JOINT SELECT COMMITTEE ON COLLECTIVE BARGAINING

[WORKING PAPERS]

STATE OF MAINE
HOUSE OF REPRESENTATIVES
106TH LEGILSATURE

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 Biddefored 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

E. LOUISE LINCOLN
CLERK OF THE HOUSE

STATE OF MAINE
HOUSE OF REPRESENTATIVES
OFFICE OF THE CLERK
AUGUSTA, MAINE 04330

August 17, 1973

Representative William J. Garsoe
Representative Floyd M. Haskell
Representative Stephen L. Perkins
Representative David Bustin
Representative James E. Tierney

Gentlemen:

I am pleased to appoint you, William J. Garsoe, Floyd M. Haskell, Stephen L. Perkins, and James E. Tierney as the five House members to study Collective Bargaining involving Public Employers and Public Employees pursuant to Joint Order H.P. 1574. I hereby enclose a copy of that Joint Order.

I understand that Senator MacLeod has appointed Senator Tanous, Senator Huber, and Senator Kelley as the three members on behalf of the Senate. I suggest that you call the first meeting for Wednesday, August 29, 1973 at the State House. The Legislative Council is meeting that day. The accepted practice is that the first named member of the Committee from the House in which the Order originated calls the meeting. Therefore Bill, it is incumbent on you to make arrangements for the first meeting.

The Speaker's Office is available for your use. I will be pleased to arrange for one of the Committee rooms to be used by you if you so desire. Let me know if I can be of further assistance.

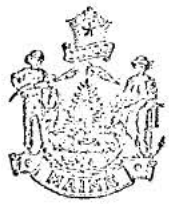
Very truly yours,

Dick (D.H.)

Richard D. Hewes
Speaker of the House

RDH;jmr
copy to: John Martin

E. LOUISE LINCOLN
CLERK OF THE HOUSE



STATE OF MAINE
HOUSE OF REPRESENTATIVES
OFFICE OF THE CLERK
AUGUSTA, MAINE 04330

August 20, 1973

Senator Paul R. Huber
22 Samoset Road
Rockland, Maine 04841

Dear Senator Huber:

In response to Speaker Hewes' letter of August 17, 1973 which I am enclosing herewith, I am setting the first meeting of the Committee to study Collective Bargaining pursuant to Joint Order H.P. 1574 (also enclosed) for September 5, 1973 at 10 a.m. in the Judiciary Hearing Room.

In an effort to expedite our work I am listing a tentative agenda.

1. Elect Officers: Chairman, Vice Chairman, Secretary.
2. Determine manner in which we will function i.e. formal public hearings or informal conference sessions.
3. Discussion of possible guidelines for the work of the Committee.
4. Determine Staff needs.
5. Compile a list of organizations and individuals to be invited to participate.
6. Set schedule for meeting dates.
7. Any other business.

If you have any additions for this agenda please contact me. Parking spaces will be arranged for your convenience. See you on September 5th.

Very truly yours,

William J. Garsoe

WJG:jmr
copy to Richard D. Hewes

E. LOUISE LINCOLN
CLERK OF THE HOUSE

STATE OF MAINE
HOUSE OF REPRESENTATIVES
OFFICE OF THE CLERK
AUGUSTA, MAINE 04330

August 20, 1973

Representative Floyd M. Haskell
Houlton, Maine 04730

Dear Floyd:

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Very truly yours,

William J. Garsoe

WJG:jmr
copy to Richard D. Hewes

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

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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

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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, §961).

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. The right to strike vs. binding arbitration

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?

Conclusions

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

The committee was unable to come to any agreement as to changes in the law.

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.

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JOINT SELECT STUDY COMMITTEE ON MUNICIPAL EMPLOYERS LABOR RELATIONS LAW

11:25 A.M. All members present.

Senator Wakine Tanous was elected Chairman pro tem unanimously.

Election of Officers was held and unanimously elected were the following:

Rep. William Garsoe, Chairman

Senator Paul Huber, Vice Chairman

Rep. Stephen Perkins, Secretary.

Discussion of scope of Order was held, and whether to report to the Special or Regular Session. It was decided to meet the Special Session deadline unless we as a Committee find it impossible.

Suzanne Havens, Legislative Assistant, is to be available to the Committee. Committee would like synopsis of statutory language of other states and a copy of the Biddeford decision for each member.

Note: (Michigan Law Review Article of this summer.)

A list of individuals and/or organizations was compiled to be invited to testify before the Committee.

Suzanne Havens to be directed to contact or communicate with the following:

Maine Teachers Association

Maine School Management Association

Maine Municipal Association

American Federated State and County Municipal Employees

International Association of Firefighters

Maine State Federated Labor Council

Marion Martin

Parker Denico, Executive Director of Employees Labor Relations Board

Walter Corey, Chairman, Employees Labor Relations Board

Dean Stanley Deveno, Field of Arbitrators

Sumner Goffin, Field of Arbitrators

Joe Chandler, Field of Arbitrators

Roger Snow, Field of Arbitrators

Paul Frensko, Attorney, of Portland

And others that may be proposed.

It was decided that the first item on the agenda for the next meeting would be the reviewing of the Biddeford decision.

It was also decided to invite Frank Chapman and Hugh McMahon. Also to discuss the summary of Suzanne Havens' responses from communications with above mentioned individuals and organizations.

It was moved and seconded that the Committee's final report would be in written form under the Rules of Legislative Committees, and that a Minority Report may be submitted.

It was moved and seconded to hire a clerk to keep the records and attend all meetings.

Tentative date for the next meeting is Tuesday, September 18, 1973, at 10:00 A.M. in the Judiciary Committee Room.

Relative to press releases, it was voted unanimously that the Chairman is initially free to release factual data recorded at the meetings unless otherwise directed.

Minutes taken by Rep. Stephen Perkins.

COMMITTEE ON COLLECTIVE BARGAINING

MEETING OF SEPTEMBER 27, 1973

PRESENT: Rep. William Garsoe, Chairman
Sen. Wakine Tanous
Sen. Paul Huber
Rep. Floyd Haskell
Rep. James Tierney
Rep. David Bustin
Rep. Stephen Perkins

ABSENT: Sen. Peter Kelley

The Committee was called to order at 10:20 a.m. on Thursday, September 27, 1973 by it's Chairman, Rep. William Garsoe.

Attorneys Frank Chapman of Augusta and Hugh MacMahon of Portland presented their views on the Biddeford Decision.

On the motion of Senator Tanous, the Committee broke for lunch at 12:25.

The afternoon session began at 2:00 p.m. with just the Committee and the Research Assistant, Suzanne Havens present. Mrs. Havens submitted two reports detailing information she had received from people she had contacted by telephone and mail as requested by the Committee at their last meeting.

Chairman Garsoe asked the Committee if they should restrict the study to the educational sector vs. the broad review of the whole law. Rep. Bustin said we were not talking about any section that talked specifically to education -- this law covers the whole range of public employees.

Chairman Garsoe pointed out that the order directs us to study the entire law. There is however, repeated emphasis on the education, teacher, school board area. Senator Tanous suggested that it be narrowed down to the area of 965.

Chairman Garsoe said what he was really after was "do we see the scope of our work as being such that we can report to the Special Session or are we going to have to stretch this out and report to the next Legislature?" No vote was taken.

Senator Tanous asked Mrs. Havens to see how many contracts were settled by the table between boards, and see how many went to fact finding how many went to arbitration, and, where it was utilized, mediation. This survey for a period of 2 years.

Senator Tanous would like the labor relations law defined and also to have a copy of the law that exists.

Chairman Garsoe asked Mrs. Havens to make a note to see if there is any way we can get a reading on the length of the negotiating session, where they were settled and how they were settled. Also solicit testimony as to the question of how long a procedure this seems to be, what are the extremes, and what are the averages.

Chairman Garsoe summarized that the following areas are before us and are under active consideration: NLRB concept, the right to strike, binding arbitration, McMahon's proposal that mediation be the only requirement, and Chapman's remarks about the stay order.

The next meeting will be on Thursday, October 18, 1973. In the meantime, Mrs. Havens will send copies of the information that she finds to the members.

Rep. Haskell made the motion to adjourn at 3:15 p.m.

Collective Bargaining Committee

Tape #1

00 - 715

Fay Emery for Pat Clark

STUDY COMMITTEE ON MUNICIPAL EMPLOYEES LABOR RELATIONS LAW

The meeting was opened at 10:10 A.M. by Chairman, Rep. William Garsoe. Absent was Rep. Steve Perkins.

Mr. Garsoe had sent various individuals letters outlining eight areas and asked speakers to comment on:

1. Right to Strike vs. binding arbitration
2. Pattern PELRB after NLRB
   a. Power of temporary restraining order
   b. Power of Board to determine negotiability
3. Setting up a Fair Employment Practices section under Title 20, Education Laws
4. Provide statutory guidelines for arbitration
5. Fiscal Autonomy for School Boards
6. Reduce process to mediation only
7. Mediation mandatory before fact finding
8. Follow the recommendations of the Advisory Committee on Intergovernmental Relations.

The speakers were:
Dr. Carroll R. McGary, Commissioner of Educational and Cultural Services, State of Maine
Dr. John H. Marvin, Maine Teachers Association
Mr. James Vickerson, Maine School Management Association
Attorney Stephen Sunenblick, ASFCME
Miss Marion E. Martin, former Commissioner of Labor
Mr. Parker Denaco, Exec. Director, Municipal Public Employees Labor Relations Board
Mr. Donald Sipe, Supt. of Schools, SAD 17
Attorney Paul Frinsko
Mr. Walter Corey, Chairman, PLRB

The morning session consisted of comments from speakers and questions from Committee members.

The afternoon session commenced at 1:30 with Rep. Steve Perkins absent. Members further questioned guests, then went into an executive session. The Order was further discussed, and discussion was held on whether there was time enough to prepare proposed legislation and whether the Committee would report to the Special Session or the 107th; also, whether legislation was needed. A motion was made, seconded, and passed unanimously that no legislation be referred to the Special Session due to the lack of time; however this does not preclude the making of a report to the Special Session.

Meeting adjourned at 3:55 P.M. The sum of $4,255.70 left in the Committee Fund.

733 - end of Tape #1 - Morning session
00 - 514 Tape #2 - Afternoon session

P. Clark

Dr. McGary: Fair employment practices section should be rewritten. Should be kept in Department of Education as a matter of expertise in the field of teaching.

There needs to be a clearer specification of the authority to employ. That should rest with the superintendents.

Due process steps are not clearly spelled out.

There should be a clearer specification for the procedures for dismissal.

Propose some sort of state tribunal.

There should be a clearer definition of the procedural rights of the probationary teacher as contrasted with a teacher on a continuing contract. This would standardize and remove from negotiations a highly charged issue and would guarantee all Maine teachers and school committees an equal kind of procedure so that we could be assured that teachers were fairly employed.

This concept for dismissal - renewal would be taken from the PLRB. Title 20 - present law is vague.

Hawaii is the only state he knows of that has a state negotiator.

There is not a good administrative revue on dismissal. Appeal before the court in terms of dismissal.

You could consider some sort of state-wide abuse board patterned after the state appeals board.

Dr. Marvin: We have always stood for the right to strike as a means of resolving unresolved labor management in the public sector. Public not ready to accept.

Should have binding arbitration to cover all areas.

We would like to see the PELRB patterned after the PLRB in terms of its jurisdictional scope. The PLRB 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.

Oppose reducing any steps now in the law.

There is uncertainty as to which takes precedence-- an individual contract or a comprehensive contract. This should be clarified.

One area we would like to see expanded is to cover evening school, summer school employees, which are not now covered. Most of these people are full-time employees in the same district and are covered by the same district but are presumably beyond the scope of the law.

Dr. Marvin, Cont'd.

Our general position is that it is virtually impossible to get a satisfactory definition of what constitutes working conditions.

It is our definite feeling that the bulk of the cases (140 contracts presently) is that as expertise is acquired in this field, the question of what is negotiable becomes less and less of an issue. People are settling down to business and the original impact of what is negotiable stems largely due to 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. Certainly not one that I can see immediate action being taken for this special session.

On licensure procedures - The decision to employ or not employ has to do with the local standards. I'm not sure that we can achieve uniform statewide standards of employment any more than we can achieve uniform statewide 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.

On hiring outside fact finders and arbitrators - We find within the private sector more satisfaction with a private enterprise system of justice than we are finding from public.

James 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 ed. 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 colsult frame up.

There is strong feeling that there are no statutory guidelines on what the term "negotiability" relates to.

Teachers want to govern themselves.

I would hope this Committee will establish new guidelines for educational policy so that these 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.

Mr. Sunenblick: The inability to reach a quick resoltuion 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.

We favor the right to strike very strongly, but we do not object to binding arbitration as well.

Need to assign resolution to the problems to PELRB. The Board needs some power to enforce its decision.

Miss Marion Martin: As far as municipal employees and the right to strike and binding arbitration, with the exception of teachers who could tie things up, it would be futile for the employees to strike because their skills are not so unusual that they could go on the open market and hire people. It is, however, a useful weapon in the negotiation process because the threat of strike gives a serious import to the negotiations 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.

On arbitration - It would be unfortunate to set standard rules because they might not fit the situation. The effect of the arbitration decision would well 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 that were handed to them.

On fiscal autonomy - We are one of 5 states that don't have school boards with fiscal autonomy. If the school board had the responsibility to face up to the taxpayers with the recommendation that we need $$$ you would find a different attitude on school boards and different types of people would be attracted to run for them.

Union security should be qualified. I would like to see the statute say that union securities are negotiable or not negotiable.

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 2. 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 that 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 the Municipal Public Employees Labor Relations Law 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.

Set up a board not limited to municipal employees.

Parker Denaco: The people of Maine would be alarmed if they heard the Legislature is considering allowing 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

Parker Denaco Cont'd.
several states which have considered this problem.

Binding arbitration serves a good point in causing the parties involved in impasse situations to be serious in their endeavors. Wisconsin has enacted a situation where they have determined that there will be a type of arbitration, but rather than being straight binding arbitration it considers the endeavor of 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.

On Impasse resolution techniques in the law - We are wise to maintain the three techniques we have in the law now. The formality of each new procedure increases as you go up the scale.

On panel of mediators - In our short history I can say that the 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.

Under injunctive powers I think you should look seriously at the 7-day limitation. In Sec. 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.

The biddeford decision should be studied in the 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.

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

Opposed to teacher dismissal under educational law.

Mediation mandatory before fact finding - Should be postponed for the time being. Mediation process under Sec. 962 is not of a long enough duration to tell us if this is necessary. If this type of process 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 served by a mediator.

Meet and Confer Act ACIR model legislation is well drawn. I also favor the collective negotiation act. The people who are covered by the labor relations law are engaging in collective bargaining. It might be a step backwards to consider a meet and confer act.

James Vickerson: The ACIR originally recommended a meet and confer act and supplemented it with this that you have distributed. This is a collective bargaining law rather than a meet and confer.

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

It is my feeling that the Maine Board, under the present law, has enforcement powers equivilant 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 requesting a temporary hearing order prior to a hearing is not specifically spelled out, but I think it is there. Maybe in the absence of legislation the Board is reluctant to take this step. Perhaps you coulc insert words similar to NLRB Act.

We should develop some sort of guidleines from precedent, by a group of people who are atuned to the problems of public sector employment in the state. The decision belongs with an administrative agency.

The Board has the power to determine negotiability now and should be the source of 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.

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

Consider discontinuing the process of fact finding.

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. If you were required to have mediation before arbitration, skipping the fact finding, you'd have a much more effective and efficient procedure.

On dismissal of employees - I think at a certain point in time a public employee by virtue of our Constitution gains a right that he cannot be terminated without the administrative procedures necessary under our decision. You could draft legislation which would apply to all public employees and guarantee them the right to due process by spelling out what the courts have already said to us.

On rights in dismissal - That review authority should not be with PLRB. You have to start talking about a separate agency in state government. You can repeal it and then

Paul Frinsko Cont'd.
spell it out comprehensively in a fair fashion. Maybe the Commissioner's office could serve as a review, maybe limited to review where the caliber of the professional is being challenged and not acts unrelated to the employment.

Mr. Sipe: The Board I represent doesn't feel this bill on the books has accomplished any of the purposes or improved the relations between employees and employers. 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 local boards any restriction in the determination of public purpose, public mission, public function, as far as negotiations are concerned.

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.

Eliminate reference to educational policy in the law.

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

Walter 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 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.

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 that 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 them 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.

There is a feeling in the Superior and Supreme Court system that in the past they have felt a bit awkward in this field of public sector, labor relations. They were asked to act as an administrative agency, but now they think of the Board as specialists in the area.

MEMORANDUM

TO: Members, Special Committee on Public Employees Collective Bargaining

FROM: William J. Garsoe, Chairman

RE: November 20 Committee Meeting

DATE: December 17, 1973

This memorandum is designed to accomplish two things: I) to summarize my own impressions of the discussion meeting on November 20 regarding what seemed to be the principal concerns of those who participated in the meeting; and II) to invite you to do the same concerning your own impressions of the meeting.

I. My impressions of the meeting can be summarized as follows:

One thread running throughout the testimony is that there is a need for modifications in the law. There seemed to be two areas that received the most attention: 1) the powers and functions of the P.E.L.R.B.; and 2) the need for a source of definition of negotiability.

1) We heard a preponderance of testimony that the P.E.L.R.B. should be given injunctive powers pending hearings on prohibited practices, should have the ability to hold such hearings with less than the current 7 days notice, should serve both the private and public sectors, should have authority to set standards for arbitrators, should interpret the law in the area of negotiability, and that the P.E.L.R.B. should be staffed and financed to accomplish these functions. 2) The need for a source of definition of negotiability was emphasized and strong suggestions were made that the P.E.L.R.B. would be a logical source if the Legislature would make guidelines within which the Board would make decisions in individual situations. The point was made

that the Courts are not the place to make these determinations and that the Biddeford decision illustrates this fact.

II. These seem to me to be the areas most emphasized at the meeting. However, I would appreciate hearing from all the committee members what they feel were the most frequently mentioned and discussed issues, and how they feel the committee should proceed in defining the scope of the study and possible legislation.

If you would jot down your reactions and send them to Mrs. Havens, Legislative Staff, Room 427, State House, I think it would be helpful.

The meeting was opened by Chairman Garsoe. Absent were Senator Kelley and Rep. Tierney.

Mr. Garsoe asked members to review the draft of suggestions and questions under consideration prepared by Sue Havens and himself, and make comments or suggestions in addition.

Senator Tanous felt that the effects of LD 1994 would bring about some changes, and most likely in the area that we are trying to make legislation in. Mr. Perkins agreed.

Senator Haskell was in question as to whether the constitutionality had been settled with the Biddeford decision.

Senator Tanous said he thought the bench was in agreement that the law in itself was constitutional--the disagreement came in the area where you are dealing with what is negotiable and what isn't.

Senator Haskell wondered if we would have repeated questions in this area, and Senator Tanous explained that you have precedents as guides and a pool of knowledge to utilize.

Senator Tanous asked Sue how many cases had gone to the Superior Court. She said there was no way of finding out, but Mr. Bustin said there haven't been any in five years.

Mr. Bustin was asked to explain teachers rights; due process; just cause.

Mr. Garsoe asked if there was basically a feeling that we should attempt some revisions, or would they rather not.

Mr. Perkins was inclined to agree that in view of LD 1994 it may be premature. He thought the trend will be toward state control in the next ten years.

Mr. Garsoe said that explicit statutory guidelines had been set for state employees. Three in the Biddeford decision thought thereweren't sufficient guidelines. He wondered if we should look at the municipal law in light of what was done with state employees. He thought we should turn our attention to the PELRB. He said the testimony heard before the committee showed that the Board needs attention paid to its structure, location and funding, and the Board should be given stability--authority to make case history.

Sue explained that the opinion spoke only of the law as it relates to teachers and they say theoretically this kind of law is constitutional. Half say there are sufficient standards and half say no. There are more standards outlined for the teachers than for anyone else. They have ruled that the standards are sufficient for teachers. They went way beyond what they were asked to do.

Senator Tanous said the Court attempted to tell us that the teachers have different standards. He believed they did say that the law is constitutional in theory.

Mr. Garsoe read from page 6 of LD 2314.

Senator Tanous suggested implementing the "final best offer".

Mr. Garsoe asked members to consider the draft of the report of the committee (page 17) Under #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 injuntion 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?

Under A. Senator Tanous stated that they do already make some determinations.

Senator Haskell said if there were some questions left and this would take care of it, it would be a desirable change.

Mr. Garsoe asked for a vote on the question of negotiability, and there were three in favor, none against, with two abstaining.

Under B, should the Board be given injunction powers?
This was discussed and felt by most that the Board wasn't asking for this power to issue them.

Mr. Bustin stated that in the teachers sector there had been no problem, but in the municipal there had. He thought the Board wanted the legal power for injunctions.

Mr. Garsoe asked for discussion on whether the Board be authorized to go to court to get an injunction.

Senator Tanous said that he would want proposed legislation attached to the Committee report so that there would be no misinterpretation.

B. was set aside in order that Sue could get moreinformation nationally.

Under 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?

Mr. Bustin wanted more information on this question and more reason to consider a change, so it was set aside for Sue to study.

Under #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?

The members felt this had been discussed with #1.

Under #3 What is the most effective post-impasse procedure?

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

Senator Huber said he thought the day was coming that we will have to say that it is not forbidden, and he wouldn't be 100% in opposition to it.

Senator Haskell said he thought there would be others wanting the right to strike in years to come, and he could now support the right to strike.

It was agreed by the Committee members not to pursue this at this time.

Mr. Garsoe stated that mediation was made mandatory last session. He asked consideration on eliminating fact finding. He doesn't feel these three steps are needed.

Mr. Bustin was asked to comment, and stated that most are settled after fact finding, and a few after mediation. He said that if you gave these three chances, you're going to get a contract at least after the third one. The cost is a big factor. Fact finding forces them into a bargaining situation sometimes. There is not enough confidence in mediation.

Mr. Garsoe asked for a vote of the committee on eliminating fact finding, on the basis of cost and need.

Senator Haskell wanted more information and the subject was dropped with no action taken.

Mr. Garsoe said that mediation is supplied at no cost to the parties and asked the members how they felt about the parties sharing the cost. The total cost was discussed, and it was brought out that this is part of the town school budget. Parties of the dispute pay for fact finding and for mediation. This has to be budgeted with no knowledge of what the amount will be. Unlimited access to a service for which they can only guess at the cost.

Mr. Garsoe asked for discussion of agency shop or service fees.

Senator Tanous felt the issues were well-defined and made a motion that we not consider this. All agreed.

Mr. Garsoe then asked if punitive provisions to strikes should be considered. The law says you shall not strike, and there are no penalties for it.

Senator Tanous said if someone did strike there should be a TRO and if they should continue to strike they would be in contempt.

Mr. Garsoe explained that he and Suzanne would work up some language on #1, A.,B.,and C. and get together again to consider the recommendations when this has been done.

Meeting adjourned.

P.Clark.

84255.70 November 20

733 10:10 A.M.

