up their right to determination and the future of the direction of their organization.

5. Fiscal Autonomy for School Boards.

Miss Martin felt that if School Boards had the responsibility to face up to taxpayers with the recommendation on needed dollars, Boards would develop a different attitude and different types of people would be attracted to run for them.

None of the other persons participating in the discussion commented on this subject.

6. Reducing the post-impasse process to mediation only.

7. Making mediation mandatory before fact-finding.

(Since these two subjects are closely related, most discussion addressed them together. The people speaking really addressed a broader question of what the post-impasse procedure should be).

Miss Martin: In reviewing bills, they all provide free mediation, free fact-finding, free arbitration. Apparently they don't like to use these. They want to select their own and have the state pay for them. They should pay for their own.

Last session you repealed the mediation section under Sec. 4 and inserted it in Sec. 965, under Part II. The result is that the private employers who may need and want mediation think there is no state service available to them. I would like to suggest the PELRB not be limited to labor relations in public employment -- that they be given the responsibility for conducting labor relations and be available to all sectors and that Municipal Public Employees be one. The mediation would be under their administration and that would be another duty that they would have and the arbitration or conciliation should be administered by the same board.

Mr. Denaco: On impasse resolution techniques in the law--we are wise to maintain three techniques we have in the law now. The formality of each new procecure increases as you go up the scale.

On the Panel of Mediators--In our short history I can say that mediation is being used in the state in the public sector more than it ever has. Mediation services are provided through the Board, and Miss Martin's idea of consolidation of labor relations under a single agency is important, especially in the area of unfair labor practices.

There is nothing in the law providing for the rendering of an arbitration report. This could be developed, requiring them within a certain period of time.

Mediation mandatory before fact-finding -- should be postponed for the time being. The new mediation process under §962 is not of a long enough duration to tell us if changes are necessary. If mandatory mediation were adopted it would probably result in a statutory change similar to the process now used in Massachusetts--before you go to fact-finding you must have an impasse certified by a mediator.

Mr. Frinsko: Consider discontinuing the process of fact-finding. If you were required to have mediation before arbitration, skipping the fact-finding, you'd have a much more effective and efficient procedure.

Mr. Corey: Mandatory mediation - In Massachusetts a mediator must certify to the impasse before the dispute gets as far as fact-finding. It is my expectation that with the most recent amendment to the act what we may have is the equivalent of mandatory mediation.

On dispute settlements--you could ask the Board to draw up language on dispute settlements and bring it back to you. You could decide that the Board should take a more active role and appoint the arbitrator and give them a blanket mandate and authorize us to set up more criteria.

8. Following the recommendations of the Advisory Committee on Intergovernmental Relations.

Due to confusion on what recommendations were to be discussed, little comment was made. Those who did comment felt that the ACIR suggested public employees collective bargaining law was well drawn, but did not go into detail on this subject.

9. Other problems mentioned.

Dr. Marvin: 1. The law needs to be clarified on whether an individual contract or a comprehensive contract takes precedence.

2. The MTA would like to extend coverage under the law for teachers in evening and summer school programs.

III

SUGGESTED RESTATEMENT OF ISSUES BEFORE COMMITTEE

1. What should be the role of the PELRB in the Collective Bargaining Process?

   A. Should the Board decide questions of negotiability?

   B. Should the Board be given injunction powers?

   C. Should the Board be generally strengthened, removed from the Bureau of Labor and Industry, and be given broader areas of jurisdiction? Combine Board of arbitration and conciliation?

2. Is there a need for more definite standards to guide decision-making at all or any stages of the public employee collective bargaining process?

   A. Should certain terms in the statutes be more clearly defined?

   B. Should certain subjects be removed definitely from the collective bargaining process? (Fair Employment Practices of Teachers).

   C. Should the PELRB be given broader power to set standards?

3. What is the most effective post-impasse procedure?

   A. Is the right to strike or binding arbitration more desirable and acceptable?

   B. Should all procedures in the current law be retained with or without modification?

IV

STATE EMPLOYEES LABOR RELATIONS ACT

During the Special Session of the 106th Legislature, state employees were granted the right to bargain collectively when the Legislature enacted the State Employees Labor Relations Act. Although this legislation had no direct effect on the subject matter of this study, some of the issues outlined in Section III above may need reinterpretation in light of the legislation. In addition, there

are some points of difference between the two outlined bargaining processes which give rise to a new issue, whether or not to change the Municipal Public Employees Bargaining Law to make it correspond as completely as possible to the new law. A third question is whether some answers to the proposed questions may be contained in the new legislation.

Differences in the two statutes are as follows:

1. The State employees statute included a much more detailed list of matters appropriate for collective bargaining.

2. Standards for arbitration decisions are given in the state statute.

3. Provision is included to enable the State Employees Appeals Board to resolve grievances under a contract, if no contract grievance procedure is included in the agreement itself.

In addition to these differences, there are minor procedural differences which need consideration. The major impact of the new law is to greatly increase the work load of the PELRB and its executive director. This fact directly relates to the question of whether the PELRB should be strengthened and removed from the Bureau of Labor and Industry.