Lyn Nuber, Sen Tanner, Sen Kelley, Rep Haskell, Rep. Burton, Rep Tierney

absent: Rep Perkins ~~Rep Rootsaert~~

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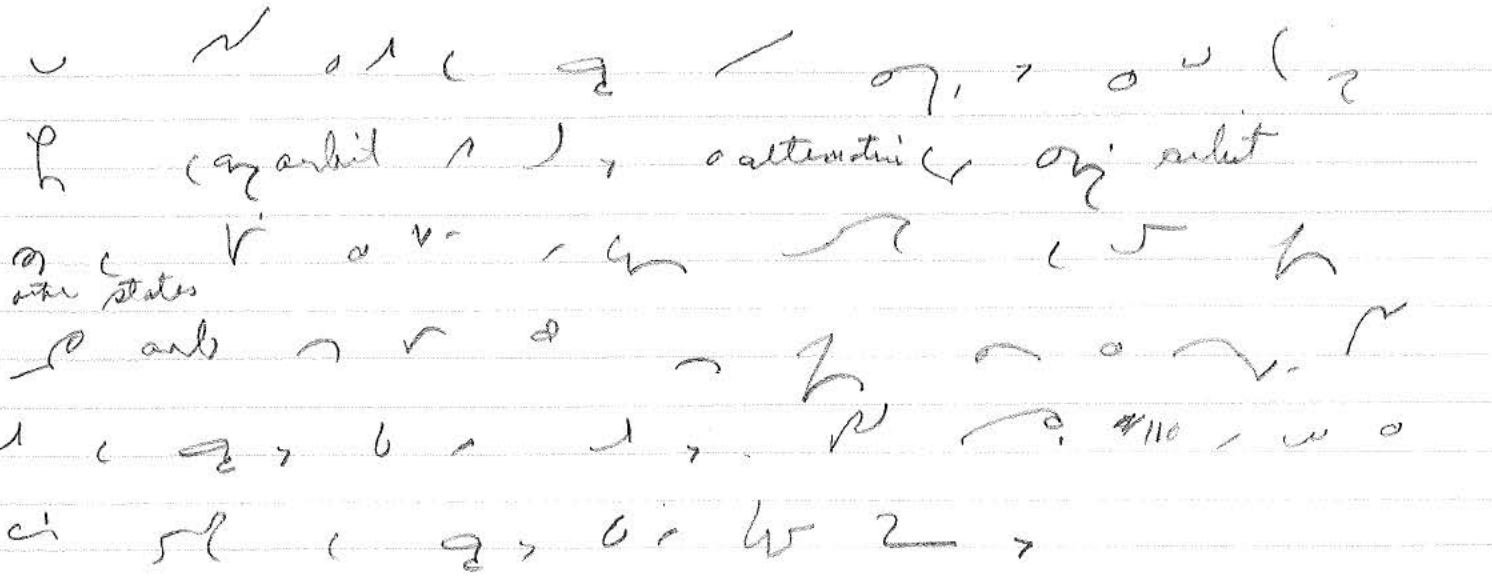

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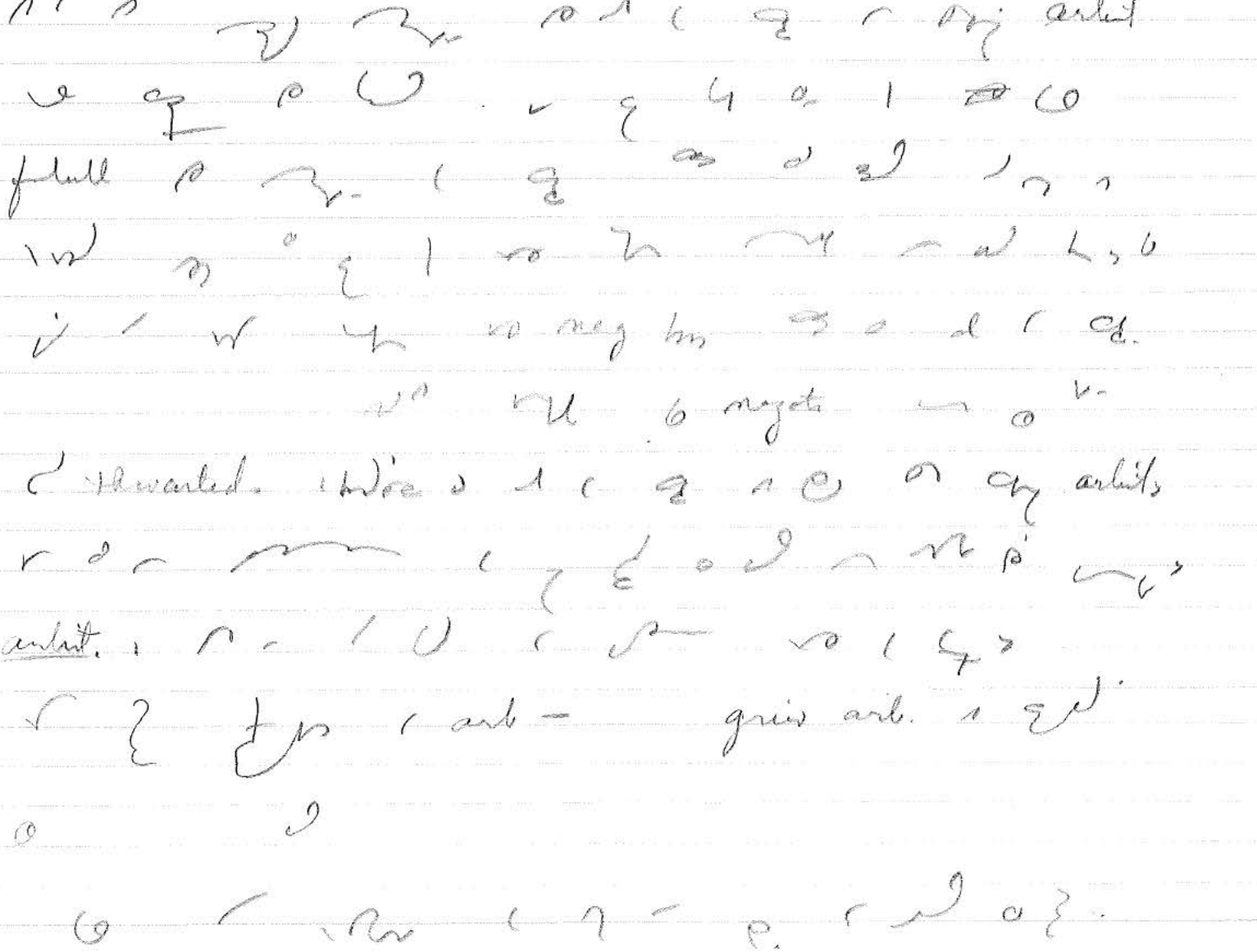

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Mr. Vickerson Absent ~~Sen Kelly, Sen Parsons, Mr Deering~~, ~~Mr Beuston~~ (inserted above: Mr. Perkins)

ACIR [shorthand]

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ACIR [shorthand]

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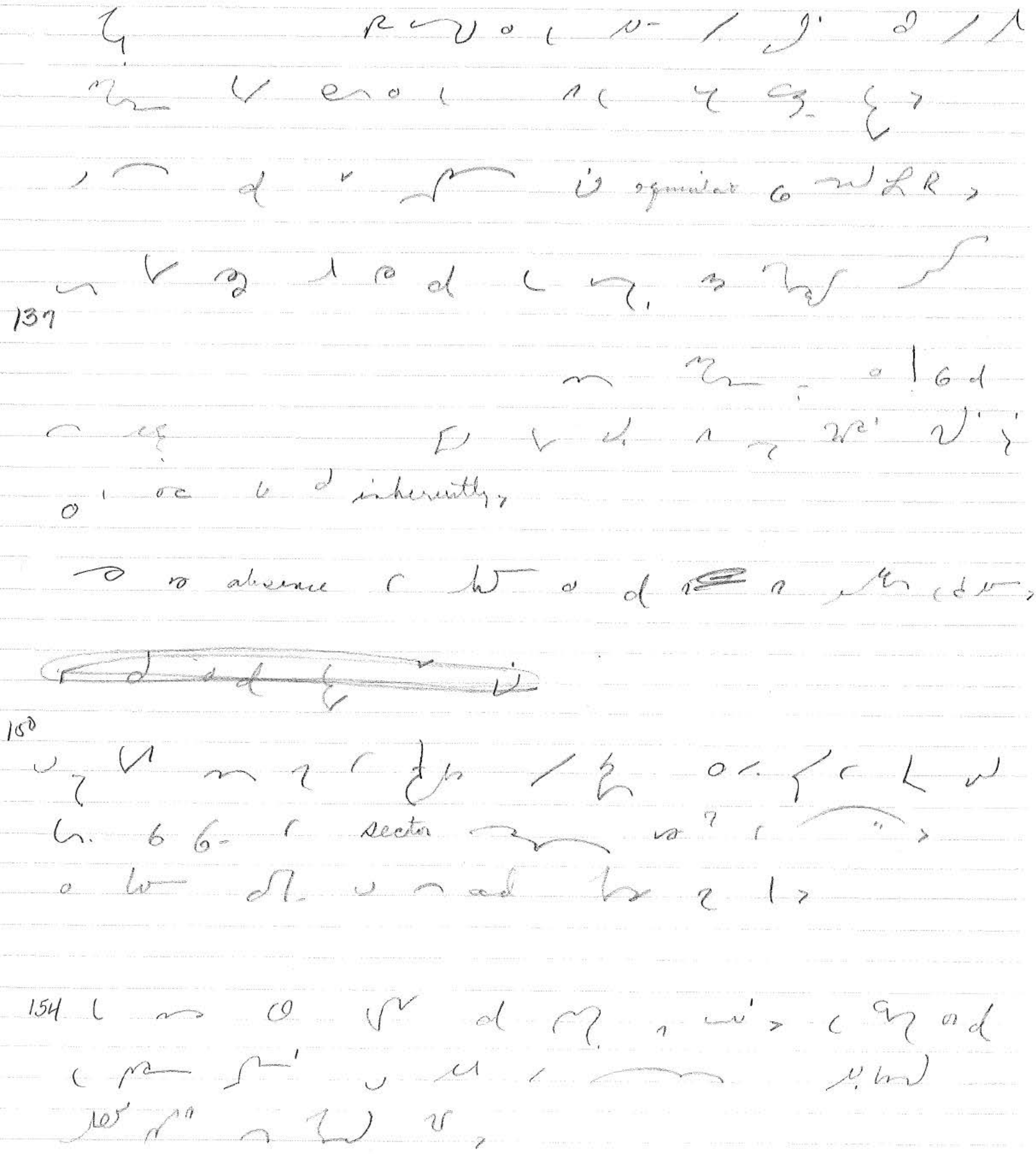

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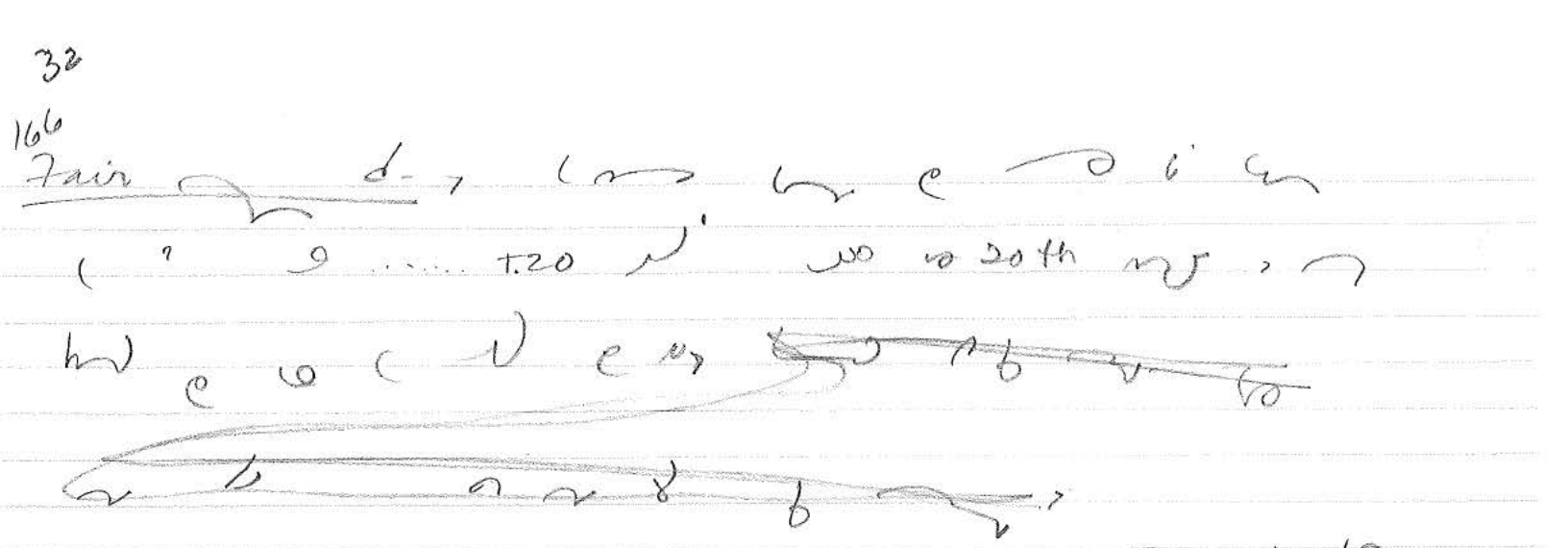

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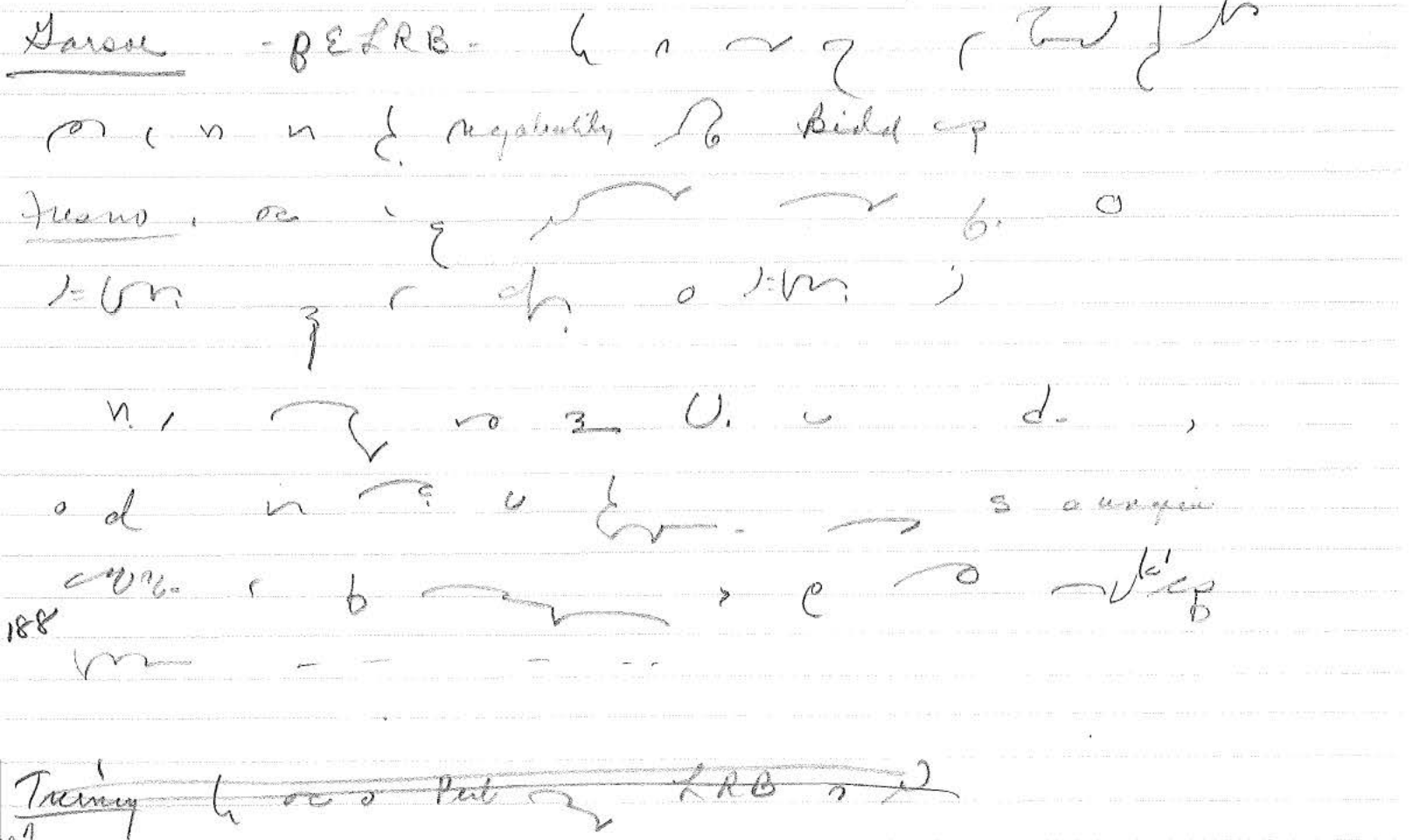

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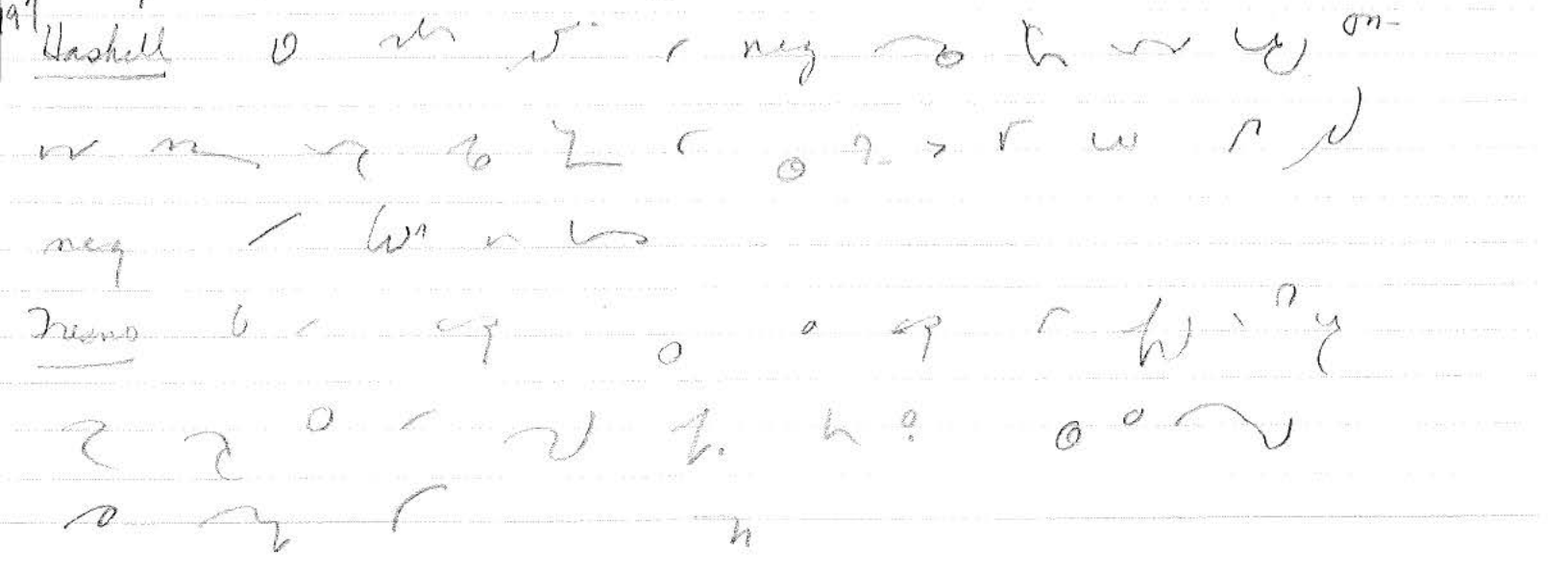

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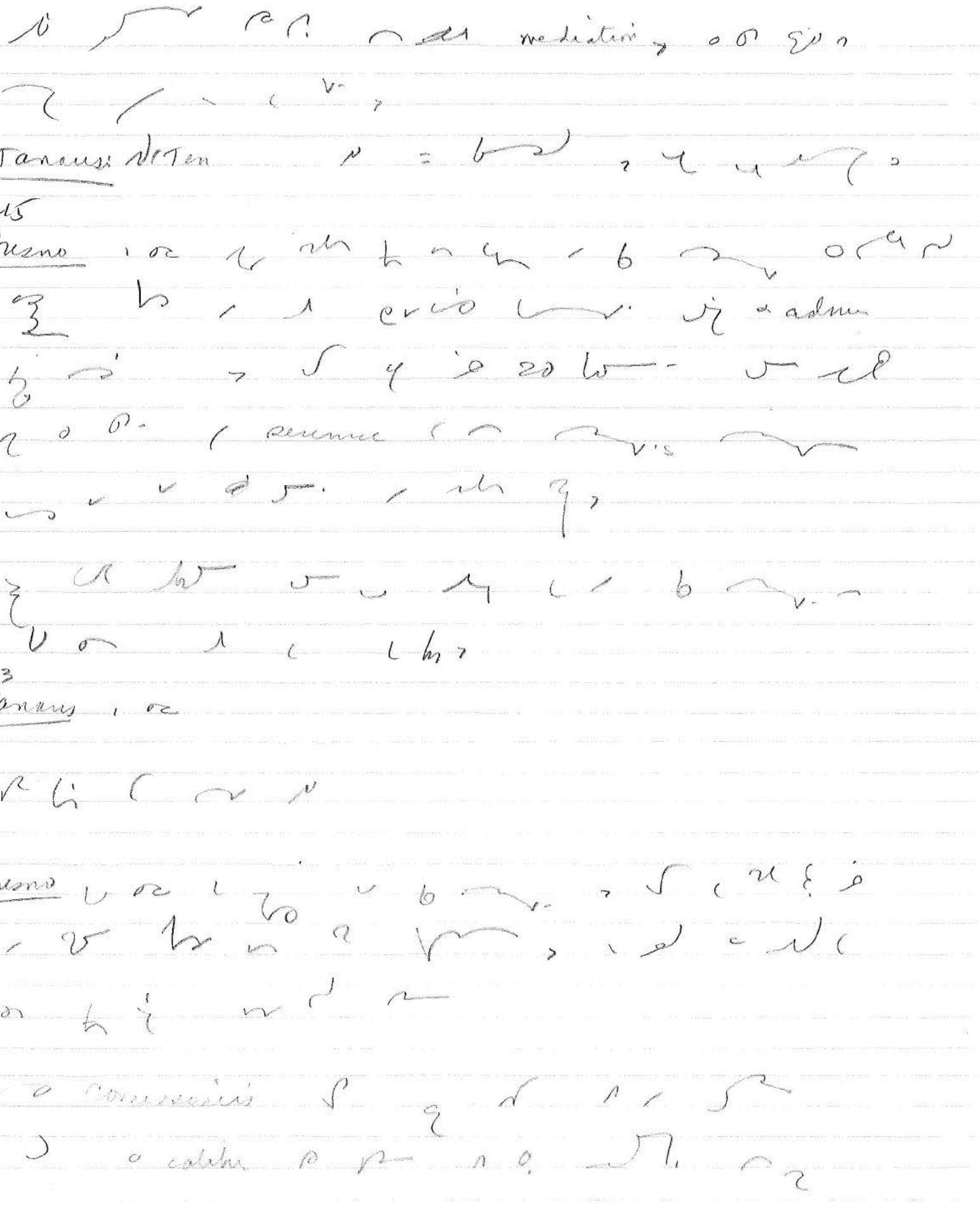

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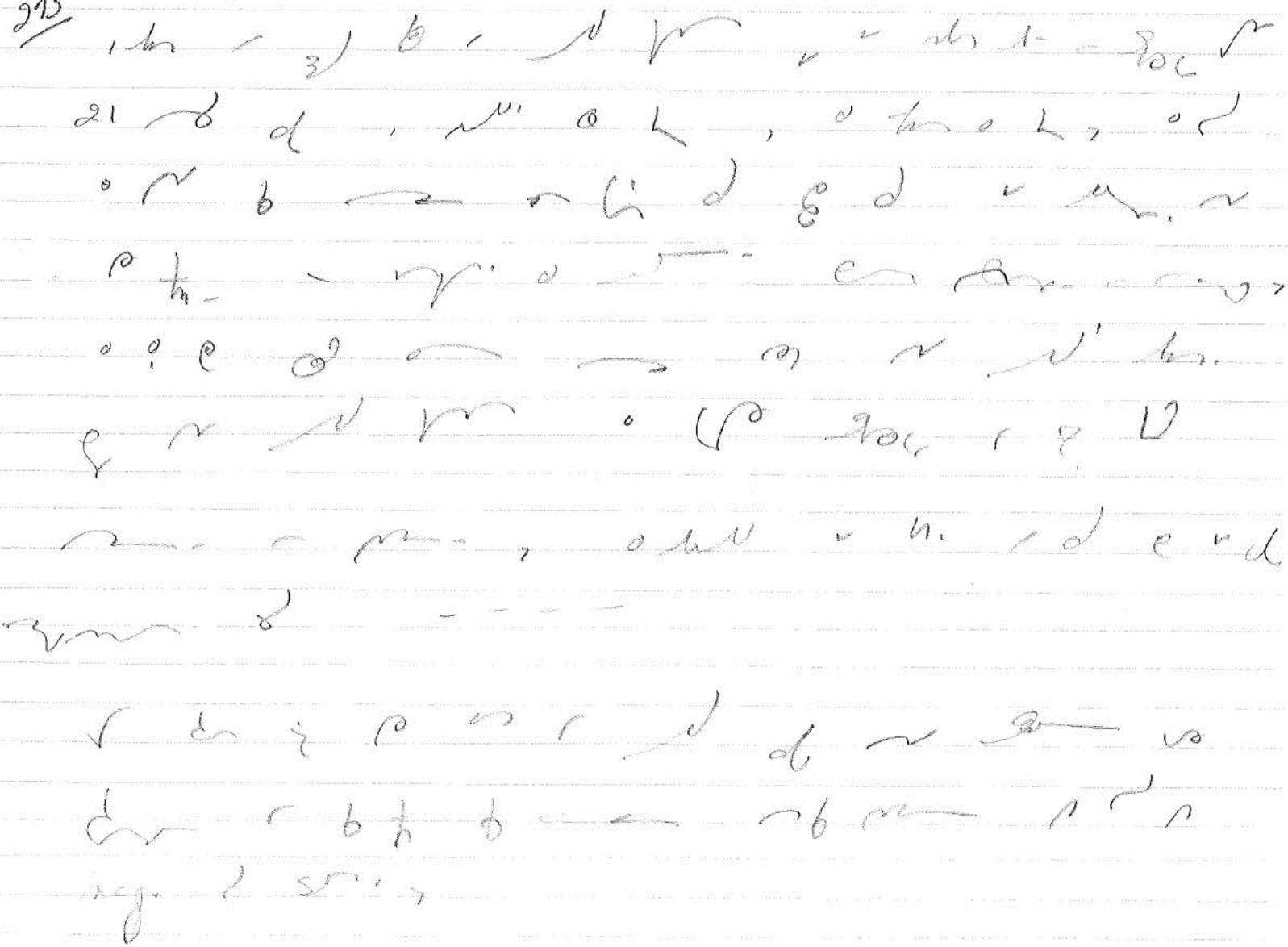

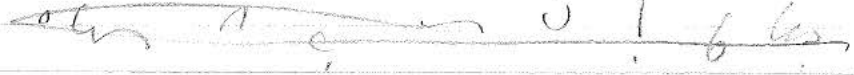

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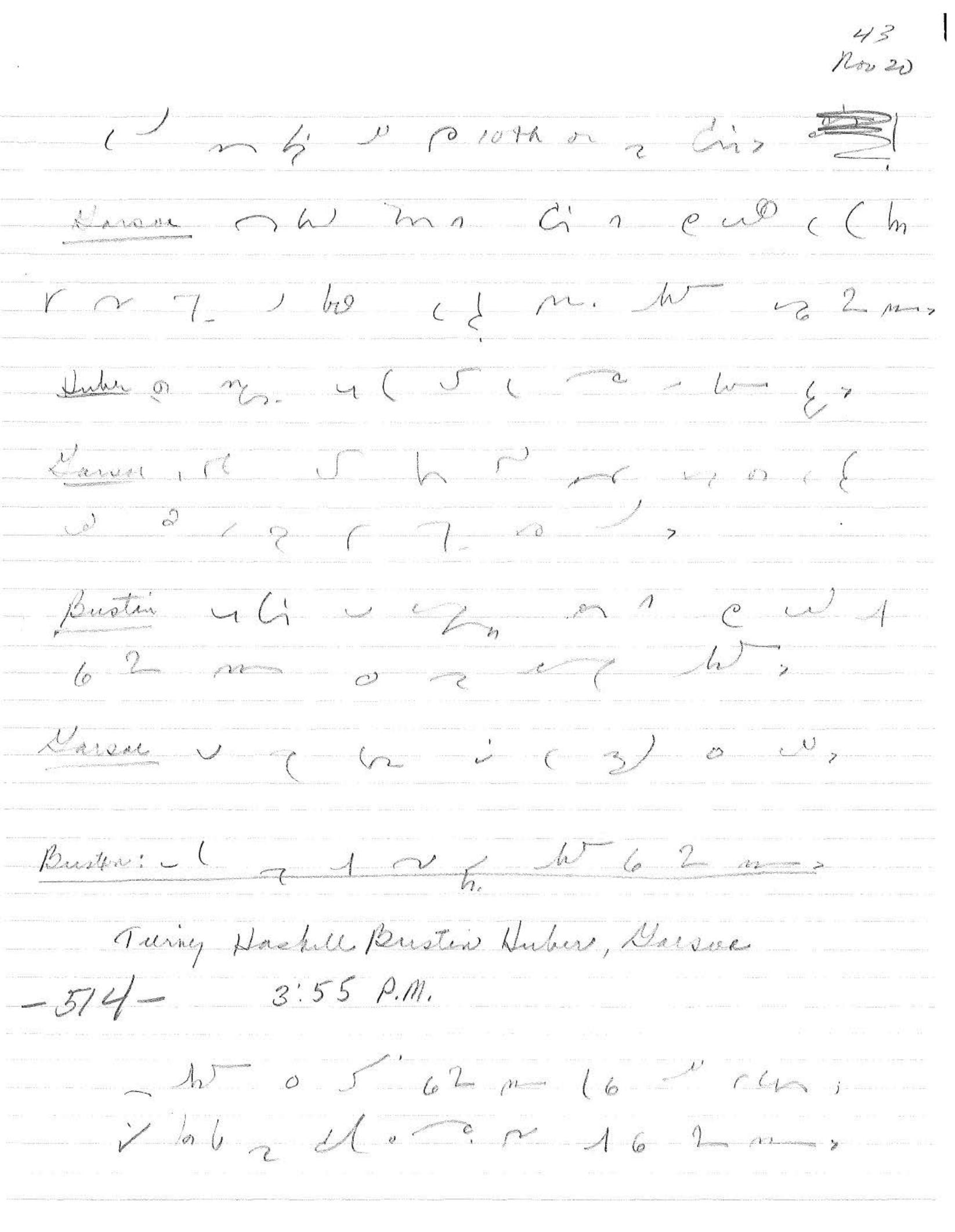


Sept. 23

Meeting opened by Chairman Garsee at 10:30 A.M.
Absent were Sen. Kelley & Rep. Tierney.

Mr. Garsee asked members to review and make comments on Section 3.

Tarrus: [illegible] RD 1994 [illegible]

Haskell: [illegible]

Tarrus: [illegible]

Haskell: [illegible] Repeated [illegible]

Tarrus: [illegible] precedents [illegible] useful [illegible]

T. asked Sen [illegible] Superior [illegible]

Burstein [illegible] 5.2,

2
Sept. 23

Austin — teachers rights | due process, just cause,

Kansas: [illegible] revisions [illegible]

Pukwana: [illegible] HB 1994 [illegible] premature [illegible] definite, [illegible] paid [illegible]

Kansas [illegible] explicit statutory guidelines [illegible] 3 vs Bill [illegible]

Kansas: [illegible] BE LR B, [illegible] arbitration, [illegible] structure [illegible] funding, [illegible] stability [illegible]

Sylvania [illegible] rules [illegible] Half [illegible]

[illegible]

Tannus: [illegible]

Gavel: Page [illegible] ZD 2314 [illegible]

Tannus: [illegible]

Garsee [illegible]

(A) Board Decide Questions of Negotiability?

Tannus (1). [illegible]

Haskell: [illegible]

Garsee: [illegible]

Yes Board decide question of negotiability
[illegible] Reg. Ruben Haskell Perkins

3 to 0 - 2 abstain.

(B) Should the Board be given injunctive powers?

4
Sept 83

Perkins: initial reaction is "no" ... order ... It was felt by most that the Board would ask ... this.

Rustin ... to ... sector ... municipal ... injunctions.

Gareau (B) ...

Hannan: misinterpretation, ...

Gareau ... Suzanne will get more information on ... #B would set aside.

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

... PSLRB ... therefore ...

Rustin ... so it was set aside for Suzanne to report on.

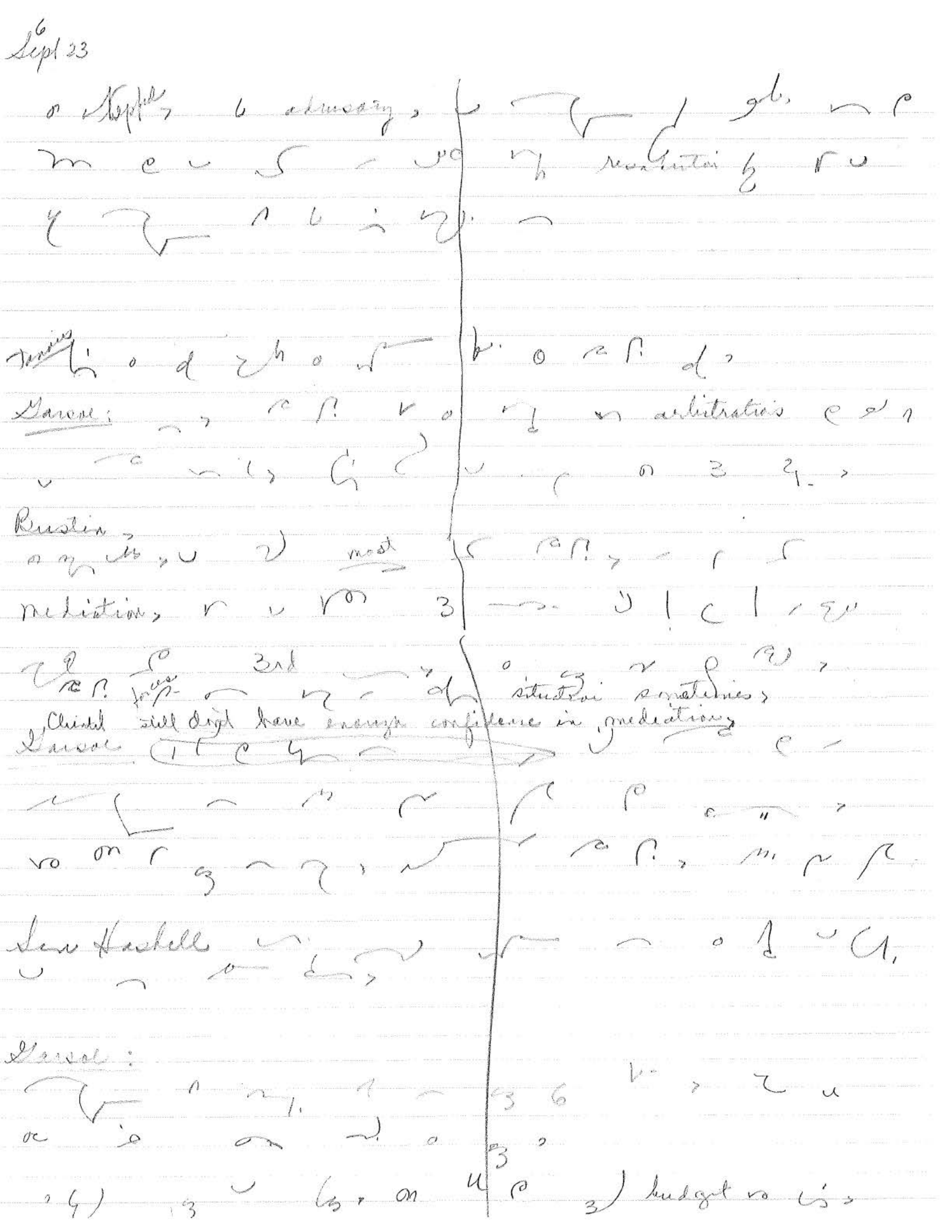
(2) Do there a need for more definite standards to guide decision making at all or any stages to the public employee collective bargaining process?

(3) What is the most effective post-impasse procedure?

A.- Right to strike:

Do the right to strike or binding arbitration more desirable and acceptable?

6
Sept 23



Perkins ... Federal is free, ...

Garson: ... mediation ...

... agency shop ... fees,

Tarnow ... all agreed,

Garson ... punitive ...

Garnow ... contempt ...

Violation ...

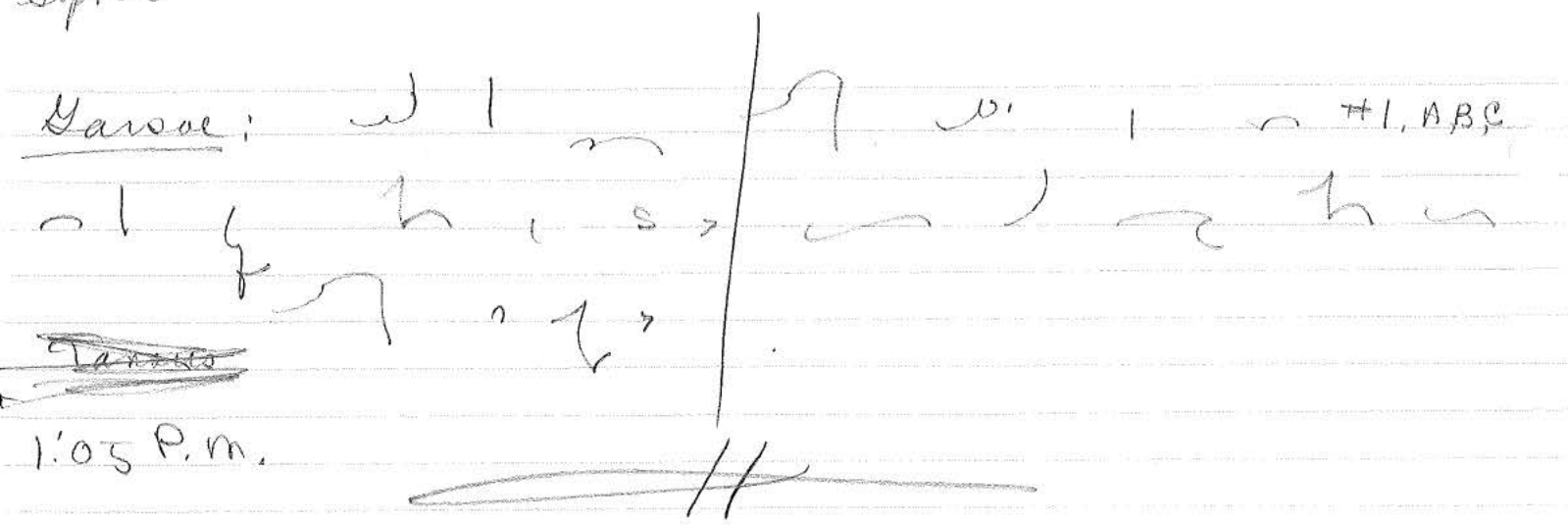
Garson ...

Supreme ... (forms under PELRB ...

... negotiability, ...

PELRB ...

8 Sept. 23



1:05 P.M.

December 2, 1974

Meeting opened by Chairman Garsoe, Absent were Sen. Kelly, Sen. Haskell, Sen. Huber, Rep. Bustin

drop Sec. 4 — Biddeford decision. Chairman had sent a memo suggesting changes to final report. Agree that the committee can't agree on any suggestions.

We understood that there is a move to initiate legislation in this area in the next session.

Rep. Tierney moved that the Committee was unable to come to any agreement as to changes in the law. Vote was unanimous

THE BIDDEFORD DECISION

Facts:

In the fall of 1970, Biddeford's Board of Education and the Biddeford Teachers Association entered into negotiations intended to lead to a contract for the school year 1971-72. They were unable to reach an agreement and following fact-finding procedures, the parties resorted to the arbitration procedure outlined in §965 (4) of the Municipal Employees Labor Relations Law. The procedures outlined in that section were followed, and on November 17, 1971, the arbitration panel issued an unanimous decision and directed the parties to enter into a contract which included each of their determinations.

The Board refused to enter into the agreement and the Association then brought an 80B complaint against the Board and the Superintendent asking that they be ordered to comply with the determination of the arbitration panel. The Board also filed an 80B complaint against the Association and the arbitrators alleging erroneous rulings of law and fact in the award, and also alleging that the award was invalidated by the partiality of an arbitrator and by prejudicial conduct of the hearing. These complaints were consolidated for consideration by the Court.

Decision:

Two opinions were written in this case. The first, written by Justice Weatherbee, and supported in part by the entire court and in part by two other justices, was as follows:

1. The provision in the Municipal Employees Labor Relations Law requiring local school boards, at the request of teaching employees, to submit to binding arbitration disputes arising both out of the making of the labor contract and out of later employment under the contract is not an unconstitutional delegation of authority to arbitrators.

(agreed to by the entire court)

2. Although it is constitutional for the Legislature to delegate its powers as contemplated in the legislation, it must provide adequate standards for the exercise of the power delegated. Since the legislation did not include factors the arbitrators were to use as guidelines in making decisions the portion of the statute which is an attempt to delegate to arbitrators binding determination of labor disputes between teachers and their public employers is void.

(agreed to by Weatherbee and two other members of the court)

The second opinion was written by Justice Wernick. His opinion was as follows:

1. He concurred in Justice Weatherbee's opinion concerning the delegation of authority to arbitrators.

2. In an elaborate discussion of standards:

The extent to which standards for exercise of delegated legislative power must be detailed must depend upon the nature of the service which the legislative body has determined should be performed by the administrative agency. The statute has prescribed an adequate "standard" and "intelligible principle" to contain, and guide, the arbitrators and to allow effective scope to judicial review as a further check upon arbitrariness. Therefore the statute is constitutionally valid.

(this portion of the opinion was supported by two other justices. Since the Court was evenly divided, constitutionality was upheld.)

3. Using the intelligible principle" outlined in the opinion, Justice Wernick ruled on the specific questions presented by the Board (erroneous findings of law by the arbitrators) as follows:

"Educational policies" (nonnegotiable) and "working conditions" (Negotiable) should be perceived as being

either extremity of a continuum. Even if some of the items in dispute may be readily classifiable at the pure extremes of "policies" or "working conditions" by far the major portion lie in the intermediate areas with substantial intermixings. Since the legislative language explicitly indicates that "educational policies" was to be restrictively conceived, not only must impact on organization, supervision, direction and distribution of personnel be held insufficient to exclude items related to teacher "working conditions" as proper matters of collective bargaining and binding arbitration, but affirmatively legislative intent must be held to be that contacts of such items with other functions generally cognizable as "managerial" and "policy making" can subordinate the "working conditions" features and accomplish an exclusion from negotiability and binding arbitration only if their quantitative number or qualitative importance, or both, are found substantial enough to override the prima facie eligibility for collective bargaining and binding arbitration established by the presence of reasonable relationships to "working conditions".

Comments:

1. This decision relates only to the application of the Municipal Public Employees Labor Relations Law to teachers in the public schools. This statement in the opinion leaves it unclear as to whether the law is still challengable on constitutional grounds and as to whether Justice Wernick's rulings on money expenditures and on when arbitration decisions go into effect are now applicable to all municipal employee collective bargaining.

2. The opinions clearly go beyond the questions presented to the Court. Usually a court will not consider the constitutional question

unless it is essential to resolution of the particular case. Perhaps these questions were expressed indirectly and Justice Weatherbee does state that the Court was forced to decide on constitutionality.

STATE OF MAINE

ONE HUNDRED AND SIXTH LEGISLATURE

COMMITTEE ON LABOR

November 27, 1973

MEMO

To: Rep. Larry Simpson
Chairman, Legislative Council

From: Rep. William Garsoe
Chairman, Study Committee on Municipal Employees Labor Relations Law

The Committee met on November 20. All were present, with the exception of Rep. Steve Perkins. The following speakers appeared:

Dr. Carroll R. McGary, Commissioner of Educational and Cultural Services, State of Maine
Dr. John H. Marvin, Maine Teachers Association
Mr. James Vickerson, Maine School Management Association
Attorney Stephen Sunenblick, ASFCME
Miss Marion E. Martin, former Commissioner of Labor
Mr. Parker Denaco, Exec. Director, Municipal Public Employees Labor Relations Board
Mr. Donald Sipe, Supt. of Schools, SAD 17
Attorney Paul Frinsko
Mr. Walter Corey, Chairman, PLRB

Morning and afternoon sessions were held, with questions from Committee members, followed by an executive session.

It was unanimously voted that time did not permit us to prepare legislation for the special session. We plan to meet during the session and continue our study to determine whether or not legislation is needed, and what recommendations we could make in this area; however, no further meetings are contemplated prior to the special session.

The meeting was adjourned at 3:55 P.M. The sum of $4,255.70 remains in the Committee Fund.

pac

May 1, 1973

Mr. James J. Vickerson
Assistant Executive Secretary
Maine School Management Association
15 Western Avenue
Augusta, Maine 04330

Dear Jerry:

The Supreme Judicial Court's decision in the Biddeford case answers some questions and raises several other questions.

Very briefly, the decision can be summarized as follows:

1. The constitutional question - The court split 3-3 on the question of constitutionality of the statute. This split means that the constitutionality of the statute is sustained. Three judges were of the opinion that the absence of any standards in the statute to guide and limit the arbitrators invalidates the Act insofar as its applicability to binding arbitration of labor disputes in the public school area is concerned. Justice Wernick, joined by two other judges, however, concluded that the statute contemplates that the arbitrators will act "with reasonableness and fairness to resolve issues in a manner tending to promote improvement of relationships", and that this "standard" is adequate. Justice Wernick's opinion also states that the arbitrators must consider the impact of monetary costs upon the ordering of priorities not only within one sphere of essential public services, but as to all public services which the public employer must provide as well as upon the ultimate burden of taxation.

   The opinion sustaining the constitutionality of the statute stressed the fact that the arbitrators do not have unlimited discretion because the parties, through negotiation, mediation and fact-finding will have narrowed down the issues in dispute.

   The decision does not state that fact-finding is a statutory prerequisite to arbitration, but the decision suggests that the parties may not waive fact-finding and proceed directly to arbitration.

2. Bias of neutral arbitrator - The court held that bias was not shown.

3. Interest of arbitrator appointed by the teacher's association - The court held that a Maine Teachers Association employee and advisor to the teacher's negotiation team was not disqualified from serving as an arbitrator. Each side can (and probably should) designate a partisan advocate. The neutral is the only arbitrator who must be impartial.

4. Sick leave bank - The court sustained the arbitrators' decision directing that a sick leave bank be established. Such a provision is not prohibited by statute and is not a "salary" item which would be excluded from binding arbitration.

5. Educational policy--working conditions - The court recognized that many items are a mixture of "educational policy" and "working conditions" and prescribed a test for determining which category applies to a given item.

   Where "working conditions" features are "so intimately entwined" with an "abundant plurality" of important "managerial" and pure "policy" elements, then such an item must be deemed an integral complex of "educational policies" and "working conditions", incapable of separation so that the working conditions factors cannot be negotiated in isolation. Such an item combining elements of both educational policy and working conditions will be non-negotiable and excluded from binding arbitration when the weight of the educational policies factors contained in it are sufficiently heavy to override the impacts upon the working conditions of teachers.

6. Class size; length of the teacher working day; scheduling of vacations and the commencement and ending of the school year - The court held that these items are not negotiable and that the arbitrators exceeded their jurisdiction in making binding determinations concerning them.

7. Pre-school and Post-school day hours and pre-school and post-school year days for teacher attendance at school; teacher-aides for "housekeeping functions"; specialist teachers for specific types of subject matter taught or services offered - The court held that these items are negotiable, but noted that the committee retains the unilateral right to determine whether or not particular subjects will be taught and whether or not particular services will be offered.

8. The court rejected the argument that the arbitrators could not make binding determinations on matters that involve the appropriation of money. The arbitrators cannot make binding determinations on "salaries, pensions, and insurance", but on working condition items that carry a price-tag, the determinations of the arbitrators are binding and the school committee and municipal legislative body must fund these obligations.

9. A school board appealing an arbitration tribunal decision should ask the court to stay the enforcement of the decision pending review.

I have only touched briefly on the highlights of the decisions. Actually, these decisions raise many new questions which will only be answered by future litigation.

Yours very truly,

Hugh G. E. MacMahon

MAINE SCHOOL MANAGEMENT ASSOCIATION
and
STATE SCHOOL BOARDS ASS'N., INC. OF MAINE
15 Western Avenue, Augusta, Maine 04330
Tel. (207) 622-3473

Executive Secretary
H. Sawin Millett, Jr.
Ass't Executive Secretary
James J. Vickerson, Jr.

May 9, 1973

To: Committee on Labor

From: H. Sawin Millett, Jr.

Subject: Biddeford Decision - Maine Supreme Judicial Court

Enclosed are copies of the opinions of Justices Wernick and Weatherbee in the case involving the City of Biddeford Board of Education and the Biddeford Teachers Association. At issue were the binding determinations of the arbitration tribunal which sat in August 1971 to hear disputes over issues presented in contract negotiations. The Biddeford Board of Education contended that the arbitrators exceeded their authority when they made binding determinations on issues which were alleged to be matters of educational policy.

In an amicus curiae brief on behalf of this association, it was contended that a court ruling upholding the arbitrators' binding determinations would raise the question of the constitutionality of the Municipal Public Employees Labor Relations Law, Chapter 9-A of Title 26. The basis for this appeal was that Chapter 9-A would then give arbitrators authority over matters which were the statutory duties of school committees and boards of school directors.

As you read the opinions of the Court, I hope you will keep the following points in mind:

1. The Court was divided (3-3) on the constitutionality question (the appeal was lost). Justice Weatherbee, speaking for the three (3) justices whose opinion is that the law is unconstitutional, points directly to the need for legislatively set standards concerning the difference between working conditions and educational policy.

> We hold that the Legislature's attempt to delegate to arbitrators binding determination of labor disputes between teachers and their public employers is void for lack of adequate standards. (p.32)

2. The Court has interpreted the present language of Chapter 9-A and has concluded that the law now allows for collective bargaining over certain aspects of the numbers, types, and use of personnel. Justice Wernick implies in his decision that the use of teacher aides to perform certain "household tasks" and the employment of "specialist" teachers to provide instruction in certain areas outside of

the strict academic curriculum are negotiable once the decision has been made to offer such programs. However, in the absence of statutory guidelines in this area, a panel of arbitrators could make a binding determination which could force a local school system to implement new programs and to employ new personnel in such new program areas. School boards maintain that numbers and types of personnel are determined by local programs and local programs are matters of educational policy. The law should be amended to so specify. This is an example of a legislatively set standard that is needed.

Justice Weatherbee seems to prophesize the reaction to amendments to Chapter 9-A that are general in application, as is L.D. 1157, when he observes

> The complaints direct our attention only to the application of the statute to teachers in the public schools.

We may all be more prudent, at this point, to address ourselves only to the question of clarity of meaning of "educational policy." We are most willing to work with the Committee in structuring a redraft of L.D. 1157 which would deal directly with the serious questions which the Maine Supreme Court has raised regarding the Municipal Public Employees Labor Relations Law.

MAINE SCHOOL MANAGEMENT ASSOCIATION
15 Western Avenue
Augusta Maine

POSITION PAPER

on

L. D. 1974

November 15, 1972

I. BACKGROUND

The lack of clarity and the resulting confusion concerning the distinction between "working conditions" and "educational policy" in Chapter 9-A of Title 26, M.R.S.A., were clearly accentuated by the comments of the late Justice Walter Tapley attached to the Determinations and Recommendations of Arbitration Tribunal in the matter of a contract arbitration proceeding between the Biddeford Teachers Association and the Biddeford Board of Education dated November 16, 1971. Legislation was introduced at the Special Session of the 105th Maine Legislature in order to specify the areas of educational policy not subject to negotiation.

Lest there be an over-reliance on the comments of Justice Tapley, it is pointed out in the beginning that school boards and superintendents who have been involved in collective bargaining with teachers under Chapter 9-A of Title 26 are acutely aware of the fact that bargaining agents for teachers make little or no attempt to distinguish between working conditions and educational policy.

After hearings, debate, and revision in Conference Committee, L. D. 1974 was enacted by both houses of the Legislature as follows (with the wording of the amendment underlined):

> C. To confer and negotiate in good faith with respect to wages, hours, terms and conditions of employment and contract grievance arbitration except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession and except that public employers of teachers shall meet a and consult but not negotiate with respect to educational policies which shall include but shall not be limited to the content and scheduling of the educational programs, standards of services, utilization of technology, the organizational structure and the selection and direction of personnel. For the purpose of this paragraph, educational policies shall not include wages, hours, terms and conditions of employment or contract grievance arbitration.

The final vote was 89-43 in the House of Representatives and 16-10 in the Senate.

Since Governor Curtis has not taken action on L. D. 1974 to date, he has formed this Study Committee for the purpose of rendering advice to him.

II. POSITION

The Maine School Management Association is an organization of associations which has only two members, namely the State School Boards Association, Inc., of Maine and the Maine School Superintendents Association. The membership of both of these latter associations strongly and actively supported L.D. 1974 while it was under consideration by the Maine Legislature. This support was the result, in part, of the realization by both school board members and superintendents that many hours were being spent at the bargaining table by themselves, other school administrators, and professional negotiators (at considerable cost to the public) needlessly debating the negotiability of issues rather than in the bargaining process itself. Maine school boards and superintendents do not subscribe to the theory that everything is negotiable in light of the Legislature's obvious intent in excluding educational policy from negotiations and, rather, providing for the establishment of a "meet and consult" procedure. The Legislature reaffirmed this posture by its action on L. D. 1974.

The Maine School Superintendents Association restated its position in adopting, without dissent, the attached resolution at its fall meeting in Waterville on October 20, 1972.

The Delegate Assembly of the State School Boards Association, Inc., of Maine passed the following resolution at its annual meeting on June 10, 1972:

> We will support all reasonable and objective efforts to clarify and define the scope and limits of negotiability as it relates to school board-teacher negotiations. We place particular emphasis upon the need for a better understanding of the distinction between "educational policies" and "working conditions." We urge all responsible parties, including the courts, to take an impartial, objective, and overall view of the adverse implications which such continued disagreement over the 'gray areas'

> of negotiability hold for the working relationship between the parties involved and its resulting effects upon the quality of our educational offerings.

The Executive Board of Directors of the State School Boards Association, Inc., of Maine unanimously voted the following at its meeting in Waterville on November 12, 1972:

> Moved, seconded, and voted unanimously to support the position that the L. D. 1974 Study Committee advise Governor Curtis to allow L. D. 1974 to become law and, if necessary, that he recommend to the 106th Legislature measures that will insure effective use of the "meet and consult" provisions of Chapter 9-A of Title 26.

The Legislature, the school boards, and the superintendents of Maine who are either elected or appointed representatives of the people and who derive no benefits from the Municipal Public Employees Labor Relations Law have overwhelmingly approved the intent and the language of L. D. 1974. Their common ground is an objective view of the best means of enhancing and protecting the public interest in the education of Maine children.

LOCAL CONTROL OF EDUCATIONAL PROGRAMS AND OF POLICIES RELATED THERETO IS AT ISSUE.

There is no question that the statutory requirement to "confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration" obligates school boards to share the determinations in these areas with the teachers. However, the provision that "public employers of teachers shall meet and consult but not negotiate with respect to educational policies" clearly indicates that the 104th Legislature did not intend to supersede Sections 161 and 473 of Title 20, M.R.S.A.

Section 161 refers to the superintendents' powers and duties including such areas as discipline in the schools, nomination of teachers, supervision of the work of teachers, selection of textbooks and distribution and accounting of supplies. Section 473 specifies that school committees and school

directors shall be responsible for "the management of the schools" and shall "direct the general course of instruction."

There being no attempt to repeal these sections of Title 20 in enacting Chapter 9-A of Title 26, the Legislature obviously intended that superintendents, school committees and boards of directors should retain the above powers and duties.

Submitting the execution of these powers and duties to the negotiations process subjects them to binding arbitration under Section 965.4 of Chapter 9-A and, in so doing, introduces a third party who has the power to dictate the adoption, deletion, and/or modification of educational programs and the policies related thereto without his necessarily having (1) any expertise in the field of education (2) any commitment to the individuals served by the school system or (3) any real concern for the economic impact of his determinations on the community served. Not only is this contrary to the intent of the Maine Legislature, it is diametrically opposed to those tenants of local control of education that are the foundations of our educational process and philosophy. When the decisions of which programs take precedence at the local level and how they are to be conducted are taken out of the hands of the elected representatives of the public served and are placed in the hands of arbitrators, then oligarchy replaces democracy.

IF EDUCATIONAL PROGRAMS AND THE POLICIES RELATED THERETO ARE NEGOTIATED, HALF OF THE AUTHORITY HAS NO PUBLIC CONSTITUENCY.

Collective bargaining requires some degree of compromise and mutual agreement between the school board and teachers' unit prior to ratification of a contract. The school board alone is answerable to the public for its programs and the manner in which they are conducted. The superintendent is answerable to the school board. Neither the board nor the superintendent can abdicate the authority and responsibility vested in them through Sections 161 and 473 of Title 20, M.R.S.A., by compromising that responsibility at the bargaining table.

In plain terms, the public is paying the bill and it wants a voice in the selection of those individuals who will be making decisions that affect its programs and policies.

THE AREAS OF POLICY IDENTIFIED IN L. D. 1974 ARE SPECIFIED BECAUSE THEY ARE PRIMARILY CONCERNED WITH STUDENT WELFARE RATHER THAN TEACHER WELFARE.

Content and Scheduling of Educational Programs

The content of the educational programs is designed in relation to the needs of the student population. The programs are scheduled to provide balance and adequate exposure to the student so that he or she will receive maximum benefit. When it is determined what is to be taught and when it is to be taught, a staff is hired to implement the program. A staff is not hired and then a program designed to place the least amount of burden on the staff.

Standards of Service

The expectations of the staff must be considered solely in terms of the impact of the educational program on the students. Reliance upon alleged teacher welfare issues in developing job descriptions and standards of performance can compromise the effectiveness of the program.

Utilization of Technology

Technological advances which prove to be of significant benefit in the learning process can hardly be rejected because they may alter the staff needs.

Organizational Structure

The organization of the school system and the staffing patterns used are adopted in relation to providing the best possible program for students. Again, the needs of the student are preeminent.

Selection and Direction of Personnel

The statutory emphasis on selection and supervision of personnel and direction of the general course of instruction place proper and primary importance on these functions of the employer. To implement the best possible program for students, the content, standards, and structure of the program rely on the final steps of selecting and directing the staff.

There is no argument that adequate and clean teachers room facilities are negotiable; but, there is no way to rationalize the compromising of student welfare in the collective bargaining process.

April 23, 1973

Testimony on L.D. 1157
James J. Vickerson,Jr.
Assistant Executive Secretary
Maine School Management Association

In this early presentation by a proponent of L.D. 1157 I will attempt to cover three major points.

I. The Advisory Commission on Intergovernmental Relations recommendations found in their report on "Labor-Management Policies for State and Local Government" are a reasonable approach to negotiations between public employers and public employees. Maine is making growing use of their content.

II. The provisions of L.D. 1157, which are patterned after Recommendation No. 6 of the Advisory Commission's report, are needed so that elected school boards can perform their statutory responsibilities in the public interest. I will try to do this by explaining how these provisions will apply to negotiations between school boards and teacher representatives and by indicating examples of the kinds of teacher proposals which can infringe on the employer's rights.

III. There will be numerous areas concerning teacher welfare that will remain on the bargaining table if L.D. 1157 becomes law.

I. The Advisory Commission on Intergovernmental Relations (ACIR) report on "Labor-Management Policies for State and Local Government" is one of many ACIR reports on critical issues facing government today. The reports issued through September 1969 are listed on the inside back cover of the report that you have.

The ACIR Labor-Management report was published after the passage of the Municipal Public Employees Labor Relations Law by the 104th Legislature. It is interesting to note that, of the fourteen ACIR recommendations concerning the content of State bargaining laws, six (6) of them were included in the MPELR Law. They are

Recommendation No. 1 - rights of employees to join or not to join employee organizations

Recommendation No. 2 - exclusion of supervisory and certain other personnel

Recommendation No. 3 - prohibition of strikes by public employees

Recommendation No. 5 - enactment of legislation by the States establishing a basic relationship between employers and employees

Recommendation No. 9 - formal recognition of employee organizations with majority support

Recommendation No.11 - enactment of provisions concerning prohibited practices

It is more interesting to note that a seventh recommendation - Recommendation No. 8 related to the establishment of a suitable type of administrative agency - was incorporated into the MPELR Law by the 105th Legislature in the form of the Public Employees Labor Relations Board and, in addition, three more ACIR recommendations are incorporated in legislation before the 106th Legislature. They are

Recommendation No. 6 - Management rights - L.D. 1157

Recommendation No. 10 - authorizing mediation at the request of <u>either</u> party - L.D. 923 and L.D. 1291 (Please note that No. 10 relates to dispute settlement procedures which were included in the original MPELR Law but it does make specific reference to mediation at the request of either party.)

Recommendation No. 7 - States bargaining laws should provide uniform coverage for both State and municipal employees - L.D. 1773 and L.D. 1800 provide coverage for state employees. Whether coverage is uniform is yet to be seen.

The four (4) recommendations of the ACIR that have not been considered to date include

Recommendation No. 4 - internal democracy and fiscal integrity of employee organizations

Recommendation No.12 - exchange of public personnel data

Recommendation No.13 - statutory authorization of voluntary dues check-off

Recommendation No.14 - multi-jurisdictional cooperation (regional bargaining)

I would point out that Nos. 12, 13, and 14 are being done to one degree or another.

For clarity I will also point out that the ACIR report contains sixteen (16) recommendations; however, Nos. 15 and 16 relate to minimizing the statutory requirement of terms and conditions of employment (i.e. reimbursement for credits) and Congress desisting from mandating labor relations provisions for State and local employees.

I submit, at this point, that, as we gain more experience in the collective bargaining process in Maine, the recommendations of the Advisory Commission on Intergovernmental Relations will provide guidelines for sane and responsible collective bargaining in the public sector. I do not believe that anyone who can read the ACIR report objectively can dismiss any of the Commission's conclusions.

On page 79 of the report, the Commission observes

> . . . there is an increasing tendency for some public employee organizations to seek to extend the scope of collective negotiations beyond "bread-and-butter" issues into areas traditionally considered to be management "prerogatives," that is to topics traditionally considered subject to unilateral determination. Many unions and associations have sought to define broadly "conditions of employment" to include program and professional matters, and have argued that these should be negotiable items. Their basic intent here is to utilize the collective negotiations rather than the legislative process to achieve fundamental program changes. Teachers' organizations, for example, commonly claim that as professionals they have an interest in and a responsibility for all factors affecting the nature and quality of the educational system; hence questions of educational policy should be subject to codetermination.

On Pages 102 and 103, the Commission states

The Commission believes statutory description of management rights is necessary if well defined parameters to discussions are to be established. In a democratic political system, dealings between public employers and public employee organizations -- whether they are called negotiations or discussions -- must necessarily be limited by legislatively determined policies and goals. This may involve merely a restatement of basic management prerogatives and civil service precepts. Listing such rights in law eliminates many of the headaches of administrative elaboration and some of the cross pressures generated by ambiguities. Wages, hours, and other terms and conditions of employment, however, are left for the conference table. Hence, the framework for a meaningful dialogue remains intact.

On page 113 the Commission concludes

The approach proposed obviously goes well beyond most of the existing meet and confer statutes by avoiding the one-sidedness of these laws. On the other hand, unlike certain collective bargaining legislation, it stops short of prescribing an employer-employee relations system which ignores the hard realities of political, governmental, and public life. It is, then, a mean between these existing statutory extremes. As such, it strikes a balance between the public interest and employee interests, between management needs and the concerns of the majority representative, between political realism and procedural innovation. The Advisory Commission on Intergovernmental Relations commends this approach and this system to legislators, labor leaders, and public managers as they strive to reconcile these vital goals and seek a more stable, more salutory system of public labor-management relations to meet the severe challenge of the 1970's and beyond.

II. In the following pages of my prepared presentation, I have indicated

1. the provisions of L.D. 1157
2. the purpose of the provision as it relates to public employers of teachers
3. some examples of contract provisions that have been proposed by teacher organizations

C.(1). of L.D. 1157 repeats ingredients of the present law.

C.(2). contains the proposed changes

PROVISION: (a) To hire, suspend or terminate employees and the right to promote, demote, assign, transfer and retain employees in positions under their control.

PURPOSE: To enable public employers of teachers to retain the final authority, subject only to review of procedural defects by the courts where applicable in matters of personnel administration. Sections 161 and 473 of Title 20, M.R.S.A., cover the statutory duties of superintendents and school boards and the final authority for execution of these duties is not properly transferred to a third party (an arbitrator) through collective bargaining. These referenced sections of Title 20 will apply to all of the provisions (a) to (g) of L.D. 1157. Please note Section 763 of L.D. 1809.

EXAMPLES OF TEACHER PROPOSALS:

INVOLUNTARY TRANSFERS AND REASSIGNMENTS

An involuntary transfer will be made only in case of an emergency or to prevent undue disruption of the instructional program. The superintendent shall notify the affected teacher and the Association of the reasons for such transfer in writing and arrange a meeting with the teacher. The teacher may, at his option, have an Association representative present at such meeting. If the teacher objects to such transfer for the reasons given, the dispute can be processed through the grievance procedure.

A list of open positions in the school district shall be made available to all teachers being involuntarily transferred or reassigned. Such teachers may request the positions in order of preference, to which they desire to be transferred. All such teachers shall be given adequate time off for the purpose of visiting schools at which open positions exist.

PROMOTIONS

A. Promotional positions are defined as follows:

Positons as used in this section means any positions which pay a salary differential and/or involves an additional or higher level of responsibility. All vacancies in promotional position; including specialists and/or special projects teachers, pupil personnel workers and positions in programs funded by the federal government shall be adequately publicized by the superintendent in accordance with the following procedure:

1. When a school is in session, a notice shall be posted in each school as far in advance as practicable, ordinarily at least thirty (30) school days before the final date when applications must be submitted and in no event less than fifteen (15) school days before such date. A copy of said notice shall be given to the President of the Association at the time of posting. Teachers who desire to apply for such vacancies shall submit their applications in writing to the superintendent within the time limit specified in the notice.

2. Teachers who desire to apply for a promotional position which may be filled during the summer period when school is not regularly in session shall submit their names to the superintendent, together with the position (s) for which they desire to apply, and an address where they can be reached during the summer. The superintendent shall notify such teachers of any vacancy in a position for which they desire to apply. Such notice shall be sent, ordinarily, at least twenty-one (21) days before the final date when applications must be submitted and in no event less than fourteen (14) days before such date. In addition, the superintendent shall, within the same time period, post a list of promotional positions to be filled during the summer period at the administration office, in each school, and a copy of said notice shall be given to the President of the Association.

(a) Vacancies in promotional positions occuring during the summer, when school is not regularly in session, to be filled before the start of the school year, shall be posted in a conspicuous public place in the office of the Biddeford School Department. A copy of such notice shall be given to the President of the Biddeford Teachers Association at the time of such posting. In addition, a notice of all such vacancies shall be enclosed with each pay check being mailed or sent at least twenty-one (21) days before the final date when applications must be submitted.

(b) Vacancies in promotional positions occurring during the summer when school is not in regular session, to be filled before the start of the school year, and such vacancies occurring less than 21 days before the start of the school year, shall be filled temporarily by a professional staff member of the Biddeford School Department. This person will be designated in writing, as Acting _____ accepting the responsibility for the position as stated in the job description. He shall serve in such position for a maximum of 60 school days. Thereafter, all efforts shall be made that a permanent appointment be made by the superintendent. He shall follow the procedure in Article XV, A, 1. If exceptions must be made to the above, notification shall be given to the President of the Association.

(c) The person designated as "acting" shall receive the regular differential at the time of appointment.

B. In the situations set forth in Section A above, the qualifications for the position, its duties, and the rate of compensation, shall be clearly set forth. The qualifications, duties and rate of compensation set forth for a particular position shall not be changed when such future vacancies occur unless the Association has been notified in writing at least 30 days in advance of such changes and the reasons therefore. A job description for the changed position must be posted at this time and the procedure for filling the changed position shall be as outlined in Section A of Article XV. Should the Association disagree as to the necessity for such changes, two representatives of the Association, upon request, shall be afforded the opportunity to meet with and consult with the Superintendent with respect thereto. No vacancy in a promotional position shall be filled other than in accordance with the above procedure.

C. All qualified teachers shall be given adequate opportunity to make application and no position shall be filled until all properly submitted applications have been considered. The Board agrees to give due consideration to the professional background and attainments of all applicants and other relevant factors. In filling such vacancies preference shall be given to qualified teachers already employed by the Board and when all other factors are substantially equal, length of time in the Biddeford School Department shall be the deciding factor. Each teacher applicant not selected shall upon request receive a written explanation from the superintendent. Appointments shall be not later than sixty (60) days after the notice is posted in the schools or the giving of notification to the interested teachers. Announcements of appointments shall be made by posting a list in the office of the central administration and in each school building. The list shall be given to the Association and shall indicate which positions have been filled and by whom. If exceptions must be made to the above, notification shall be given to the President of the Association.

TEACHER RECRUITMENT

A. The Board and Association recognize that recruitment of new teachers is important to both. It is agreed that, in event there are vacancies or new positions which cannot be filled by existing staff, that an active recruitment program shall be established as follows:

1. The Association shall receive first notification of all vacancies.

2. A notice of vacancy or opening shall include, but not be limited to, a description of the position, the educational and professional prerequisites, the location and level of the position, salary and benefits, supportive services, and specialist personnel available.

3. No vacancy shall be filled until at least three applicants have been screened.

4. No teaching vacancy shall be filled unless there has been a visit to the class of the successful applicant and he has been observed for at least two normal length classes or one-half day, whenever practical.

5. The screening and interviewing of all potential candidates shall be performed by the Recruitment Committee.

6. The Recruitment Committee shall consist of a representative of the Board, a representative of the Association, the appropriate principal, the appropriate department head, and a teacher representing the building, level, department, or special area in which the vacancy or opening exists.

7. All members of the Recruitment Committee shall have equal status on the Committee.

8. No candidate shall be employed unless he is approved by a majority of the Recruitment Committee. If the Board does not employ a candidate recommended by a majority of the Recruitment Committee, the Board shall so notify the Recruitment Committee in writing, stating reasons for the action.

9. The Board shall provide released time and funding for members of the Recruitment Committee at such times when meetings, interviews, or classroom visits become necessary.

10. Out-of-state travel for recruitment purposes shall be considered a normal activity of the Recruitment Committee.

11. Classroom visitations shall be made by teams of two members of the Recruitment Committee elected by the members of the Committee.

PROVISION: (b) To schedule and direct the work of their employees.

PURPOSE: To enable school boards and school administrators to establish policies related to scheduling of classes within the negotiated workday and to supervise teachers as directed in Section 161, T. 20.

EXAMPLES:

TEACHER ASSIGNMENT

The superintendent shall assign all newly-appointed personnel to their specific positions within that subject area and/or grade level for which the Board has appointed the teacher. The superintendent shall give notice of assignments to new teachers as soon as practicable, and except in cases of emergency not later than _____ weeks before school opens.

In the event that changes in such schedules, class and/or subject assignments, building assignments, or room assignments are proposed after the above designated time, the association and any teacher affected shall be notified promptly in writing and, upon the request of the teacher and the Association, the changes shall be promptly reviewed between the superintendent or his representative and the teacher affected and at his option a representative of the Association. In the event of any disagreement as to the need and desirability of such changes, the dispute shall be subject to the grievance procedure set forth herein.

TEACHER EVALUATION

Teachers shall be evaluated only by persons certificated by the Maine State Department of Education to supervise instruction within the teachers' subject area except personnel in the teachers building such as the building principals, the area principals, and the department heads. No teacher will be subjected to a team evaluation of more than three members.

ASSOCIATION RIGHTS AND PRIVILEGES

All orientation programs for new teachers shall be cosponsored by the Board and the Association with the Association obligated to assume only such costs as may be mutually agreed upon during the planning of such programs. To the extent prohibited by law, the school board shall not be expected to assume the cost of purely social events conducted as part of such orientation programs, nor shall the Association be expected to assume the cost of speakers, consultants, and services normally considered an appropriated professional inservice training activity of a board of education.

PROVISION: (c) To determine the methods, means and numbers and types of personnel by which their operations are to be carried on.

PURPOSE: To enable school boards to "direct the general course of instruction" by retaining final authority in the approval of programs, materials, and types of personnel. The meet and consult provision that follows (g) mandates that school boards obtain the input of their professional employees before making these decisions. Some teacher associations have virtually disregarded the "meet and consult" provision in the existing law on the basis that "educational policies" are mythical and that "everything is negotiable." In contract, other school systems have made use of the "meet and consult" provision by forming a committee consisting of teachers, school board members and administrators which has resulted in an harmonious approach to discussion of areas of concern and in positive action by all groups.

EXAMPLES:

TEACHER RIGHTS

If at any time during the term of this contract or any extensions or renewals thereof the Board shall contract or subcontract out any services performed by teachers hereunder, the following shall prevail.

The Board shall enter into no contract which will result in instruction being provided, supervised, or otherwise influenced by any organization other than the Association without the express written approval of the Association. The Board shall further provide for Association involvement in new or innovative programs, from planning through evaluation stages.

In the event the Board enters into a contract with any outside agency for any service related to curriculum and instruction, the Board agrees that no regular staff shall be displaced in any way. It is also agreed that such contracted agency shall perform its work in accordance with sound educational practices and that all its employees shall be bound by the existing Master Agreement between the Board and the Association.

PROVISION: (d) To modify programs and personnel with respect to budgetary resources.

PURPOSE: To enable school boards to function in a two-fold manner -- first, to retain the authority to reduce programs, services, and personnel if they are faced with a budget cut (note that this does not refer to reducing salaries or fringe benefits) and, secondly, to add to their programs, services, and staff if they receive additional federal, state, or local monies.

EXAMPLE:

NEGOTIATION PROCEDURE

The Board agrees to reopen negotiations and permit amendments to any section of this Agreement whenever state and/or federal funds over and above those previously anticipated for the current budget year have been appropriated. The Board shall so inform the Association within five (5) days of its notification of the amounts to be received in such subsequent state and/or federal appropriations.

PROVISION: (f) To take actions as may be necessary to carry out their operations in emergencies.

PURPOSE: Growth in population may result in over-crowding of facilities or a disaster such as a fire may require a sudden change in local conditions without notice. While these conditions may or may not affect negotiated contract provisions, the school board must retain the right to take those steps necessary to provide immediate remedy.

EXAMPLE:

INVOLUNTARY REASSIGNMENTS AND TRANSFERS

A. Notice of a reassignment or transfer not requested by a teacher shall be given to the teacher as soon as practicable (normally, except in cases of extreme emergency at least thirty (30) days before the date of such reassignment or transfer) by the Superintendent and/or the principal under whom the employee was assigned prior to the new assignment or transfer.

B. Within ten days after receipt of such notification, an employee dissatisfied with his new assignment or transfer may make a request in writing for a meeting with the appropriate Principal to discuss reasons for the new assignment or transfer. The Assistant Superintendent for Personnel may, at his option, also participate in such meeting.

C. Within ten (10) days after any such meeting with the appropriate Principal, the employee, if dissatisfied with the reasons given for his reassignment or transfer shall have the further right to request a meeting with the Superintendent to discuss said reasons. If the Assistant Superintendent for Personnel has not attended the meeting with the appropriate Principal, the Superintendent may elect to have said Assistant Superintendent confer with the employee in his place.

D. An employee, whose position prior to the reassignment or transfer does not come within the jurisdiction of any Principal, shall have the right to request a conference with the Superintendent, and shall make his written request therefor within ten (10) days after receipt by him of his notice of reassignment or transfer.

E. A representative of the Association may attend either or both of said meetings if requested by the teacher.

F. Such meetings with the appropriate Principal or the Superintendent shall be held as soon as practicable after receipt of a request therefor by the employee.

G. If the foregoing procedures have been followed, the decision of the Superintendent or the Assistant Superintendent for Personnel, as to whether the employee shall be reassigned or transferred shall be final.

PROVISION: (g) To determine the use of physical plant and other facilities

PURPOSE: To enable the school board to determine the uses of the school buildings and other facilities so that the primary consideration for such use will be in the best interest of the students and the community. Teacher organization activities should not preempt educational and community activities under any conditions and contract provisions that dictate who can and cannot use school buildings violate the intent of Section 473.1 of Title 20.

EXAMPLE:

ASSOCIATION RIGHTS AND PRIVILEGES

Representatives of the Association, the Maine Teachers Association and the National Education Association shall be permitted to transact official Association business on school property at all reasonable times, provided that this shall not interfere with or interrupt normal school operations.

The Association and its representatives shall have the right to use school buildings at all reasonable hours for meetings. The principal of the building in question shall approve upon being notified in advance of the time and place of all such planned meetings.

The rights and privileges of the Association and its representatives as set forth in this Agreement shall be granted only to the Association as the exclusive representative of the teachers, and to no other organizations.

PROVISION: Controversies over the negotiability of subjects proposed in collective bargaining by either a public employer or a public employee bargaining agent may be submitted to the Public Employees Labor Relations Board by either party for interpretation under section 968, subsection 3.

PURPOSE: Expecting both the law and the persons using it to be perfect is beyond reason. The Public Employees Labor Relations Board provides a reasonable means of obtaining an interpretation of the meaning of subsections (a) through (g).

The most interesting provisions are the two that follow --

MAINTENANCE OF STANDARDS

All conditions of employment, including teaching hours, extra compensation for duties outside regular teaching hours, relief periods, leaves, and general teaching conditions shall be maintained at not less than the highest minimum standards, presently in effect in the school system at the time this Agreement is signed, provided that such conditions shall be improved for the benefit of teachers

as required by the express provisions of this Agreement. This Agreement shall not be interpreted or applied to deprive teachers of professional advantages heretofore enjoyed unless expressly stated herein.

The duties of any teacher or the responsibilities of any position in the negotiated agreement will not be substantially altered or increased without prior negotiation with the Association.

NEGOTIATION PROCEDURE

Except as this Agreement shall hereinafter otherwise provide, all terms and conditions of employment applicable on the effective date of this Agreement to employees covered by this Agreement as established by the rules, regulations and/or policies of the Board in force on said date, shall continue to be so applicable during the term of this Agreement. Unless otherwise provided in this Agreement, nothing contained herein shall be interpreted and/or applied so as to eliminate, reduce nor otherwise detract from any teacher benefit existing prior to its effective date.

With no clear distinction between "working conditions" and "educational policy" and with no employer rights, the teacher organization claims that everything is a term and condition of employment and, therefore, all school board policies are frozen for the term of the contract and, with the possibility of getting a provision out of a future contract as doubtful as it is, possibly forever.

III. An immediate question is, "If L.D. 1157 becomes law, will there be anything left to bargain?" The following list is my opinion of the types of provisions that would be negotiable. I emphasize that this is my opinion because the procedures for final determination of negotiability are proposed in the bill.

1. Salaries
2. Compensation for extra-curricular activities
3. Length of the teachers' workday
4. Length of the teachers' work year
5. Grievance procedures
6. Teacher rights and privileges
7. Association rights and privileges
8. Negotiation procedures
9. Timely notice of vacancies, employment, assignment, reassignment, transfer, and promotion
10. Access to evaluation reports and conferences with evaluators
11. Sick leave
12. Temporary leaves of absence
13. Extended leaves of absence
14. Sabbatical leave
15. All types of insurance protection
16. Dues check-off
17. Duration of agreement
18. Various miscellaneous provisions

This list is taken from teacher proposals that have been made in the past and probably is not all inclusive. I am sure that a clever mind could expand this list.

IV. In conclusion, I would like to point out that the combination of binding arbitration on matters other than salaries, pensions, and insurance and no clear definition of "educational policy," "management rights," or "working conditions" subjects the statutory role of both school boards and superintendents to the binding determinations of third parties.

Protection of the public interest by reinforcing the role of elected school boards and their appointed administrators can be accomplished in two ways. One is by listing what is not negotiable as was done recently by the Nebraska Supreme Court in stating

> Without trying to lay down any specific rule, we would hold that conditions of employment can be interpreted to include only those matters directly affecting the teacher's welfare: Without attempting in any way to be specific, or to limit the foregoing, we would consider the following to be exclusively within the management prerogative: the right to hire; to maintain order and efficiency; to schedule work; to control transfers and assignments; to determine what extracurricular curricular activities may be supported or sponsored; and to determine the curriculum, class size, and types of specialists to be employed. School District of Seward Education Associations v. School District, 199 N.W. 2d 752, (Nebraska, 1972).

On the other hand, the New Jersey School Boards Association has recommended the following definition which states what is negotiable:

> The phrase "terms and conditions of work" shall mean compensation of every kind paid or furnished to the employee; the length of the workday and workweek, rest periods and meal hours; physical conditions at the place of employment which affect the health or safety of employees, and fringe benefits as the term is commonly understood in public employment.

I propose that the recommendation of the Advisory Commission on Intergovernmental Relations is a sound approach to a very difficult topic and urge your favorable action on L.D. 1157.

MEMORANDUM

TO: Special Committee on Municipal Employees Labor Relations

FROM: Suzanne Havens

The following material is taken from the municipal employees bargaining laws of the fifty states. Many states which have such laws have made no real attempt to define "working conditions", "conditions of employment" or similar terms, when included as subjects of collective bargaining. If a state seemed to have made any effort to more closely define the term, I included the language. Please note that in some states, certain topics are established as subjects of "discussion" and not of "bargaining" or "negotiation".

Alaska

SLL 11:211. Public employees are required to negotiate with and enter into written agreements with employee organizations on matters of wages, hours, and other terms and conditions of employment.

SLL 11:216. "terms and conditions of employment" means the hours of employment, the compensation and fringe benefits, and the employer's personnel policies affecting the working conditions of the employees; but does not mean the general policies describing the function and purposes of a public employer.

California

SLL 14:220

Sec. 3504. The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours and other terms and conditions of employment, except however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

Sec. 3505. "The governing body ... shall meet and confer in good faith regarding wages, hours and other terms and conditions of employment ..."

Connecticut

West Hartford Educ. Assn. v. DeCourcy, 80 LRRM 2422, Conn Sup. Ct. May 2,1972

"Board of Education is required to bargain with teachers union regarding class size, teacher load, and submission of grievances to binding arbitration, since these topics are mandatory subjects of bargaining, the State Supreme Court ruled. However, Board is not required to bargain with such teachers union regarding length of school day and school calendar, since these topics are directly related to hours of employment, specifically exempted from the

Connecticut Teachers Negotiations Act. It was further ruled that Board is empowered to determine whether or not there shall be extracurricular activities and what such activities shall be, but is required to bargain with plaintiff union regarding assignment of teachers to and compensation for such activities, since, to that extent only, said activities are mandatory subjects of negotiations.

Delaware

SLL 17:127 (Public employees)

(c) "Employment relations" mean matters concerning wages, salaries, hours, vacations, sick leave, grievance procedures and other terms and conditions of employment.

SLL 17:132 (Public school employees)

Sec. 4006. Exclusive Negotiating Representative

(a) An organization certified as the exclusive negotiating representative shall have the right to be the exclusive negotiating representative of public school employees of the school district in all matters relating to salaries, employee benefits, and working conditions.

(a-1) For the purposes of this Act:

"Salaries" are defined as the direct compensation of the employee for his (her) professional services. "Employee benefits" are defined as those items contributing to the employee's welfare, paid by the local school district and are not subject to income taxation of the employee, i.e., medical and life insurance. "Employee Benefits" also include a "dues check-off" system. "Working conditions" are defined as physical conditions of facilities in the school district building such as, but not limited to, heat, lighting, sanitation, and food processing.

(b) Professional Relations. Nothing in this Chapter shall be construed as to prohibit the Board of Education and the exclusive negotiating representative from mutually agreeing upon other matters for discussion except as prohibited in Section 4011 (c).

Sec. 4011

(c) No public school employee shall strike while in the performance of his official duties. For purposes of this section, the word "strike" shall be deemed an unexcused absence.

Florida

SLL 19:210

Sec. 4. Right to organize and negotiate professionally. The teachers have the right to negotiate professionally with the board and to be represented by a professional association in such professional negotiations as to salaries, hours, wages, rates of benefits and other terms of employment, curriculum, student discipline personnel policies and all other items that affect rights and responsibilities of teachers.

Hawaii

SLL 21:230

(c) Except as otherwise provided herein, all matters affecting employee relations, including those that are, or may be, the subject of a regulation promulgated by the employer or any personnel director, are subject to consultation with the exclusive representatives of the employees cpncerned. The employer shall make every effort to consult with the exclusive representatives prior to affecting changes in any major policy affecting employee relations.

(d) Excluded from the subjects of negotiations are matters of classification and reclassification, retirement benefits and salary ranges and the number of incremental and longevity steps now provided by law, provided that the amount of wages paid in each range and step and the length of service necessary for the incremental and longevity steps shall be negotiable. The employer and the exclusive representative shall not agree to any proposal which would be inconsistent with merit principles or the principle of equal pay for equal work pursuant to sections 76-1, 76-2, 77-31 and 77-33, or which would interfere with the rights of a public employee to (1) direct employees; (2) determine qualification, standards for work, the nature and contents of examinations, hire, promote, transfer, assign, and retain employees in positions and suspend, demote, discharge, or take other disciplinary action against employees for proper cause; (3) relieve an employee from duties because of lack of work or other legitimate reason; (4) maintain efficiency of government operations; (5) determine methods, means, and personnel by which the employer's operations are to be conducted; and take such actions as may be necessary to carry out the missions of the employer in cases of emergencies.

Indiana

SLL 24:140

Sec. 3. Duty to bargain collectively and discuss.

On and after January 1, 1974, school employers and school employees shall have the obligation and the right to bargain collectively the items set forth in Sec. 4, the right and obligation to discuss any item set forth in Sec. 5 and shall enter into a contract embodying any of the matters on which they have bargained collectively. No contract may include provisions in conflict

with (a) any right or benefit established by federal or state law, (b) school employer rights as defined in Sec. 7(a) of this chapter, or (c) school employer rights as defined in Sec. 7(b) of this chapter. It shall be unlawful for a school employer to enter into any agreement that would place such employer in a position of deficit financing as defined in this chapter, and any contract which provides for deficit financing shall be void to that extent and any individual teacher's contract executed in accordance with such contract shall be void to such extent.

Sec. 4. Subjects of Bargaining

A school employee shall bargain collectively with the exclusive representative on the following: salary, wages, hours, and salary and wage related fringe benefits. A contract may also contain a grievance procedure culminating in final and binding arbitration of unresolved grievances, but such binding arbitration shall have no power to amend, add to, subtract from or supplement provisions of the contract.

Sec. 5. Subjects of Discussion

(a) A school employer shall discuss with the exclusive representative of certified employees, and may but shall not be required to bargain collectively, negotiate or enter into a written contract concerning or be subject to or enter into impasse procedures on the following matters: working conditions, other than those provided in Sec. 4; curriculum development and revision; textbook selection; teaching methods; selection, assignment or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations: Provided, however, That any items included in the 1972-73 agreements between any employer school corporation and the employee organization shall continue to be bargainable.

(b) Nothing shall prevent a superintendant or his designee from making recommendations to the school employer.

Kansas

SLL 26:233 (Public Employees)

(t) "Conditions of employment" means salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, wearing apparel, premium pay for overtime, shift differential pay, jury duty and grievance procedures, but nothing in this act shall authorize the adjustment or change of such matters which have been fixed by statute or by the conditions of this state.

SLL 26:235 - Existing rights of public employer not affected. - Nothing in this act is intended to circumscribe or modify the existing right of a public employer to:

(a) Direct the work of its employer;

(b) Hire, promote, demote, transfer, assign and retain employees in positions within the public agency;

(c) Suspend or discharge employees for proper cause;

(d) Maintain the efficiency of governmental operations;

(e) Relieve employees from duties because of lack of work or for other legitimate reasons;

(f) Take actions as may be necessary to carry out the mission of the agency in emergencies; and

(g) Determine the methods, means and personnel by which operations are to be carrried on.

Minnesota

SLL33:248a

(18) The term "terms and conditions of employment" means the hours of em-

ployment, the compensation therefor including fringe benefits except retirement contributions or benefits, and the employer's personnel policies affecting the working conditions of the employees. In the case of professional employees the term does not mean educational policies of a school district. The terms in both cases are subject to the the provisions of Sec. 179.66 regarding the rights of public employers and the scope of negotiations.

SLL 33:248d Rights and obligations of employers. -

(1) A public employer is not required to meet and negotiate on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the employer, its overall budget, utilizations of technology, the organizational structure and selection and direction and number of personnel.

(2) A public employer has an obligation to meet and negotiate in good faith with the exclusive representative of the public employees in an appropriate unit regarding grievance procedures and the terms and conditions of employment, but such obligation does not compel the public employer or its representative to agree to a proposal or require the making of a concession.

(3) A public employer has the obligation to meet and confer with professional employees to discuss policies and those matters relating to their employment nor included under Sec. 179.63, subdivision 18, pursuant to Sec. 179.73.

Pennsylvania

SLL 48:226

Article VII

Scope of Bargaining

Section 701. Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any questions arising thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Section 702. Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employer representatives.

Section 703. The parties to the collective bargaining process shall not effect or implement a provision in a collective bargaining agreement if the implementation of that provision would be in violation of, or inconsistent with, or in conflict with any statute or statutes enacted by the General Assembly of the Commonwealth of Pennsylvania or the provisions of home rule charters.

Section 706. Nothing contained in this act shall impair the employer's right to hire employees or to discharge employees for just cause consistent with existing legislation.

South Dakota

From an inquiry on what comprises "other conditions of employment", the Attorney General held that the term applies to conditions of employment "which materially affect rates of pay, wages, hours of employment and working conditions". (Attorney General's Opinion No 72-10, issued March 21, 1972).

See also LR > 54.201 for Court rulings on the same subject matter.

Vermont

SLL 56:221 (State employees)

Sec. 904. Subjects for bargaining.

(a) All matters relating to the relationship between the employer and employees shall be the subject of collective bargaining except those matters which are prescribed or controlled by statute. Such matters appropriate for collective bargaining to the extent they are not prescribed or controlled by statute include but are not limited to:

(1) Wage and salary schedules to the extent they are inconsistent with rates prevailing in commerce and industry for comparable work within the state.

(2) work schedules relating to assigned hours and days of the week;

(3) use of vacation or sick leave;

(4) general working conditions;

(5) overtime practices;

(6) rules and regulations for personnel administration, except the following: rules and regulations relating to persons exempt from the classified service under Sec. 311 of this title and rules and regulations relating to applicants for employment in State service and employees in an initial probationary status including any extension or extensions thereof provided such rules and regulations are not discriminatory by reason of an applicant's race, color, creed, sex or national origin.

(b) This chapter shall not be construed to be in derogation of, or contravene the spirit and intent of the merit system principles and the personnel laws.

SLL56: 232 (municipal employees)

(11) "Managerial perogative" means any nonbargainable matters of inherent managerial policy.

(17) "Wages, hours and other conditions of employment" means any condition of employment directly affecting the economic circumstances, health, safety or convenience of employees but excluding matters of managerial prerogative as defined in this section.

Washington

SLL 58: 242: (Teachers)

Sec. 28.72.030. Negotiation by Representatives of Employee Organization -

Authorized - Subject Matter. Representatives of an employee organization which organization shall by secret ballot have won a majority in and election to represent the certified employees within its school district, shall have the right, after using established administrative channels, to meet, confer and negotiate with the board of directors of the school district or a committee thereof to communicate the considered professional judgement of the certified staff prior to the final adoption by the board of proposed school policies relating to, but not limited to, curriculum, textbook selection, in-service training, student teaching programs, personnel, hiring and assignment practices, leaves of absence, salaries and salary schedules and non-instructional duties.

Summary of Correspondence Concerning Scope of Study

1. Sumner J. Coffin

1. Need for both sides in negotiations to develop proper attitude - trust and confidence - . Feels this lacking in Biddeford decision.

2. Proper roles, varying aspects of mediation, fact finding and arbitration, and availabilities thereof, should be better spelled out, more advantageously utilized and implemented.

2. Marion E. Martin

1. Basic problem is conflict between Public Employees Labor Relations Law and fact that school boards have no fiscal autonomy, can't make final decisions affecting budgets, which are approved by towns. Could either give board autonomy or make city government part of management negotiating team.

2. Another problem is that school year overlaps 2 fiscal years.

3. Sees no problem on limiting areas of negotiation. Should be left to good faith bargaining. Board should settle on case by case basis.

3. Stanley Devins

1. Committee might want to consider changes in the fact-finding procedure. May at times involve on the spot mediation and settlement. Law should recognize this.

4. John Marvin

1. Area of what is negotiable. Should study history of NLRB in this regard. Does not recommend definitive list.

2. Fact-finding. Recommends elimination of this step.

3. Strike right-binding arbitration as alternatives.

4. Board should have immediate injunctive power.

5. Agency shop provisions should be included.

5. Walter Cory

1. Scope of bargaining - feels much should be left to the Board, needs flexibility to proceed on a case by case basis. Is sure courts will cooperate here.

2. § 968 - 5B - refers to procedure re prohibited practice complaints, service of copy and notice of hearing. Feels 7 day notice period might in future create problems i.e. work stoppage.

3. Placement of Board in Labor and Industry. No problem to date, but if Board independent may be less sensitive to external governmental pressures.

6. Parker Deneco

At first recommended confinement of study to area of Biddeford decision. Later phoned again to confirm W. Cory's comments, also expressed concern about § 965 - 7 - E, wishes "mediation" included before fact finding.

7. Roger Snow

Recommended consultation of Fish report for his ideas. Most of his recommendations would be covered by the Federally funded study.

8. Joseph Chandler

Would like to see study of four general problem areas. 1) Inherent managerial rights; 2) Problems of determining 'just cause'; 3) Views concerning the strike in the public sector; 4)The spelling out of impasse resolution procedures. Each of these areas is discussed at some length in Mr. Chandler's letter.

9. Sawin Millett

Recommends clarification of the "educational policy" provision of the present statute to provide guidelines for all persons and institutions touched by collective bargaining. (See attached statement provided by the Maine School Management Association).

10. Dr. Carroll McCary

Would like to see study of three major areas;

1) Redefinition of the negotiations process and the subjects for re-negotiation;

2) the areas recommended for study by the special committee which studied L.D. 1974;

3) the relationship between a possible fair employment practices section change in T. 20, and the Public Employees Labor Relations Law.

Detailed discussions of each of these areas is included in Dr. McGary's communication.

MAINE SCHOOL MANAGEMENT ASSOCIATION
15 Western Avenue Augusta, Maine

Recommendations for Changes in Chapter 9-A, Title 26, M.R.S.A.

submitted to the

Joint Select Committee of the 106th Legislature

In enacting the Municipal Public Employees Labor Relations Law, the 104th Maine Legislature intended that "educational policy" be excluded from the collective bargaining process and, rather, be subject to a meet and consult provision. Legislation was filed in both the 105th and 106th Legislatures for the purpose of defining "educational policy" in order to establish guidelines for those who administer or function under the provisions of Chapter 9-A of Title 26, M.R.S.A.

The Maine School Management Association prays that the Joint Select Committee will recommend legislation that will clarify and define the policy area. The following points are submitted in support of the need for this improvement in Chapter 9-A.

1. The exclusion of "educational policy" from the collective bargaining process by the 104th Legislature has merit because it protects matters of public policy from the compromises of bargaining. The rights of the products of our educational system - children and young adults - must be inviolate and must be protected by both the Legislature and those persons who are elected by the public with the statutory duty to manage the schools.

2. The stated purpose of Chapter 9-A of Title 26 is "to promote the improvement of the relationship between public employers and their employees . . ." There being no uniform basis for determining what constitutes a policy matter, Chapter 9-A is leading to controversies and schisms between school boards and teachers which can only have a negative impact on the education process. Lack of harmony and lack of unity of purpose will destroy the school board-teacher relationship to the detriment of the consumer.

3. Guidelines must be set by the Maine Legislature. This point is re-emphasized in the opinion written by Justice Weatherbee in the case of City of Biddeford v Biddeford Teachers Association.

"There are many features of the bill (Chapter 9-A) the cumulative effect of which appears to us especially to demand that the Legislature include standards which will effectuate the carrying out of its purposes. The Act distinguishes between the arbitrators' authority as to disputes involving educational policy and those concerned with working conditions but neither educational policy nor working conditions is defined by the Act."

4. L.D. 1974, which was enacted by the 105th Legislature but vetoed by Governor Curtis, provided for realistic standards for determining educational policy. Minnesota and Pennsylvania have similar provisions.

5. L.D. 1157, filed, then withdrawn, during the regular session of the 106th Legislature, proposed standards for "management rights" which would have applied to all public employers and public employees. The provisions of L.D. 1157 were patterned after the "management rights" recommendation of the Advisory Commission on Intergovernmental Relations (ACIR). This recommendation, in whole or in part, is incorporated in legislation governing public employer-employee relations passed in Kansas, Montana, Hawaii, Indiana, and Nevada as well as the Personnel Board Regulations of New Mexico, the charter of New York City, the city code of Baltimore, the Executive Order governing relations in the District of Columbia, and in a number of federal service contracts including the Postal Service and I.R.S.

The ACIR published its recommendations in 1969 and followed with model legislation for both public sector "meet and confer" and "collective bargaining" in 1971. The ACIR recommendations and collective bargaining model should be reviewed and judged on their merits. The Maine School Management Association views them as a realistic guide in designing guidelines for public policy and educational policy matters.

6. Analogies between public and private sector bargaining are often "mythical and misleading." Factors such as the interests and fragmented authorities of public employers and the constraints on collective bargaining are substantially different. The goals that teachers and their associations hope to achieve through collective bargaining are not only different from employees in the private sector but are different from those of other public employees. As a result "educational policy" needs to be defined.

7. The Governor's Study Committee on L.D. 1974 which met during the fall of 1972 recommended that "a study and review of the entire public employees labor relations law should be undertaken by the Legislature itself with ample opportunity for testimony and expert opinion from the interested parties." The Maine School Management Association stands ready to provide additional information and testimony to the Joint Select Committee on the matter of educational policy vs working conditions and the related implications of binding arbitration.

The above factors weigh heavily on the future impact of collective bargaining on public education in Maine. The Maine School Management Association strongly recommends that the Joint Select Committee thoroughly study the "educational policy" area for the purpose of recommending legislation that will provide guidelines to all those persons and institutions touched by collective bargaining in Maine education.

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04330

JON A. LUND
ATTORNEY GENERAL

October 24, 1974

Honorable Wakine G. Tanous
Chairman, Judiciary Committee
State House
Augusta, Maine 04330

Dear Senator Tanous:

Thank you for your recent letter concerning spending limitations on initiative and referendum campaigns.

I understand your first question to be what, if any, spending limitations are presently imposed by Chapter 35, Title 21 M.R.S.A., upon initiative and referendum campaigns? The answer to that question is none.

21 M.R.S.A. § 1391-A requires the reporting of receipt of all contributions and expenditures made in connection with any public referendum of direct initiative legislation or the state-wide public referendum of any statute. Chapter 35 of Title 21 makes neither an explicit nor an implicit limitation on the amount of such contributions or expenditures. The last paragraph of § 1391 provides:

> "Any references in this chapter to the promotion or defeat of a candidate includes the promotion or defeat of a party, principal, initiative or referendum question."

Such a reference to candidates cannot be construed as an adoption by reference of the limitation upon expenditures imposed upon candidates in § 1395, sub-§ 3, for several reasons.

First, § 1395 specifies a variety of limitations--one set for primaries and another set for general elections; the limitation also varies in accordance with the number of votes cast for each such office in the preceding general election. Such a variety does not lend itself to adoption by reference. It also does not seem likely that the Legislature intended by the reference in the last paragraph of § 1391 to equate the total prior vote for the same office with the total prior vote for the same referendum question in view of the singularity of such questions.

Second, the questioned limitation may constitute a restriction upon the right of the general citizenry to freedom of speech. This right is guaranteed by the First Amendment, Constitution of the United States, and by Article I, Section 4, Constitution of Maine. This has long been deemed a preeminent right and one which is fundamental to a free society. See, e.g., NAACP v. Button, 371 U.S. 415, 433; NAACP v. Alabama, 357 U.S. 449, 463, 464; Healy v. James, 408 U.S. 169; U.S. v. Robel, 389 U.S. 258; Sweezy v. New Hampshire, 354 U.S. 234, 250, 265; Miller v. Alabama, 384 U.S. 214, 218; Monitor Patriot Co. v. Roy, 401 U.S. 265, 272; Dombrowski v. Pfister, 380 U.S. 479, 486; Pickering v. Board of Education, 391 U.S. 563, 573; Wood v. Georgia, 370 U.S. 375; Organization for a Better Austin et al v. Keefe, 402 U.S. 415; N.Y. Times Co. v. U.S., 403 U.S. 713; U.S. v. C.I.O. 335 U.S. 106, 121; Talley v. Cal., 362 U.S. 60; Schneider v. State, 308 U.S. 147; and Opinion of the Justices, Me., 306 A. 2d 18.

All laws in restraint of liberty are to be strictly construed. In re Pierce, 16 Me. 255.

Your second question is: "Does the coverage of this statute extend to reporting contributions and expenses during the period when signatures are being

gathered for petitions to initiate these processes?" The answer to that question is affirmative.

21 M.R.S.A. § 1391-A, in pertinent part, reads:

> "Notwithstanding any other provision of law, any person, corporation, public or private utility, association, governmental agency or political committee accepting or expending money, to initiate, promote or defeat the public referendum of direct initiative legislation within the meaning of the Constitution of Maine or the state-wide public referendum of any statute shall be required starting on July 1, 1973 to file a report detailing the source, amount and date of receipt of all contributions and expenditures made in connection with any such referendum thereafter at the end of each month during such activity to file a report similarly detailing all such contributions and expenditures for that month."

Thus, the statutory reporting requirement includes "accepting or expending money, to initiate . . . . the public referendum of direct initiative . . . . or the state-wide public referendum of any statute . . . ." The phrase, "to initiate," encompasses the process of circulating petitions for the requisite signatures.

I understand your third question to be: Would limitations on spending in the initiative and referendum processes violate the provisions of the First Amendment of the United States Constitution and of Article I of the Constitution of Maine? In my opinion, it is quite likely that any statute which imposed any limitation on spending in the initiative and referendum processes would raise a grave question of violation of the right

of free speech guaranteed by the First Amendment, Constitution of the United States, and by Article I, Section 4, Constitution of Maine. As stated by the Supreme Court of the United States in Mills v. Alabama, 384 U.S. 214, at 218, "a major purpose of that Amendment was to protect the free discussion of governmental affairs." In that case, the Court struck down a statute which made it a crime for a newspaper editor to publish an editorial on election day urging people to vote a particular way, stating, at 219:

> "It is difficult to conceive of a more obvious and flagrant abridgment of the constitutionally guaranteed freedom of the press."

In Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, the Court said:

> "Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." Also see N.Y. Times Co. v. U.S., 403 U.S. 713, 714; U.S. v. C.I.O., 335 U.S. 106, 121; and Schneider v. State, 308 U.S. 147; and Valley v. California, 362 U.S. 60, 66.

Such a restriction upon the full exercise of speech would require a clear showing of a compelling governmental interest to sustain it. See Opinion of the Justices, Me., 306 A. 2d 18, 21. A mere assertion that such a statute was enacted to maintain the purity of the electoral process would not necessarily suffice. The report of the Legislative Committee investigating this problem should clearly establish the nature of the evil and the proposed Act should deal narrowly and precisely with that demonstrated evil. In this connection, it should be noted that there may be

significant differences between an office candidacy campaign and a referendum campaign. For example, political activity in connection with referenda is expressly excepted from the prohibition of the Hatch Act. See 5 U.S.C. § 7326, and CSC v. Letter Carriers, 413 U.S. 548, and Broadrick v. Oklahoma, 413 U.S. 601.

I trust that the foregoing comments will aid your Committee in its deliberations. If I can be of any further aid to you in this matter, please advise me.

Yours very truly,

JON A. LUND
Attorney General

JAL/jwp

cc: Honorable Wakine G. Tanous
One Spruce Street
East Millinocket, Maine 04430

CITY OF BIDDEFORD
BY ITS BOARD OF EDUCATION

vs.

BIDDEFORD TEACHERS ASSOCIATION ET ALS.

and

BIDDEFORD TEACHERS ASSOCIATION

vs.

BOARD OF EDUCATION OF CITY OF BIDDEFORD ET ALS.

WERNICK, J. (Agreeing in part and disagreeing in part with the opinion of Weatherbee, J.)

I concur in the conclusions reached in Part One of the opinion of Mr. Justice Weatherbee.

I disagree, however, with Part Two and its conclusion that the statutory provisions for binding arbitration must be nullified as an unconstitutional delegation of powers legislative in nature. My opinion is that the legislature has constitutionally utilized arbitration, and judicial interference with the legislative program is unwarranted.

"Unconstitutional delegation of legislative powers" connotes that in a given instance the legislature has transferred a portion of its legislative power to another body in contravention of principles derived from the constitutional vesting and separation of the three polar categories of sovereign power: legislative, judicial and executive.

For one hundred fifty years the "unconstitutional delegation" doctrine has been developed largely in relation to the sovereign's exercise of "police power" externally to control and regulate private personal and property rights.

In the instant statute sovereignty appears in a different role. Here, its concerns are directed fundamentally inward to meet internal problems arising from governmental functioning as an "employer" of "employees" in the "business" of providing essential services to the public.

In this domain there is a paucity of judicial authority on "delegation"questions. Since the decision of the instant case thus entails a large measure of pioneering, analysis should not assume that principles of "delegation" formulated relative to "police power" problems are automatically applicable at all, or with full scope, to the present issues. Inquiry should probe deeply to assess whether, and the extent to which, "delegation" principles affecting the exercise of the police powers of government should be transposed into the separate realm of sovereignty's internal "employer-employee" relationships in the rendering of essential public services, both as a general matter and as specifically crystallized in the particular statutory program now under scrutiny.

I

Before American life had been substantially affected by the political, social and economic complexities of the industrial

revolution, the constitutional vesting of the "law-making" power of sovereignty in a specific body, designated the "legislature", was conceived to reflect, literally, the dogma of John Locke:

> "The Legislature neither must nor can transfer the power of making laws to anybody else, or pass it but where the people have."

Soon, the burgeoning needs and exigencies of the latter part of the nineteenth century caused enormous extension of the scope of governmental police power regulation and necessitated that broad discretionary authority be granted to bodies other than the legislature. In the face of this development, adherence to the Locke dogma created a dilemma which, at first, the courts sought to resolve by giving lip-service to the dogma while escaping its practical strictures with the rationalization that to delegate to another body only a power to "fill in details" or "find facts" is not really to transfer "legislative" power. Illustrative of this earlier approach are cases such as Locke's Appeal, 72 Pa. 491 (1873); Field v. Clark, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892); and in Maine, State v. Butler, 105 Me. 91, 73 A. 560 (1909).

As twentieth century pressures became heavier, the courts were ultimately driven to the recognition that under the fiction that only "facts were being found" or "details being filled in", they had been sustaining, with increasing frequency, expansive grants of power unquestionably "legislative" in character.

It became apparent that fiction must be discarded to avoid confusion and error. A new approach was necessary by which twentieth century needs could be met realistically but yet consistently with preservation of the essential spirit of the constitutional vesting and separation of the polar categories of sovereign power.

Interestingly, in the mid-nineteenth century a State Court, with remarkably prophetic insight, had provided the root concept for such undertaking. In People v. Reynolds, 10 Ill. 1 (1848) the Illinois Court had observed:

> ". . . few will be found to insist, that whatever the legislature may do, it shall do, or else it shall go undone. . . . it may still authorize others to do those things which it might properly, yet can not understandingly or advantageously do itself. Without this power legislation would become oppressive, and . . . imbecile. . . . but in doing this it [the legislature] does not divest itself of any of its original powers. It still possesses all the authority it ever had." (pp. 13, 20 and 21)

Seventy years later, the message, more frequently heard, was amplified--and by another State Court. In State v. Whitman, 196 Wis. 472, 220 N.W. 929 (1928) the Wisconsin Court perceived that (1) necessity had required "delegation", and "cross-delegation", of the powers of government; (2) to accomplish it the courts, by "one pretext or another", had been upholding extensive delegations

of legislative power; (3) avoidance of "confusion and error", and a "logical and symmetrical development" of administrative law, demanded that a new approach be adopted, abandoning the pretense of "finding facts" and filling in "details" and acknowledging that legislative power, as such, is constitutionally permissible of delegation under appropriate limitations to check against abuse--the most potent of which is the legislature's retention of power to revise or withdraw the power granted; (4) if a prospective legislative "standard" is to be used as a device to confine administrative authority, the subject-matter under regulation will often allow as feasible only a generalized "standard"; and (5) the "standard" need not be expressly stated but may be implicit in the overall statutory context.[1]

In the development of its rationale Whitman relied substantially upon a course being charted almost simultaneously

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1 As to the specific subject-matter before it the Whitman Court observed: "While the statute does not in terms provide that the commissioner of insurance shall exercise a sound and reasonable discretion in the disapproval of proposed rules and regulations, that condition is necessarily implied. As has been said many times, in many cases administrative officers or bodies must act, not only within the field of their statutory powers, but in a reasonable and orderly manner. . . . The rule of reasonableness inheres in every law, and the action of those charged with its enforcement must in the nature of things be subject to the test of reasonableness." (pp. 942, 943)

by the Supreme Court of the United States in Hampton & Co. v. United States, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624 (1928) --a decision itself bringing to fruition the seeds of a newer federal approach to the problems of "delegation" germinated in 1924 in Mahler v. Eby, 264 U.S. 32, 40, 44 S.Ct. 283, 68 L.Ed. 549 (1924).

In Mahler v. Eby the Supreme Court of the United States, taking its clues from leads in Buttfield v. Stranahan, 192 U.S. 470, 24 S.Ct. 349, 48 L.Ed. 525 (1904), had begun to talk explicitly of the constitutional permissibility of delegation of powers avowedly "legislative" so long as consent of the governed is channeled through the legislature to be a continuing indirect source of control over the actions of a body not immediately responsible to the people. The mechanism conceived to serve this "conduit" function was the prospective prescription by the legislature, as the people's delegate, of a "primary standard" to confine the legislature's delegate.

Hampton & Co. v. United States developed this into the full-blown principle:

> "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to . . . [act] is directed to conform, such legislative action is not a *forbidden* delegation of legislative power." (p. 409) (emphasis supplied)

Thus, the Court in Hampton & Co. recognized that the transfer of legislative power will not, as such, produce

constitutional infirmity; it is rather the manner of the transfer--whether it places unbridled legislative authority in a body not responsible to the electorate and thus precipitates the potential for an absolutism of power (the primary evil apprehended by Montesquieu and Locke to require the protections embodied in the concepts of "separation" and "checks and balances)."

In Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935) and Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935), and even though these decisions represented the solitary instances in which the Supreme Court of the United States had struck down congressional "delegation", the Court reaffirmed the "intelligible principle" approach--with the further development that the "principle" need not be expressly stated by the legislature but might be regarded as legislatively implied.[2]

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2 The language of Chief Justice Hughes, writing for the majority in Panama Refining Co. v. Ryan, was: "We examine the context to ascertain if it furnishes a declaration of policy or a standard of action, which can be deemed . . . to imply what is notthere expressed." (p. 416) In dissent Justice Cardozo explicitly added: "I concede that to uphold the delegation there is need to discover in the terms of the act a standard reasonably clear whereby discretion must be governed. I deny that such a standard is lacking . . . when the act with all its reasonable implications is considered as a whole." (p. 434)

Reiterating the clear permissibility of finding standards implicit, Justice Cardozo said: "The prevailing opinion concedes that a standard will be as effective if imported . . . by reasonable implication as if put there in so many words." (p. 435)

Subsequent evaluations in the federal Courts saw the most general of "standards" relied upon to sustain the constitutionality of large delegations of legislative power. As shown by Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944) and American Power & Light Company v. Securities and Exchange Commission, 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946), the focus was upon whether the legislature had imposed, explicitly or implicitly, a check on absolutism by an "intelligible principle" by which the delegated power

> "is . . . canalized within banks that keep it from overflowing." Cardozo, J., concurring, in Schechter Poultry Corp. v. United States, 295 U.S. 495, 551, 55 S.Ct. 837, 79 L.Ed. 1570 (1935)

To the objection raised in American Power & Light Company that Congress had, in effect, because of vagueness and generality, allowed "unlimited whim" and "unfettered discretion" to the Securities and Exchange Commission

> "to decide whose property shall be taken or destroyed and to what extent" (p. 104),

the Supreme Court of the United States answered that (1) in other contexts "standards" as broad and indefinite as "public interest," "just and reasonable rates," "unfair methods of competition" or even "relevant factors" had been approved as adequate limitations upon the exercise of arbitrary power (p. 105); (2) the judicial approval accorded these broad standards reflected

a "necessity", imposed by complex economic and social problems, which

> ". . . fixes [that] . . . it . . . becomes constitutionally sufficient if Congress clearly delineates the general policy, the . . . agency which is to apply it, and the boundaries of this delegated authority" (p. 105)

--the protection of private rights being left, primarily, to judicial review

> "to test the application of the policy in the light of these legislative declarations" (p. 105);

and (3) permissible sources to derive and provide meaning for the concepts interpretable as the boundaries are

> "the purpose of the Act, its factual background and the statutory context." (p. 104)

In the state courts a similar trend was plainly discernible, notwithstanding that state courts tended to be more prone than the federal to nullify delegations--often revealing strange internal inconsistencies within a given body of decisions.[3]

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3 A partial explanation might be that the specific subject-matter which most frequently comes before state tribunals involves an overlay of additional and unique problems not entirely answerable by use of the "standards" conception as the sole criterion of valid "delegation" and requiring special emphasis upon prevention of arbitrary and capricious action--as, for example, licensing controls over the right of a person to earn a living in a profession, trade or business (in which one's peers often sit on the administrative tribunal having the licensing, or revocation, power--thus giving rise to likelihood of the influence of friendship or self-interest); or situations involving zoning boards of appeals and their authority to decide exceptions or

In Maine, illustrative is the contrast between Butler, supra, in 1909 and the decision in 1961 in Kovack v. City of Waterville, 157 Me. 411, 173 A.2d 554 (1961). In Kovack, following strong intimations already contained in McGary et al v. Barrows et al, 156 Me. 250, 163 A.2d 747 (1960) (which dealt specifically with "delegation" in the field of education), this Court basically discarded its earlier conception that law-making powers and authority may not at all be delegated by the legislature to another body and that administrative tribunals may be permitted only to "find facts" or "fill in details." Frankly acknowledging that:

> "There are many instances . . . where the Legislature has delegated to an administrative body authority to use its discretion and judgment" (p. 417),

this Court concluded that it must be held justifiable in principle because

> "administrative bodies are functionally necessary in the process of government",

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variances (and in which inheres the potential for favoritism and discrimination resulting from the influence of small pressure groups or other aspects of local politics). These unique features create special danger of invidious discrimination in the exercise of power--the worse because it might be undetectable and, therefore, unexposable by judicial review if the power is not adequately contained; and the dangers are aggravated because in these types of proceedings there is generally an absence of evidentiary hearings conducted with reasonable procedural controls.

and

> "There must be that delegation of power sufficient to the end that a proper, . . . administration may occur." (p. 416)

The approach of Kovack was to test the validity of the delegation of legislative power in the terms that (1)

> "it is important that there exists in the statute adequate procedural safeguards",

and (2) the

> "Legislature sets the standard." (p. 416)

Cf. also: Smith v. Speers, Me., 253 A.2d 701 (1969) dealing with delegation of the power of eminent domain.

In a dissenting opinion in Arizona v. California, 373 U.S. 546, 83 S.Ct. 1468, 10 L.E.2d 542 (1963) Justice Harlan, joined by Justices Douglas and Stewart, incisively summarized the rationale by which the "intelligible principle", or "primary standard", mechanism for the delegation of substantial legislative power to a body not directly responsible to the electorate may be deemed to fulfill the essential spirit of the constitutional provisions concerning the vesting and separation of the polar powers of sovereignty to achieve "checks and balances." Justice Harlan said:

See: Waterville Hotel Corp. v. Board of Zoning Appeals, Me., 241 A.2d 50 (1968); Small v. Maine Board of Registration and Examination in Optometry, Me., 293 A.2d 786 (1972).

> "The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. First, it insures that the fundamental policy decisions in our society will be made . . . by the body immediately responsible to the people. Second, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged." (p. 626)

In a leading decision, Ward v. Scott, 11 N.J. 117, 93 A.2d 385 (1952), the Supreme Court of New Jersey (likewise conceiving the same two constitutional objectives to be fulfilled by a prospectively prescribed legislative "primary standard" to control broad discretion reposed in bodies not immediately answerable to the people) offered the following specifications for a sound "standards" approach in the exercise of the police power.

(1) "It is settled that the Legislature may not vest unbridled or arbitrary power in the administrative agency . . ." (p. 388);

(2) hence, the legislature must give the administrative agency "a reasonably adequate standard to guide it" (p. 388);

(3) ". . . the exigencies of modern government have increasingly dictated the use of general rather than minutely detailed standards in regulatory enactments under the police power" (p. 388);

(4) expansive latitude for discretion and judgment under a generalized standard is the more readily tolerable, in police power regulation of private rights, when procedural safeguards are afforded as an additional check upon the danger of unwarranted or arbitrary administrative action (p. 389); and

(5) "it is elementary that we . . . must examine the entire act in the light of its surroundings and objectives. . . . Nor are we restricted to the ascertainment of standards in express terms if they may be reasonably implied from the entire act. . . . ". . . That which is clearly implied is as much a part of the law as that which is expressed.'" (p. 387)

II

In the present situation, then, attention must be concentrated upon the extent to which the above delineated general, and specific, concepts (as developed in the realm of the police power control and regulation of private rights) have reasonable applicability to government when it is acting as an "employer" of "employees" engaged in the "business" of providing essential services to the public--this being an area in which the police power regulation of private rights is not an inherently prominent factor.

Initially, assessment must be made of whether the powers here granted to "ad hoc" arbitrators operate in a domain so attenuated in its relationship to "law-making" activity--and, therefore, outside areas likely to precipitate the kinds of value

judgments which demand channeling the consent of the governed through the legislature as a continuingly operative control--that insistence upon a "primary standard" or "intelligible principle" becomes realistically unnecessary.

As clarified in Part One of the opinion of Mr. Justice Weatherbee, when the focus is strictly upon the internalities of sovereignty separately and independently of extrapolations affecting the rights of the general citizenry, the sovereign (acting through the legislature) is free to adopt a policy by which it gives an advance consent that its own "employer-employee" disputes be resolved by the binding determinations of persons serving only "ad hoc"; and who, precisely for this reason that they are not continuing governmental officials, are capable of being regarded by the employees of sovereignty as free of its direct, or indirect, pressures or controls.

To the extent, therefore, that sovereignty, as one party, and its "employees" as the other party, <u>both freely consent</u> to submit to "ad hoc" binding arbitration areas of controversy lacking significant spill-over into other spheres in which it is thought necessary to preserve the consent of the governed as an indirect monitor of the exercise of legislative power by a body not elected by the people, an approach which demands a legislatively prescribed "primary standard" might be dispensed

with--reliance to be placed, instead, upon a totality of procedural safeguards and adequate techniques of judicial review to prevent irresponsible, arbitrary or capricious determinations.

In the present situation, however, and even though we are in the area of internal governmental employer-employee relationships, factors are present which could develop potential constitutional infirmities were we to forego reliance upon the combination of a before-the-fact legislative "primary standard", or "intelligible principle", and adequate controls against irresponsible arbitrary action through procedural safeguards and opportunity for effective judicial review.

First, notwithstanding that sovereignty has here provided its own advance consent to binding arbitration should the teacher employees request it, sovereignty has not made choice by the teachers the sole determinant. 26 M.R.S.A. §965-4 provides that "either party" may bring about "binding arbitration"; and if arbitration is requested by the public employer, a refusal of the teachers to participate is an unfair labor practice under the combined effects of Sections 964 and 965.

Because the statute empowers the public employer to force binding arbitration against the will of the teachers, it is, in this respect, a "police power"

law-making control at least of the teachers; and this involvement with the exercise of police power might generate need for a decision as to whether unconstitutionality results from the absence of a legislatively prescribed "intelligible principle", or "primary standard", to allow a channeling of the consent of the governed and also to enable judicial review to be more effective in detecting and exposing irresponsible arbitrational conduct.

Further, there are carry-over effects upon the citizenry generally.

It may be true that (1) in the statutory scheme before us "salaries, pensions and insurance", as well as "educational policies", have been removed from the scope of binding arbitration; and (2) thereby, the legislature has taken from the determinative control of the arbitrators areas having the most direct and substantial impact upon the interests of the citizenry not only directly in the field of education but also in the quantity and quality of all other essential public services; and (3) hence, it might be thought that the consent of the governed, as expressed through policy determinations made by the persons whom they elect as their representatives, need not enter as a significant factor to require a prospective legislative "intelligible principle" or "primary standard" to afford a pipeline of control from the people to the arbitrators.

Nevertheless, even as thus carefully limited, the area of "working conditions" which is subject to binding arbitration can involve sufficient overlap with the sphere of "educational policies" (see infra, pp. 28, 29) to precipitate for decision questions as to the statute's constitutionality should the consent of the governed not be transmitted to the arbitrators by a "primary standard" or "intelligible principle" prospectively prescribed by the legislature. In addition, insofar as "working conditions" (other than "salaries, pensions and insurance") can entail financial costs, they generate overtones which beat upon general fiscal policy and which, therefore, affect the personal and property rights of the citizenry (1) in the availability, as well as the quantity and quality, of all essential public services and (2) in the taxes which the citizenry will be called upon to pay to provide the services.

Notwithstanding, therefore, that binding arbitration is here restricted to a narrowed domain encompassing only those "working conditions" from which matters of "educational policies" as well as "salaries, pensions and insurance" have been excluded, there yet remains a sufficient connection with "law-making", at least in the sense of important value choices, to induce search for a legislatively prescribed "primary standard" or "intelligible principle" through which is effected, at least indirectly, a control by the electorate as the ultimate source of fundamental value judgments--and the presence of which will avoid need for a decision

concerning potential issues of constitutionality which might be thought to arise were such intelligible principle lacking.[4]

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4 This approach has been taken in the present context with full awareness that much respectable current scholarship advocates (1) abandonment, even in the area of police power regulation and control of private rights, of the methodology which insists upon adequate "primary standards", legislatively prescribed, as an absolute precondition of the validity of legislative delegation and (2) reliance, rather, upon a total conglomerate of safeguards against irresponsible, arbitrary or capricious action by administrative bodies in which before-the-fact statutory standards may be a helpful, but not an indispensable, factor. Illustrative of this attitude are the following comments by Professor Kenneth Culp Davis:

> "The non-delegation doctrine can and should be altered to turn it into an effective and useful judicial tool. Its purpose should no longer be either to prevent delegation of legislative power or to require meaningful statutory standards; its purpose should be the much deeper one of protecting against unnecessary and uncontrolled discretionary power. The focus should no longer be exclusively on standards; it should be on the totality of protections against arbitrariness, including both safeguards and standards." Davis, Administrative Law Treatise (1970 Supplement, p. 40)

Compare, however, the resurgence of the directly opposite philosophy as recently advanced by Judge J. Skelly Wright in his book review of Professor Davis' book Discretionary Justice: A Preliminary Inquiry.

Judge Wright maintains in Beyond Discretionary Justice, 81 Yale Law Journal 575 (January, 1972):

> "There must be some limit on the extent to which Congress can transfer its own powers to other bodies without guidance as to how these powers should be exercised." (p. 582)
>
> "I think the delegation doctrine retains an important potential as a check on the exercise

In the assessment of whether the legislature has provided such "primary standard" or "intelligible principle" the criteria for judgment, as above delineated, are that (1) the "standard" or

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> of unbounded, standardless discretion by administrative agencies. At its core, the doctrine is based on the notion that agency action must occur within the context of a rule of law previously formulated by a legislative body. That concept is as important now as it was a century and a half ago when it was first propounded." (pp. 583, 584)
>
> "Delegation is, after all, a matter of degree, and the amount of power which it is permissible to delegate to an agency varies with the problem involved. . . . It will be necessary to do some systematic thinking about the degree to which various categories of problems are subject to prospective . . . [legislative] control. We need, in short, some standards for when we should require standards. . . . [the legislature] should channel its delegations of power with prospective guidelines and standards to the greatest extent possible. But ironically, the courts may have to work out the precise contours of the requirement of prospective standards on an empirical, case-by-case basis, ..." (p. 587)

Finally, and to be regarded, probably, as a position mediating between the two extremes, is a recent analysis by Professor Abraham D. Sofaer in his December, 1972 Columbia Law Review article, Judicial Control of Informal Discretionary Adjudication and Enforcement, 72 Col.L.Rev. 1293.

Professor Sofaer injects a new dimension into the "standards" controversy by observations which concentrate upon the opportunity for benefits deriving from "individualized" rather than "standardized" approach. Professor Sofaer says (1):

> "Even if it were reasonable to expect the courts to insist on better legislative standards, one cannot be confident that the results of such action would be salutary" (p. 1307);

"intelligible principle" need not be expressly stated by the legislature but may be found implicit in the totality of the statutory provisions reasonably construed in relation to surroundings and objectives and (2) large latitude for exercise of discretion and judgment by the arbitrators under a"standard" highly generalized becomes the more readily tolerable (a) when the nature of the subject-matter makes such breadth and generality necessary or desirable and (b) ample procedural safeguards are afforded as additional checks to narrow the likelihood of otherwise undetectable irresponsibility, arbitrariness or invidious discrimination.

At the outset of the "Municipal Public Employees Labor Relations Law", the legislature expressly declares the fundamental public policy upon which it has settled. In purpose the policy

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and (2) in respect to Professor Davis' position that the concern should be not so much with prospective legislative standards as with administrative rule-making,

> "The current focus on rulemaking as a means of limiting and controlling discretion distracts needed attention from the use of adjudication for such purposes. A decision is a standard, at least potentially. If the relevant facts are included along with the conclusion in a statement made available to interested persons, then a decision will give guidance. . . . Decisions can narrow or control discretion just as effectively as regulations; they can turn on the special circumstances of a particular case; they can set forth principles applicable to many cases; and they can even specify the presence of a single factor as controlling." (pp. 1314, 1315)

is "to promote the improvement of the relationship between public employers and their employees." As pragmatic implementation of the purpose, the policy is to achieve it by the specific "uniform" processes that (1) public employees shall have full rights "to join labor organizations of their own choosing" and (2) such labor organizations are "legally recognized" as the representatives of the employees to engage in mandatory "collective bargaining" ultimately to achieve "terms and conditions of employment" to be embodied in contracts. (Section 961) The details of implementation are elaborated in various other provisions of the statute proclaiming the protection of the right of the public employees to join labor organizations (Section 963), defining unfair labor practices (Section 964) and delineating with the greatest of care the details comprehended within the generalized concept of the "obligation ... to bargain collectively." (Section 965)

Most importantly, the legislature unequivocally clarifies that the obligation to bargain collectively embraces, specially, that the parties (1) submit in good faith to binding arbitration, as provided in Section 965-4, concerning the area of "working conditions"--exclusive of "salaries, pensions and insurance" and, additionally, specifically as to teachers, "educational policies" (Section 965-1-C)--and (2)

> ". . . enter an agreement or take . . . other action . . . appropriate to carry out and effectuate such binding determinations"

of the arbitrators. (Section 965-4)

Thus, the legislature's policy is clearly and expressly that there be an improvement of the relationship between public employers and their public employees by the mechanism that disputes unresolved by negotiations between the parties shall not continue to fester but shall be forced, at least in part, toward termination, upon the request of either party, by the binding arbitration of such "working conditions" as are not "salaries, pensions and insurance" or significant aspects of "educational policies." The binding arbitration is to follow after the parties themselves have established the framework within which the controversy is confined not only (1) by virtue of their discharge of their obligation to "confer and negotiate in good faith" but also (2) through the highly probable, if not mandated,[5] resort to fact-findings and recommendations developed by an independent panel.

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5 The language of Section 965-3, as specifically interrelated with and carried over into Section 965-4, forcefully suggests that before either party may compel arbitration, such party, as a precondition to arbitration, must have demanded the fact-finding process to have been instituted and completed.

We need not here decide, however, whether fact-finding is a statutory prerequisite to arbitration since it will suffice for present purposes that the fact-finding process has been available and is highly likely to have been invoked.

With arbitrational authority placed within these explicitly stated contours, the omission of the statute to delineate additional express criteria by which the arbitrators are to make their selections among "working conditions" creates no fatal deficiency. By what is said expressly, conjoined with what may be ascertained implicitly, the statute has prescribed an adequate "standard" and "intelligible principle" to contain, and guide, the arbitrators and to allow effective scope to judicial review as a further check upon arbitrariness.

The statute plainly contemplates that the arbitrators shall act reasonably and fairly to resolve the dispute in terms of the respective positions which have been (1) developed by the parties in negotiations, including independent fact-finding, (2) represented by the parties in the issues presented to the arbitrators for decision, and (3) further supported by evidence taken out during the hearing--the statute making abundantly clear that the entire hearing procedure and the statutory specifications regarding the taking of evidence are calculated to achieve relevance "to the issues represented to . . . [the arbitrators] for determination." (Section 965-4)

Unless we would destroy all significance in the expressed legislative policy that binding arbitration is an implementing method "to promote the improvement of the relationship between

public employers and their employees", it must be held an implicit minimal injunction of the statute that the arbitrators act reasonably and fairly to effect accommodation within the bounds developed by the parties and the positions asserted by them. Surely, unless arbitrators act responsibly and with fairness and reasonableness to accommodate the interests of the parties, crystallized in the issues presented for determination and as buttressed by the positions asserted by the parties concerning the issues, and as the parties will themselves have sharpened them through the negotiating process and fact-finding, the arbitrators would frustrate, rather than achieve, the promotion of "the improvement of the relationship between public employers and . . . employees."

The foregoing analysis could suffice, without more, to sustain the binding arbitration provisions here involved. The legislatively prescribed "standard" or "intelligible principle" --that the arbitrators shall act with reasonableness and fairness to resolve the issues in a manner tending to promote improvement of relationships--is adequate. The conclusion is a fortiori when we observe, further, that there are ample procedural safeguards concerning the conduct of the hearing and provisions for judicial review by which the Court

> "may, . . . affirm, reverse or modify any . . . binding determination or decision based upon an erroneous ruling or finding of law." (Section 972)

Precisely this generalized justification has been approved in an approach taken by the Pennsylvania Supreme Court--and as to a scope of subject-matter including "salaries, pensions and insurance" and thus having far more direct and extensive impact upon the general citizenry (in terms of their potential tax burdens and the order of the priorities governmental public service provided them) than we presently confront. In Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969), and independently of the consideration that constitutional amendment had made a "standards" analysis unnecesaary, the Pennsylvania Court chose to deal with the "delegation" issue before it on an assumption that adequate limiting standards were necessary to avoid an unconstitutional delegation of legislative power. Sustaining as sufficient the standard that the arbitrators shall act reasonably to accomplish labor peace between the public employer and its employees in the rendering of essential public services, the Court said:

> "To require a more explicit statement of legislative policy in a statute calling for labor arbitration would be sheer folly. The great advantage of arbitration is, after all, the ability of the arbitrators to deal with each case on its own merits in order to arrive at a compromise which is fair to both parties. The arbitrators' services are particularly valuable where, as the legislative scheme here requires, the parties have been unable to reach an agreement through collective bargaining. Certainly that is what the Legislature envisioned in its attempt to insure labor peace in this critical public area, and this is adequate . . .." (p. 563)

As to the statute presently before us, we may observe that it goes further to furnish, as reasonably implicit in its overall context, additional subsidiary "intelligible principles" to guide

the arbitrators in the discharge of their functions as well as the courts in exercising judicial review.

In the total statutory context the limitations upon the jurisdiction of the arbitrators to make binding determinations elucidate not only the drawing of a jurisdictional line but also "intelligible principles" to guide the exercise of judgmental selectivity within the areas jurisdictionally covered.

It is to be emphasized that the arbitrators are not denied all authority to deal with "salaries, pensions and insurance." They are responsible to "recommend terms of settlement", and they "may make findings of fact" thereon, "such recommendations and findings . . . [to] be advisory only." There is thus crystallized not merely an express differentiation of function but also an implicit message as to the reason for the differentiation. Obviously because they have direct and enormous impact, in terms of costs, not only upon the ordering of priorities within the particular sphere of public services affected by the controversy before the arbitrators but also upon the public employer's general fiscal budgeting and appropriations for all public services, and the tax burdens consequently imposed upon the citizenry, "salaries, pensions and insurance" are withheld from binding determination by persons who are not directly responsible to the electorate.

Since the legislature has thus manifested an overriding concern with the impact of monetary costs upon the ordering of priorities not only within one sphere of essential public services but as to all public services which the public employer must provide, as well as upon the ultimate burden of taxation, this legislative concern transposes to become one factor which the arbitrators must consider in arriving at determinative decisions concerning any "working conditions" which involve monetary costs.

Legislative intention that the arbitrators take into account the impact of the money costs of those "working conditions" which are to be settled upon for contractual incorporation is further manifested by the express legislative mandate that not only as to "wages" or "rates of pay" but also "any other matter requiring appropriation of money by any municipality" (emphasis supplied), it is a pre-condition of the subject-matter's being eligible for collective bargaining that

> "the bargaining agent . . . serve written notice of request for collective bargaining on the public employer at least 120 days before the conclusion of the current fiscal operating budget." (Section 965-1)

Similarly, the exclusion of "educational policies" from the jurisdictional scope of binding arbitration, in the case of teachers, operates with carry-over effect to provide additional

subsidiary "intelligible principles" to guide discretional selectivity by the arbitrators within the domain of the "working conditions" which may be bindingly determined.

The concepts of "working conditions" and "educational policies" yield a significantly clear core of meaning when they are regarded as the opposite poles of a continuum toward the center of which there will be large degrees of intermixture. Whether a datum is analytically classifiable as "working conditions" rather than "educational policy", or vice-versa, will depend, therefore, on (1) the decision made as to the legislature's intended direction of emphasis and (2) recognition that notwithstanding the ultimate theoretical classification decided upon, the substantive reality retains those features of the opposed classification which inhered in it as a fact before the theoretical classification process was undertaken.

Hence, as a glass containing water to the halfway point may be said to be "half empty" or "half full", dependent upon the direction of emphasis and, in addition, no matter what the theoretical designation chosen, the reality continues to remain both "half full" and "half empty", so will the appropriate classification of a given subject-matter as "working conditions" or "educational policy" be controlled by the presumed legislative emphasis; and the substantive reality after classification will retain in fact the features of both categories.

Thus, the process by which the arbitrators decide their jurisdiction to make binding determinations simultaneously provides them with an "intelligible principle" to guide their selection (from among the totality of "working conditions" subject to their jurisdiction) of those which shall be contractually incorporated. The arbitrators will be obliged to bear in mind that (1) the legislature deemed "educational policies" to involve value choices so fundamental that binding decisions concerning them should be made essentially unilaterally and by persons directly responsible to the people and (2) for this reason, even though the arbitrators might reasonably believe a concrete item to embody a sufficient measure of the features of "working conditions" to overbalance an admixture of "educational policy"--thereby warranting a conclusion that the subject-matter is to be classified as "working conditions" and, as such, subject to binding arbitrational determinations by them--the arbitrators must acknowledge the continuing importance of such generalized interests of the citizenry in the overall domain of education as might be relevantly in play. The arbitrators must balance the impacts of such "educational policy" overlays as inhere in fact (even though they might not have been sufficient to require that the subject-matter be classified as "educational policies" thereby to be totally excluded from collective bargaining and binding arbitration) against the weight of the "working conditions" interests of the teachers (e.g.,

their comfort and their ability to perform and work with efficiency, effectiveness, enjoyment and satisfaction). Into this assessment will enter, also, the consideration that arbitration is offered, policy-wise, as a partial substitute for the denial to the teachers of a right to strike and, hence, counterbalancing evaluation must be made in arbitration of what the teachers might be capable of winning were they allowed resort to the economic force of a right to strike.

In light of the foregoing discussion disclosing the existence of "standards" or "intelligible principles" by which, expressly and implicitly, the authority of the arbitrators is legislatively contained, a point cogently made by Professor Louis L. Jaffe and based upon the premise that

> "Delegation of power to administration is the dynamo of the modern social service state" (p. 85)

must be stressed.

> "If, . . ., the legislature has seen fit to create an organism for the transaction of public business, its validity should be sustained if one among competing logical implications reasonably supports it. At such points the theory of separation is logically too infirm to condemn any sensible or convenient arrangement. We should in sum keep in mind that the great end of the theory is, by dispersing in some measure the centers of authority, to prevent absolutism." Jaffe, Judicial Control of Administrative Action (p. 32)

Thus, in the final analysis the potency of the presumption favoring constitutionality of legislative action becomes determinative. As this Court stressed in Crommett et al v. City of Portland, 150 Me. 217, 107 A.2d 841 (1954) quoting

Laughlin v. City of Portland, 111 Me. 486, 90 A. 318 (1914):

> "'The Court is bound to assume that, in the passage of any law, the Legislature acted with full knowledge of all constitutional restrictions and intelligently, honestly and discriminatingly decided that they were acting within their constitutional limits and powers. That determination is not to be lightly set aside. It is not enough that the court be of the opinion that had the question been originally submitted to it for decision it might have held the contrary view. The question has been submitted in the first instance to the tribunal designated by the Constitution, the Legislature, and its decision is not to be overturned by the court unless no room is left for rational doubt. All honest and reasonable doubts are to be resolved in favor of the constitutionality of the act. This healthy doctrine is recognized as the settled policy of this court.'" (pp. 231, 232)

The attack upon the binding arbitration provisions of the Municipal Public Employees Labor Relations Law, as an unconstitutional delegation of legislative powers, fails. In this respect, the statute is constitutionally valid and must be judicially sustained.

III

Since this opinion upholds the legislative scheme of binding arbitration, the additional issues are reached of asserted invalidity by virtue of improprieties in the conduct of the arbitration and claimed "erroneous . . . finding[s] of law" in the decision.

III-A

The conduct of the arbitration is attacked on two grounds: (1) bias and prejudice of the neutral arbitrator as manifested by language contained in the arbitration decision, and (2)

disqualification of the person appointed to the arbitration panel by the Biddeford Teachers Association because he had been

> ". . . employed full time by the Maine Teachers Association with which the Biddeford Teachers Association is affiliated and participated as advisor . . . at various times in the bargaining process prior to the arbitration."

Both grounds fail.

Notwithstanding that the arbitration decision sharply rebukes counsel for the Biddeford Board of Education and persistently points up his lack of cooperation to assist in the accomplishment of the purposes of the proceeding, the totality of the record--including, specifically, the cogent point that all three arbitrators signed the arbitration decision--shows an absence of bias or prejudice attributable to the neutral arbitrator and likely to affect or in fact tainting his conscientiousness, impartiality and fairness.

Similarly, no fatal infirmity was caused either in the composition, or the decision, of the arbitration panel because the person designated by the Biddeford Teachers Association might be regarded as "interested" in the subject-matter or parties--as an employee of the Maine Teachers Association who had participated in the prior proceedings leading to the arbitration.

The statutory design for the selection of a tripartite arbitrational panel reveals that the legislature was unconcerned with the "interests", pecuniary or otherwise, of the two arbitrators to be designated by the parties. Only as to the third arbitrator

--to be appointed by the two arbitrators selected by the parties or, upon their failure to agree, by the American Arbitration Association,--is there a statutory specification of qualifications. The third arbitrator shall be (1) "neutral" and (2)

> ". . . not, without the consent of both parties, . . . the same person . . . selected as mediator pursuant to subsection 2 nor any member of the fact-finding board selected pursuant to subsection 3."

This omission of the statute to state qualifications for the party-designated arbitrators, and the implications flowing negatively from the inclusion of restrictive qualifications for the third arbitrator, establish that the two party-appointed arbitrators are neither incompetent nor disqualified because they might have interests concerned with the subject-matter of the arbitration, or the parties, or which arise by virtue of participation in processes prior to arbitration.

The type of arbitration here involved--so-called "interests" arbitration to establish particular terms and conditions of a contract (as distinguished from "grievance" arbitration by which the terms of an existing contract are interpreted or applied)--suggests a sound policy reason for favoring, rather than prohibiting, the designation by the parties of "interested" arbitrators. In "interests" arbitration the function of the arbitrators is to make a contract for the parties which they were unable to make for themselves. It is, therefore, desirable that a degree of

"bargaining" be part of the arbitration process itself--to assist in the ultimate settlement of contract terms and conditions. Such continuance of bargaining into the arbitrational process, including the reaching of accommodations usually necessary if the arbitration is to result in an improvement of the relationships between the contesting parties, is effectively achieved if the arbitrators appointed by the parties, precisely because they are allowed to have "interests", may function as "advocates" along the way to becoming, ultimately, decision-makers.

III-B

Particular aspects of the arbitration decision attacked as "erroneous . . . finding[s] of law" must now be evaluated.

III-B-1

Claim is made that the arbitrators' approval of the contractual clause:

> "Except as otherwise specifically provided in this Agreement or otherwise specifically agreed to in writing between the parties . . .",

to operate as a limitation upon the further contractual language:

> "the determination of educational policy, the operation and management of the schools and the control, supervision and direction of the certificated staff are vested exclusively in the Board",

contravenes independent statutory mandates.

The argument is that the reference to "certificated staff" comprehends all full-time principals, all substitute teachers and all part-time teachers (because of the provisions of 20 M.R.S.A.

§ 1751)--with the consequence that the above stated language of exception, it is said, effectively subjects full-time principals, substitute teachers and part-time teachers to the collective bargaining process as well as to coverage under a collective bargaining contract--in direct violation of the exclusions of 20 M.R.S.A. § 962-6.

The argument misconceives the purport of the excepting clause under consideration. In itself the clause is without operative effect to delineate an appropriate bargaining unit or to bring any persons within the coverage of the contract. Some separate and independent provision of the contract is requisite for such purpose. Were the present contract to contain such separate independent provision, subjecting to contractual coverage persons excluded by Section 962-6, it would be that separate and independent provision which should be attacked as invalid--not the excepting clause under scrutiny. Yet, the Biddeford Board of Education has pointed to no such separate independent contractual provision. It is, therefore, specious for the Board to assail the instant general language of exception, more particularly since this language performs the important, and valid, function of clarifying that various portions of the collective bargaining agreement--pursuant to changes of prior law introduced by the Municipal Public Employees Labor Relations Law--have limiting effect upon what (otherwise) would be unilaterally exclusive powers of superintending school boards or committees.

Assault is made upon the arbitrators' approval of a contractual clause establishing a "sick-leave bank." The "sick-leave bank" provision authorizes each teacher, who is independently contractually granted 20 days annual sick leave with unlimited accumulation, voluntarily to become a member of the "bank" by a contribution, from his own allowable sick leave days, of one day--the total of contributions to create a maximum of 180 "banked" days. Any member of the "bank" may draw from it to a maximum of 30 days in any one school year to cover absence because of illness for a period in excess of said teacher's own total "sick-leave" authorization. When the number of days in the "bank" is reduced to a minimum of 30, the "bank" members are to contribute another one day each to re-establish the 180 days "bank" maximum.

Contention is made that the arbitrational approval of such "sick-leave bank" is error of law because (1) 20 M.R.S.A. § 1951 must be interpreted to prohibit the pooling, or transfer, of sick-leave days[6] and (2) in any event, the "sick-leave bank" is

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6 20 M.R.S.A. § 1951 reads: "Each administrative unit operating public schools within the State shall grant all certified teachers, except substitute teachers as defined by the commissioner, a minimum annual sick leave of 10 school days accumulative to a minimum of 90 school days without loss of salary. Each administrative unit employing teachers who have unused sick leave accumulated in their previous positions shall accept up to 20 days of such sick leave to be transferred

"effectively" a subject-matter relating to "salary" and, hence, must be held legally excluded from the scope of binding arbitration. Both points are without merit.

By its literal language 20 M.R.S.A. § 1951 aims only to guarantee minimal annual sick-leave and accumulativeness. Solely for this purpose, the statute speaks, as it must to establish a unit of reference for computation of the minimum, of a relationship to each individual teacher. There is, however, an absence of language having reasonable tendency to show legislative insistence upon the entirely different concept that sick-leave days must be personal to each teacher and personally utilized, thereby to prohibit pooling or transfer of sick-leave days. Neither does the manifest statutory purpose to mandate a minimum amount of sick-leave days and accumulations suggest that the statute is violated in spirit by recognition of the propriety of pooling or transfer--whether of the statutory minimum or of contractual allowances in excess of the statutory minimum.

The argument that in making binding determinations for contractual inclusion of a "sick-leave bank", the arbitrators

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to the employing administrative unit, said sick leave to be credited and made effective upon achieving continuing contract status in the new employing unit. Any other plan of sick leave which, in the opinion of the state board, provides at least equal benefits may be approved in lieu thereof. Full-time teachers assistants and teachers aides shall be granted minimum annual sick leave of 10 school days."

exceeded their jurisdiction because the "sick-leave bank" is really a form of "salary" (concerning which arbitrators are authorized to act only advisorily) is likewise fallacious for error in its premise.

"Salary", as ordinarily conceived, reasonably connotes an actual, affirmative regular payment of benefits (usually in monetary form) in exchange for work or services. Measured by such concept the "sick-leave bank" does not lend itself, reasonably, to a classification as "salary."

Independently of the "bank" plan, the public employer is contractually committed to "sick-leave" to a theoretical maximum for each teacher of 20 days and unlimited accumulativeness. By the "bank" arrangement any individual teacher "member" derives opportunity for sick-leave enjoyments in excess of said teacher's otherwise allowable maximum. And it is true that such "benefit" to individual teachers is achieved through the device of limited pooling and transfer arrangements among teachers from the aggregate of sick-leave days authorized for all teachers without causing need that this aggregate maximum be exceeded.

Yet, it must be recognized that the aggregate maximum sick-leave days theoretically authorized for all teachers, in

the absence of a sick-leave bank and should each teacher be permitted sick-leave days only on a personal basis without pooling and transferability, are not usually totally claimed in practice. Thus, without the "sick-leave bank" the public employer would ordinarily have the "benefit" that of the total sick-days authorized for all teachers a residual number remain unused. This "benefit" to the public employer is impaired by operation of the sick-leave "bank" insofar as transfers from the "bank" among individual teachers, even though within the aggregated maximum allowed for all teachers, tends to reduce the number of ultimately unclaimed sick-leave days; and this reduction is to be regarded as an economic "cost" to the public employer.

To categorize such "economic benefit" to any individual teacher and "economic cost" to the public employer as "salary" to the teacher "paid" by the public employer, however, would be to pervert the ordinary, plain meaning of "salary." It would be to transform the ordinary connotations of "salary"--directness, regularity and actuality of payment--into that which is indirect, sporadic and fortuitous. No sound reason appears suggesting that the legislature intended that "salary", as used in the Municipal Public Employees Labor Relations Law, should carry such artificial and distorted meaning.

The provisions for "sick-leave bank" are thus not reasonably to be regarded as a form of "salary." The arbitrators acted

within their jurisdiction when they bindingly determined that the "sick-leave bank" should be incorporated as a term of the contract.

III-B-2

Attacks upon other facets of the arbitrational decision are comprehended within the generalized claim that they are errors of law because the arbitrators exceeded their jurisdiction by purporting to make binding contractual determinations on specific matters of "educational policies."

Since the exclusionary concept of "educational policies", and its specific relationships to "working conditions" as the inclusionary statutory concept for collective bargaining and binding arbitration, will provide the foundation for subsequent analysis, a preliminary exposition of general guidelines will be helpful.

As already observed (ante at p. 28), "educational policies" and "working conditions" may be reasonably conceived as categories defining areas with essential purity at the extremities but with intermediate zones of substantial intermixture. Thus, in the controversies between teachers and their public employers (currently prevalent throughout the country), even if some of the concrete items in dispute may be readily classifiable at the pure extremes of "policies" or "working conditions", it is undeniable that by far the major portion lie in the intermediate areas with substantial intermixings.

How, then, is exclusionary and inclusionary classification under the Maine statute rationally to proceed? Again, as already discussed (ante at p. 28), the key is found in ascertainment of the legislatively prescribed direction of emphasis by which particular features of one classification must be considered legislatively subordinated to factors of the opposed classification.

The legislative language on its face sufficiently offers an answer for these purposes. The crucial words appear in Section 965-1-C. After first clarifying that the obligation to bargain includes the duty

> "To confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration . . .",

the statute immediately thereafter specifies, in particular relationship to the public employers of teachers, the exception that

> "public employers of teachers shall meet and consult but not negotiate with respect to educational policies . . .."

Had the legislature seen fit to end its recitation at this point, it might be held a reasonable conclusion that the concept of "educational policies" was legislatively intended broadly to mandate continuance of the unilaterally exclusive powers of school boards to "supervise" and "manage" the public schools --as such powers had been traditionally conferred by statute prior

to the enactment of the Municipal Public Employees Labor Relations Law; and that, therefore, any concrete item tending to impinge upon any area ordinarily conceived as "supervision" or "management" must be excluded as an appropriate subject of mandatory collective bargaining regardless of its concomitant relationships to the "working conditions" of teachers.

It is of extreme significance, therefore, that in Section 965-1-C the legislature revealed that it was not content to leave the language as above set forth--thereby to open the door to the extreme "exclusive-management-prerogatives" interpretation above indicated. On the contrary, the legislature was careful, explicitly and definitively, to insert additional language having strong tendency to show that "educational policies" was legislatively intended to be restrictively, not broadly, conceived--specifically that "for the purpose of this paragraph" the calculated meaning is that

> "educational policies shall not include wages, hours, working conditions or contract grievance arbitration."

Such double emphasis by the legislature upon the overriding importance of the concept of "working conditions" in relation to the collective bargaining process,--first, that by affirmative definition teacher "working conditions" are explicitly included within mandatory collective bargaining and, second, that by

negative exclusion "working conditions" are eliminated from the limitational effects of "educational policies"--signifies, most clearly in my view, a legislative design that the general doctrine of "unilaterally exclusive managerial prerogatives" must not be permitted to operate as an instrumentality by which all practical substance may be scooped out of the concept of teacher "working conditions", to transform teacher collective bargaining-- in marked contradistinction to the collective bargaining of all other public employees--into a litany noble in sound but hollow in reality.

More particularly, I interpret such double legislative emphasis upon the "working conditions" of teachers to mean that the legislature intended that teacher "working conditions" shall be bilaterally negotiable in collective bargaining and subject to binding arbitration (except for "salaries, pensions and insurance") notwithstanding that they touch upon one specific "managerial" function with which, as a practical matter the "working conditions" of teachers are almost invariably interconnected--i.e., the organization, supervision, direction and distribution of working personnel. Since decisions concerning almost every "working condition" of teachers will tend to encroach upon the "managerial" organization, supervision, direction or

distribution of the working personnel, were this single facet of "managerial" functioning to be permitted to accomplish, under the category "educational policies", a per se automatic exclusion of teacher "working conditions" from the collective bargaining process, there would result precisely that emasculation of "working conditions" as a mandatory subject of collective bargaining and of binding arbitration which, as above indicated, the legislature--by its specially reiterated emphasis upon "working conditions"--must reasonably be interpreted to have sought to prevent.

Thus, (1) negatively, not only must impact upon the organization, supervision, direction and distribution of personnel be held insufficient, per se, to exclude items related to teacher "working conditions" as proper matters of collective bargaining and binding arbitration but also, (2) affirmatively, the reasonably manifest legislative intention must be held to be that other contacts of such items with other functions generally cognizable as "managerial" and "policy-making" can subordinate the "working conditions" features, and accomplish an exclusion from negotiability and binding arbitration, only if, on balance, their quantitative number or qualitative importance, or both, are found significantly substantial to override the prima facie

eligibility for collective bargaining and binding arbitration established by the presence of reasonable relationships to "working conditions."

"Class Size"

By such general approach to the application of the "working conditions"-"educational policies" dichotomy, and as an initial illustration of the technique in operation, I conclude that the concrete item of "class size" lies within "educational policies" --excluded from collective bargaining and binding arbitration.

Although the size of a class to be taught by a given teacher plainly and seriously affects teacher "working conditions", the impacts of "class size" overlap into a number of "managerial" and "policy" areas which are of substantial qualitative importance. "Class size" requirements directly involve considerations not merely of organization, supervision, direction and distribution of personnel but also of the needs for additional school building construction or other types of capital outlays, the current population trends, the appropriate use of technological developments (such as television or other electronic teaching aids) and the swings in educational philosophies and theories and the manner of their implementation.

Here, then, (1) "working conditions" features are so intimately entwined with an abundant plurality of important "managerial" and pure "policy" elements that "class size" must be deemed to be an integral complex of "educational policies" and "working conditions"--incapable of separation to allow the "working conditions" factors to be negotiated in isolation and (2) with "class size" thus treated as an inseparable unit, it cannot, as a unit, qualify for collective bargaining and binding arbitration because the weight of the "educational policies" factors contained in it are sufficiently heavy to override the impacts upon the "working conditions" of teachers.

The arbitrators exceeded their jurisdiction in making binding determinations as to "class size."

"Length of a Teacher's Working Day"

Similarly, the length of the school day in terms of the number of hours the teacher will be required to teach or be in attendance at school, is a matter concerning which the "working conditions" interests of teachers are fundamentally inseparable from a plurality of non-teacher considerations involving important "managerial" and "policy" areas.

While it is clear that the number of hours which any individual teacher shall be required to work in a given day need

not coincide with the number of hours the students are obliged to be in attendance at school, this fact by itself fails to establish that the length of the teacher's school day may be isolated as a proper subject of mandatory collective bargaining. Closer scrutiny reveals that were the length of the teacher's school day negotiable in collective bargaining and in a given situation were economic conditions to preclude the hiring of additional teaching personnel, negotiations aimed at shortening the work-day of teachers would necessarily become directed toward seeking alternatives to the hiring of additional personnel. There would thus eventuate an exploration into such areas as the utilization of newer educational techniques by which a teacher's actual presence or participation is rendered unnecessary--e.g., electronic aids, open class rooms, team teaching programs and subject-matter restrictions or modifications. In this manner, significantly more substantial intrusions into "policy" areas, --over and above encroachment simply upon the "managerial" supervision, organization, direction and distribution of personnel--become involved.

Thus, the length of the teacher's working day is closely and heavily interwoven with judgments bearing upon the welfare of the students,--as reflected in the ultimate quality of their education and the extent to which it may be improved

or weakened by use of various types of substitutes, technological or otherwise, for the living presence and active participation of teachers. Such foundational educational value judgments cannot reasonably be subordinated to the overlay of teacher "working conditions", and for this reason, the length of the teacher's working day must be held, fundamentally, that kind of "educational policies" subject-matter which was legislatively intended to remain outside the scope of mandatory collective bargaining and, therefore, of binding arbitration.

The arbitrators exceeded their jurisdiction in making binding determinations concerning the length of the teacher working day.

"Scheduling and Length of School Vacations and of the Commencement and Ending of the School Year"

On similar reasoning, questions concerned with the scheduling and length of school vacations and the commencement and ending of the school year (insofar as such calendar aspects, respectively, are directed at teacher attendance at school) must be held matters of "educational policies" and, as such, non-negotiable and beyond the scope of binding arbitration.

Here, again, the "educational policies" predominance arises not merely because of an impingement upon the "managerial" function of organizing, supervising, directing and distributing personnel but mainly because of a substantial intermixing of judgments

transcending teacher interests and embracing important interests of the general citizenry. Since the teaching staff is reasonably to be required to be at school, minimally, whenever the students must attend, the commencement and termination of at least such minimum school year for the teachers, and the scheduling and length of intermediate vacations, will be settled by such calendar arrangements as are to be fixed for student attendance.

Into the calendar arrangements for students enter considerations and decisions involving the plans and interests of families, the need to arrange for the presence of all non-teaching personnel who function while students are in attendance at school and the interests and concerns of all other parts of the community related to, or affected by, the times when students will be in attendance at school or on vacation.

Thus, the commencement and termination of the school year and the scheduling and length of intermediate vacations during the school year, at least insofar as students and teachers are congruently involved, must be held matters of "educational policies" bearing too substantially upon too many and important non-teacher interests to be settled by collective bargaining or binding arbitration.

The arbitrators exceeded their jurisdiction in purporting to make binding determinations concerning this subject-matter.

"Pre-and post-school Day Hours and pre-and post-school Year Days for Teacher Attendance at School"

On the other hand, questions relating to the attendance of teachers at school at times other than when the students will be in attendance are to be regarded as "working conditions" of teachers lacking significant relationships to non-teacher interests of a quantitive and qualitative magnitude sufficient to negate collective bargaining or binding arbitration. The negotiation or arbitration of questions related to whether and when teachers shall be at school, even though the students are not in attendance, impinge only upon that "managerial" function concerned with the organization, supervision, direction and distribution of personnel. As above emphasized, this single "managerial" factor must be regarded as insufficient per se to establish the kind of involvement with "educational policies" requisite, statutorily, to remove an item substantially related to teacher "working conditions" from the sphere of mandatory collective bargaining or of determination by binding arbitration.

The arbitrators acted properly within their jurisdiction in making binding determinations concerning pre-and post-school day hours and pre-and post-school year days for teacher attendance at school (at times other than when the students would be in attendance).

"Teacher Aides for non-teaching 'Housekeeping' Functions"

By the same analysis the issue of the use of teacher aides to monitor play grounds, supervise lunch periods, load and unload buses and other non-teaching types of activities must be held a subject proper for collective bargaining and within the scope of binding arbitration.

Unquestionably bearing heavily upon the work load of teachers, the issue of teacher aides for various "housekeeping" functions touches upon other areas ordinarily deemed to affect "policy"--over and above a narrow impingement upon "managerial" organization, supervision, direction and distribution of personnel --only in terms of the monetary costs of hiring the additional non-professional personnel. That money costs may become involved --with potential for impact upon not only the ordering of educational priorities but the overall budgeting appropriations and tax rate of the public employer--does not suffice, ipso facto, to exclude from negotiability or binding arbitration any concrete item substantially related to "working conditions." (See ante, p. 27) Rather, these monetary costs of various "working conditions" are operative as one consideration providing guidance to the arbitrators as they engage in the balancing of facts leading to the accommodations they make when they select the particular

terms to be fixed as contractually binding.

The subject-matter of teacher aides for non-teaching "household" tasks is negotiable and subject to binding arbitration.

In making binding determinations of the issues, the arbitrators acted within their jurisdiction.

"Specialist Teachers for Specific Types of Subject-matter Taught or Services Offered"

Analysis discloses that the question of the employment of "specialist" teachers for particular subjects being taught or services being offered students is a matter bilaterally negotiable in collective bargaining and included within the sphere of binding arbitration.

The issue, here, is posited not as requiring decision whether a particular subject, such as art, music or remedial reading is to be taught as part of the curriculum or whether a special type of "service" (such as guidance counseling, remedial reading or library) is to be offered. The assumption is that it has been settled that art, music, remedial reading, guidance counseling and library services are to be taught as subjects or offered as services.

The question is, rather, who shall do such teaching or provide such services---specifically, whether it shall be an additional ancillary task to be borne by regular class-room

teachers who have other primary teaching and class-room responsibilities or whether it shall be made the primary responsibility of teachers who are fundamentally free of generalized regular teaching obligations and who are to concentrate as specialists in a subject-matter which involves special skills or knowledge.

Clearly, to the extent that art, music, remedial reading, guidance and counseling or acting as a librarian do involve special types of skills and knowledge, to have regular teachers assume the additional ancillary responsibility for such specialities not only increases the work load of the regular teachers, as such, but also tends, indirectly, to cause them additional difficulties; it tends to introduce a potential for frustrations and dissatisfactions should regular teachers be unable to develop the special skills, or competencies, for which they are thus given ancillary responsibility.

To have these "working conditions" aspects determined by bilateral negotiation and ultimately (should it be necessary) by binding arbitration, as with the issues of teacher aides for "household" tasks, impinges upon "managerial" and "policy" areas --over and above an involvement with the organization, direction and distribution of personnel--basically only in terms of the additional monetary expenditures which might be required to arrange for such "specialist" teachers.

Hence, as with teacher aides for "housekeeping" tasks, the contacts with the "managerial" and "policy" realm must be held insufficient to override the prima facie eligibility for negotiation and binding arbitration established by the important "working conditions" factors present. That money expenditures might be involved does not preclude bilateral negotiation or binding arbitration but rather is only one of a plurality of considerations which enter into the ultimate determination by the arbitrators of whether, and to what extent, "specialist" personnel for the above designated "special" subjects or services shall be used rather than to have these "special" subjects or services (art, music, guidance counseling, remedial reading and library) be taken on as additional ancillary responsibilities of regular teachers who have other primary teaching tasks to perform.

The arbitrators acted within their jurisdiction in making binding determinations concerning these questions of "specialists" for "special" subjects or services.

III-B-3

The Biddeford Board of Education has levelled a wide ranging onslaught against all of the determinations in the arbitrational decision the implementation of which entails monetary expenditures. The argument is that since the monies

for the conduct of the public schools come from the municipal legislative body empowered to make appropriations, the arbitration panel had lawful jurisdiction to settle issues requiring money expenditures for their implementation not bindingly but subject only to a contingency that adequate funds will be provided by appropriations.

The argument is unacceptable. It is fundamentally at odds with the basic pattern and objectives of the Municipal Public Employees Labor Relations Law.

As fully explained (ante at p. 27), "working conditions" which are other than "salaries, pensions and insurance" are placed within the jurisdiction of arbitrators to settle as the terms and conditions of contracts which are to have fully binding legal effect, notwithstanding that they can, or will, require expenditures of money. This is the only meaning reasonably attributable to the explicit provisions of Section 965:

> ". . . with respect to a controversy over subjects other than salaries, pensions and insurance, the arbitrators shall make determinations . . . and if made by a majority . . . such determinations will be binding on both parties and the parties will enter an agreement or take whatever other action that may be appropriate to carry out and effectuate such binding determinations . . .."

The position being asserted by the Biddeford Board of Education is contrary to this plain statutory language.

Moreover, the position is irreconcilable with the full implications of the legislature's carefully stated differentiation between the function of the arbitrators (1)

> ". . . with respect to a controversy over . . . salaries, pensions and insurance . . .",

that the arbitrators in such controversy

> ". . . will recommend terms of settlement and may make findings of fact; such recommendations and findings . . . [to be] advisory only . . ."

(Section 965) but (2) otherwise,

> ". . . with respect to a controversy over subjects other than salaries, pensions and insurance . . ."

shall, by majority,

> ". . . make determinations . . . binding on both parties . . ."

and to be embodied in an "agreement" to be entered into by the parties.

This legislative concern to point up such differences in arbitrational functioning, dependent upon whether "salaries, pensions and insurance" are involved, emphasizes precisely that (1) only as to the major items of money expenditures represented by "salaries, pensions and insurance" is the contingency of the need for appropriations recognized, thereby to require that the arbitrators act only as an advisory body making recommendations but (2) concerning all items negotiable in collective bargaining

other than "salaries, pensions and insurance", and even though such other items can and, will, involve money expenditures when they are to be implemented, the arbitrators are empowered to impose fully binding legal obligations. As to these necessary monetary expenditures resulting from such binding decisions of the arbitrators, it becomes the responsibility of the school board, as well as the appropriate legislative body of the municipality, to make such arrangements as will ensure that these legal obligations will be met. Cf. Providence Teach. U. Local 958 v. School Committee, R.I., 276 A.2d 762 (1971).[7]

III-B-4

A last issue raised for decision concerns the legal effects under the Municipal Public Employees Labor Relations Law flowing

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7 To assist the public employer (including its school board and legislative body) to deal with the legal obligations which will result if (1) issues as to "salaries, pensions and insurance" are settled by collective bargaining, or (2) any other matters requiring the appropriations of money, are settled by collective bargaining or, if collective bargaining has failed, by the binding determinations of arbitrators, the Municipal Public Employees Labor Relations Law has inserted a special provision affording the public employer the benefit of specific timing for all collective bargaining which involves money expenditures. The statute explicitly provides: "Whenever . . . any matter[s] requiring appropriation of money . . . are included as a matter of collective bargaining . . ., it is the obligation of the bargaining agent to serve written notice or request for collective bargaining on the public employer at least 120 days before the conclusion of the current fiscal operating budget . . .."

from the binding determinations of arbitrators acting pursuant to Section 965-4---in particular, during the period allowed for instituting review (under Section 972) and, if review has been sought, while it is pending.

By the express language of the statute, when made

> ". . . by a majority of the arbitrators . . . determinations will be binding on both parties and the parties will enter an agreement . . . to carry out and effectuate such binding determinations."

Hence, that at least two arbitrators have in fact settled upon determinations becomes the controlling factor by which their determinations become binding and which brings into play the legal obligation of the parties to incorporate the determinations into an agreement. The statute omits to establish an automatic suspension of legal consequences because of the potential that the arbitrational decision might embody errors causing them to be reversed or modified on review.

Any such suspension of "bindingness" or of legal obligation is allowed by the statutory language, to come into play only to the extent that in Section 972[8] the statute prescribes that

> "review shall be sought in accordance with Rule 80B of the Rules of Civil Procedure".

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8 By P.L. 1970 Chapter 578, § 7, a new section, Section 972, was added to govern the review of binding determinations of arbitrators.

and that

> "an appeal [from the Superior Court's review] may be taken to the law court as in any civil action."

As to any review "in accordance with Rule 80B . . .," the Rule plainly provides:

> "Except as otherwise provided by statute, the filing of the complaint does not stay any action of which review is sought, but the court may order a stay upon such terms as it deems proper."

The present statute fails to provide otherwise and, on the contrary, tends clearly to indicate that until a Court ordered stay is accomplished pursuant to Rule 80B, the arbitrational determinations are immediately and continuingly binding and the parties are under immediate and continuing legal duty to enter an agreement which incorporates them.

Accordingly, regardless of whether it is, or will be, claimed that determinations of arbitrators contain an "erroneous ruling or finding of law" subjecting the determinations to potential reversal or modification upon review, the determinations are, and remain, binding in their legal effect and the parties are, and remain, under the legal duty to incorporate them in a signed agreement until the party asserting a right of review achieves the

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The consolidated matters now before us are governed by these statutory changes effective (by emergency enactment) as of February 9, 1970.

It is to be observed that at the Special Session of the Legislature convened from January 24, 1972 to March 10, 1972, other changes were made affecting the remedies for unfair labor practices which could, in future situations, have a relationship to matters arising from binding arbitration and interrelationships between enforcement proceedings and the review proceedings provided by Section 972.

intervention of judicial action in the form of such "stay" as the Superior Court sees fit to order in the circumstances.

CONCLUSION

I would remand the cases to the Superior Court for action, as follows:

(1) In Docket No. 2688-71, City of Biddeford by its Board of Education vs. Biddeford Teachers Association, et als., the decision of the arbitration panel of November 17, 1971 is to be modified by striking therefrom the determinations concerning "Class Size", "Length of a Teacher's Working Day" and "Scheduling and Length of School Vacations and of the Commencement and Ending of the School Year."

After such modification has been effected, the Superior Court should enter

> Judgment affirming the decision of the arbitrational panel (as modified)

(2) In Docket No. 2690-71, Biddeford Teachers Association vs. Board of Education of City of Biddeford, et als, the case, as remanded, is to await the entry of judgment in case No. 2688-71 aforesaid. Thereafter, the Superior Court shall proceed in such manner as the subsequent conduct of the parties might make necessary or appropriate--all in accordance with the principles enunciated in this opinion.

Date Opinion Filed
April 30, 1973

Reporter of Decisions
Docket No. 911
Law Docket No. 1686

CITY OF BIDDEFORD
BY ITS BOARD OF EDUCATION

vs.

BIDDEFORD TEACHERS ASSOCIATION ET ALS.

and

BIDDEFORD TEACHERS ASSOCIATION

vs.

BOARD OF EDUCATION OF CITY OF BIDDEFORD ET ALS.

WEATHERBEE, J.

These two complaints necessitate our first examination of the provisions of the Municipal Employees Labor Relations Law, 26 M.R.S.A. Chap. 9-A, which was enacted by the Maine Legislature in 1969. The complaints direct our attention only tc the application of the statute to teachers in the public schools.

In the fall of 1970 the Board of Education of the City of Biddeford and the representatives of the Biddeford Teachers Association entered into negotiations in an attempt to effect a contract for the professional services of teachers in the Biddeford public schools for the school year 1971-1972.[1] When the Board and the Association were unable to reach an agreement, the fact-finding procedures provided in section 965(3) were called into play but they proved unsuccessful. Finally, in August of 1971 the parties resorted to the arbitration process found in

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1. The parties had succeeded in negotiating a contract for the year 1970-1971.

section 965(4).

The three arbitrators held a hearing on the various provisions of the proposed contract which were in dispute on September 22 and 23, 1971. Both sides were given opportunity to offer testimony and documentary evidence and to present argument on the disputed issues. Later, on November 17, 1971 the arbitration panel issued a unanimous decision in which it made findings and determinations as to disputed sections and directed the parties to enter into a written agreement (retroactive to September 1, 1971) which included each of their determinations.

The Board refused to enter into the agreement and on December 13, 1971 the Association brought an 80B complaint against the Board and the Superintendent of Schools asking that the Defendants be ordered to comply with the determination of the arbitration panel and enjoined from continuing to refuse to do so.

On December 14, 1971 the Board brought an 80B complaint against the Association (and the two then surviving arbitrators) alleging that the award contained erroneous rulings of law and fact and was invalidated by partiality of an arbitrator and by prejudicial conduct of the hearing.

The two actions were consolidated for appeal and, upon the parties' agreement, the consolidated actions were ordered reported to us upon the complaints, answers and stipulation "for such final decision as the rights of the parties may require". The stipulation presents for our study the 1970-1971 contract, the 1971-1972 contract, the Determinations and Recommendations

of the Arbitration Tribunal and the agreed fact that "David W. Bustin [one of the arbitrators] is employed full time by the Maine Teachers Association with which the Biddeford Teachers Association is affiliated and participated as advisor on behalf of the latter association at various times in the bargaining process prior to the arbitration."

The purpose of the Municipal Public Employees Labor Relations Law is stated by 26 M.R.S.A. § 961 as follows:

> "It is declared to be the public policy of this State and it is the purpose of this chapter to promote 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."

Unquestionably the Board of Education of the City of Biddeford is a public employer as defined by the Act, and the Association is composed of teachers in the Biddeford public schools who are among the public employees who are entitled to the benefit of the Act. The authority of the Association to represent the teachers as their chosen bargaining agent is not disputed.

The Act makes it the obligation of the public employer and the bargaining agent to meet and bargain collectively and provides a four-step procedure consisting of negotiation, mediation (when jointly requested), fact finding and arbitration.[2] The parties are first obligated to negotiate in good faith concerning "wages, hours, working conditions and contract grievance arbitra-

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2. The Act prohibits public employees from engaging in a strike, work stoppage, slowdown or blacklisting.

tion" — with the exception —

> "...[T]hat public employers of teachers shall meet and consult but not negotiate with respect to educational policies for the purpose of this paragraph, educational policies shall not include wages, hours, working conditions or contract grievance arbitration;"[3]

Secondly, if the parties are unable to agree after negotiation they may jointly agree upon mediation procedures. Thirdly, if mediation procedures are omitted or are unsuccessful, either one or both may request fact-finding and the parties are then obligated to present their contending positions to the fact-finding board which will, after hearing, submit its findings to the parties. If a 30-day period of further effort to resolve the controversy is unsuccessful either party may make the findings public. Fifteen more days are then allowed to permit a further good faith effort to resolve the controversy. Fourth, and lastly, if, after another ten days they have not agreed as to an arbitration procedure, either party may request in writing that their differences shall be arbitrated in accordance with the procedure described in subsection 4.

In brief, this procedure requires each party to choose an arbitrator and the two so chosen shall name a "neutral" arbitrator. The three arbitrators shall then proceed to hear the

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3. We consider that a printing error doubtless distorted the legislative language here and that the phrase "for the purposes of this paragraph" was intended to be the beginning of a separate sentence.

matter. If the subject of the controversy has been salaries, pensions or insurance, the arbitrators shall recommend terms of settlement which are advisory only and may make findings of fact. As to other matters in dispute the arbitrators shall make determinations which are binding upon the parties and "the parties will enter into an agreement or take whatever other action that may be appropriate to carry out and effectuate such binding determinations". The determinations are subject to review in accordance with M.R.C.P., Rule 80B but, in the absence of fraud, the arbitrators' decisions upon questions of fact are final.[4]

PART I

The Act obviously represents a fresh approach to municipal public employee labor relations problems and enters an area as yet unexplored here. In the field of education, particularly, it appears to clash with traditional concepts of school control and management. As a result, members of the Board here — as several school boards in other jurisdictions have done — protest that if the members entered into the proposed contract, as the arbitration award has ordered them to do — they would be surrendering their authority as public officers to persons who are in no way responsible to the electorate.

Traditionally, the control of the public schools has

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4. Within the areas covered by the Act either party is entitled to require the other to participate in both interest arbitration (that is, concerning disputes involved in the making of the employment contract) and grievance arbitration (concerning disputes arising out of employment under the contract).

been entrusted to the local school boards since our State's earliest days. When our Constitution was adopted on October 29, 1819, Article VIII read:

> "A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the Legislature are authorized, and it shall be their duty to require, the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools; ..."

The first Legislature promptly acted upon this directive (P.L. 1821 Chap. 117) by (sec. 1) requiring the various towns to raise money for maintenance of public schools[5] and (sec. 3) by giving local school committees responsibility as to the qualification of teachers, the books to be used and the conduct of the local educational process.[6] Although the nature of the educational

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5. "Sec. 1. Be it enacted by the Senate and House of Representatives, in Legislature assembled, That every town and plantation shall annually raise and expend for the maintenance and support of schools therein, to be taught by school masters duly qualified, a sum of money including the income of any incorporated school fund not less than forty cents for each inhabitant, the number to be computed according to the next preceding census of the State by which the representation thereof has been apportioned: Provided, That a part, not exceeding one third of the money allotted to any district, may, if the district so determine, be applied to the support of a school taught by a mistress, or when the sum so allotted to a district in any year, shall not exceed thirty five dollars, the whole may be expended in the same manner."

6. "Sec. 3. Be it further enacted, That there shall be chosen by ballot at the annual meeting, in each town and plantation, a superintending school committee, consisting of not less than three nor more than seven persons, whose duty it shall be, to examine school masters, and mistresses, proposing to teach school therein. And it shall be the duty of such committee to visit and inspect the schools in their respective towns and plantations, and inquire

units changed with the growth of our communities through the years,[7] the responsibility for the management of local public educational systems has remained, substantially unchanged, in the local school authorities -- primarily the local superintending school committees[8] -- with the exception of two developments.

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into the regulations and discipline thereof, and the proficiency of the scholars therein, and use their influence and best endeavours, that the youth in the several districts regularly attend the schools; and the said committee shall have the power to dismiss any school master or mistress who shall be found incapable, or unfit to teach any school, notwithstanding their having procured the requisite certificates; but the towns and plantations shall be bound to pay such instructors for the time they have been employed; and the superintending committee shall have power to direct what school books shall be used in the respective schools; and at the meeting for the choice of town officers, there shall be chosen an agent for each school district, whose duty it shall be, to hire the school masters, or mistresses for their respective districts, and to provide the necessary fuel and utensils for the schools. ..."

7. During the early history of our state, our statutes permitted areas within a town or areas composed of parts of two or more towns to form semi-autonomous school districts and to choose school agents and share with the town superintending school committees the responsibility for maintenance of the public schools. See, for example, R.S. 1871, Chap. 11, §§ 16-51. For a time, towns were permitted to elect a supervisor of schools in lieu of a superintending school committee. R.S. 1871, Chap. 11, § 10. P.L. 1897, Chap. 332, §1 first required superintending school committees to choose or towns to elect superintendents of schools who succeeded to some administrative duties formerly performed by the superintending school committees.

For a brief period -- 1871 to 1872 -- our statutes directed the Governor to appoint for each county a county supervisor to public schools who "shall act as the official advisor and constant assistant to the school officers and teachers in his county. R.S. 1871, Chap. 11, §§ 75-80. This office was abolished by P.L. 1872, Chap. 67.

8. The members of the Superintending School Committee are elected officials (20 M.R.S.A. § 471) and their statutory duties include (20 M.R.S.A. § 473):

> "1. Management of schools. The management of the schools and the custody and care ... of

The Legislature, having originally delegated to local school bodies the entire responsibility for the conduct of public primary and secondary education, soon began taking back selected portions of this authority by enacting specific parcels of legislation which imposed various requirements upon the conduct of the local education process. Examples of this are found today in statutes which create certain school holidays,[9] establish a minimum number of sessions,[10] require that study in hygiene be offered,[11] that health, safety and physical education studies be taught[12] and that the school committees appoint a school physician, etc.[13] In 1868 the Legislature made a single major inroad into local school committee authority when it created the office of State

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all school property in their administrative units ...

2. General course of instruction; textbooks. [They shall][d]irect the general course of instruction and approve a uniform system of textbooks ..."

They employ the Superintendent of Schools (20 M.R.S.A. § 155) and approve or disapprove of his nomination of teachers. 20 M.R.S.A. § 161(5). They may, after notice and hearing, dismiss a teacher for unfitness. 20 M.R.S.A. § 473(4). Although we have spoken in terms of powers of the superintending school committees, the same principles apply as to directors of School Administrative Districts (20 M.R.S.A. § 219), to committees of supervisory unions (20 M.R.S.A. § 153) and to community school committees. 20 M.R.S.A. § 356.

9. Now 20 M.R.S.A. § 801.

10. Now 20 M.R.S.A. § 855.

11. Now 20 M.R.S.A. § 473(3).

12. Now 20 M.R.S.A. § 1011.

13. Now 20 M.R.S.A. § 1131.

Superintendent of Schools and empowered that officer "to exercise a general supervision of all the public schools and to advise and direct the town committees in the discharge of their duties".[14] Later, this official became the Commissioner of Education and, under the reorganization of 1971, became the Commissioner of Education and Cultural Resources.[15] He still retains supervisory powers, now somewhat more detailed, over the conduct of local education.[16] 20 M.R.S.A. § 102, subsections 1 and 7.

Until the enactment of the Municipal Employees Labor

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14. P.L. 1868, Chap. 221, §3(1).

15. 20 M.R.S.A. § 101; P.L. 1971, Chap. 492. P.L. 1971, Special Session 1972, Chap. 610 changed his title to Commissioner of Education and Cultural Services.

16.

> "1. General supervision. To exercise a general supervision of all the public schools and to advise and direct the town committees and superintendents in the discharge of their duties, by circular letters and personal conference, devoting all his time to the duties of his office;
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> ....
>
> 7. Studies to be taught. To prescribe the studies to be taught in the public schools and in private schools approved for attendance and tuition purposes, reserving to superintending school committees, trustees or other officers in charge of such public or private schools the course of study prescribed by the commissioner shall be followed in all public schools and in all private schools approved by the said commissioner for attendance or tuition purposes. Upon the approval by the said commissioner of any course arranged by the superintending school committee of any town, or by the trustees or other officers of any private school, said course shall be the authorized course for said town or private school. ..."

Relations Law, the local school authorities retained all the responsibility for the operation of the public schools which had not been given to the Commissioner of Education or specifically assumed by the Legislature. The effectiveness of their authority has been limited, of course, by the extent that local legislative bodies made finances available.

While the present actions present many issues concerning various areas of the arbitrators' award, we must first consider the constitutionality of the Act in so far as it requires local school boards, at the request of the teaching employees, to submit to binding arbitration disputes arising both out of the making of the labor contract and out of later employment under the contract. Can the superintending school committees constitutionally delegate this authority to arbitrators? In requiring them to do so, can the Legislature constitutionally take away the authority which local officials had traditionally exercised and repose it in persons who compose ad hoc boards of arbitration? If so, has there been such a valid delegation of authority here?

> "... All acts of the Legislature are presumed to be constitutional and this is a 'presumption of great strength.'... The burden is upon him who claims that the act is unconstitutional to show its unconstitutionality. ... Whether the enactment of the law is wise or not, and whether it is the best means to achieve the desired result are matters for the Legislature and not for the court. ..." State v. Fantastic Fair, 158 Me. 450, 467, 186 A.2d 352, 363 (1961).

We have examined the few decisions from other jurisdictions which have dealt with these issues.

The concept of collective bargaining between public officials and their municipal employees is of comparatively recent appearance in the courts of this country. Many courts found this concept impossible to reconcile with the long accepted principle that members of the public are entitled to have public service issues determined according to the best judgment of the officials to whom they have entrusted the responsibilities. In most of the jurisdictions where the issue has been litigated it has been held that municipal officers have no right to bargain collectively in the absence of legislation giving them this authority and that when city officials agree to bargain collectively without such legislation they are abdicating the responsibilities reposed in them by the electorate.[17]

It appears to be accepted that statutes relating to labor relations in general have uncertain application to the public sector as the courts find that public employees, as servants of the public welfare, occupy a status much different from that of employees engaged in private enterprises.[18]

While a number of states have recently enacted legis-

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17. State Board of Regents v. United Packing House Food and Allied Workers, Local No. 1258, 175 N.W.2d 110 (Iowa 1970); In Re Richfield Federation of Teachers, 263 Minn. 21, 115 N.W.2d 682 (1962); City of Fort Smith v. Arkansas State Council No. 38, 433 S.W.2d 153 (1968); Norwalk Teachers' Ass'n. v. Board of Ed., 138 Conn. 269, 83 A.2d 482 (1951).

18. City of Manchester v. Manchester Teachers Guild, 100 N.H. 507, 131 A.2d 59 (1957); Wichita Public Schools Employees Union, Local No. 513 v. Smith, 194 Kan. 2, 397 P.2d 357 (1964).

lation to permit collective bargaining in different forms in the public sector, very few cases involving these laws have reached the courts of last resort and judicial concern over loss of governmental responsibility has not disappeared. When collective bargaining is provided by statute, the public officials cannot be said to have abdicated ultimate responsibility — the legislature has taken it away from them — but the power of the legislature to delegate to private persons discretion to determine issues which are essentially governmental is not free from doubt.

In 1947 the Pennsylvania General Assembly enacted legislation which established grievance procedure under which public employer-employee disputes should be submitted to a mediation board which, after hearing, would make findings and recommendations to local public officials. Such a mediation board heard such a dispute for the Erie firefighters and then recommended that the City Council enact an ordinance creating a pension plan which the mediators found the public interest required.

In Erie Firefighters Local No. 293 v. Gardner, 406 Pa. 395, 178 A.2d 691 (1962) the firefighters had brought mandamus to compel the City Council to take this action. The Court chose to face the constitutional issue by "assuming" that the statute did require the City Council to take the action the mediators recommended. The Court held that, as so construed, the statute was an unconstitutional delegation of legislative discretion to the mediators.

An article in the Pennsylvania Constitution contained

this language:

> "'The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.'" Erie Firefighters Local No. 293 v. Gardner, supra at , 178 A.2d at 695.

The Court recognized that there was, even then, an important current trend toward delegation of power to administrative bodies, but said:

> "If the delegation of power is to make the law, which involves a discretion of what the law shall be, then the power is nondelegable. If the conferred authority is the power or discretion to execute the law already determined and circumscribed, then the delegation is unobjectionable. ... We are of the opinion, therefore, that if the Act of 1947 makes the findings of the panel of conciliators binding upon the city in so far as the creation of municipal ordinances is concerned, then that portion of the Act which so states is unconstitutional and cannot be enforced in this proceeding." Erie Firefighters Local No. 293 v. Gardner, supra at , 178 A.2d at 695.

The State of Wisconsin had one of the first comprehensive municipal labor laws in the nation and Local 1226, Rhinelander City Employee's v. City of Rhinelander, 35 Wis.2d 209, 151 N.W.2d 30 (1967) is frequently cited as representing a modern judicial attitude as to this problem. Their statute authorized municipalities to enter into labor contracts with representatives of employees. The statute permitted but did not require cities to make binding agreements to submit grievances to arbitration. (Wisconsin had earlier held in a non-labor dispute case that a city may submit to binding

arbitration claims arising out of contract.)[19]

The City entered into a labor contract in which it agreed to submit grievances to arbitration. Later it refused to arbitrate contending that to be required to do so would be an unlawful infringement upon the legislative power of the City. The Court held that the City, having agreed to arbitrate, could now be forced to carry out its agreement. It is necessary, however, to an appreciation of the Court's opinion to note that it added, distinguishing between interests arbitration (that is, disputes involved in the making of the labor contract) and grievance arbitration (disputes arising out of employment under a contract which has already been made):

> "Yet in all its arguments the city is talking about arbitration in the collective bargaining context -- arbitration to set the terms of a collective bargaining agreement. Such is not this case, which involves arbitration to resolve a grievance arising under an existing agreement to which the city is a party." Local 1226, Rhinelander City Employee's v. City of Rhinelander, supra at , 151 N.W.2d at 36.

While the acceptance of any collective bargaining in municipal employment affairs doubtless dilutes the absolute discretion which public officials had formerly enjoyed, the issue becomes acutely presented when statutes or charters provide, as an ultimate step, the right of either party to have issues settled by arbitration which is binding upon the municipality.

State of Washington v. Johnson, 46 Wash. 114, 278 P.2d

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19. City of Madison v. Frank Lloyd Wright Foundation, 20 Wis.2d 361, 122 N.W.2d 409 (1963).

662 (1955) dealt with a "home rule" city charter which provided for binding arbitration between the City and its firefighters concerning working conditions, wages and pensions. The Court found this to be an invalid delegation of public authority and the language of the opinion seems to be representative of the rationale of the majority of courts.

> "Can the legislative body abdicate its responsibility and turn it over to a board of arbitrators whose decision will be binding upon the legislative body and the firemen? Clearly it has no legal right to do so. The theory of delegation of authority is that the person or group to whom authority has been delegated, act for and as the agent of the person or group delegating such authority. That is not the situation here. Here the council would be stepping out of the picture entirely and the arbitration board would be performing a function which, by law, is the responsibility of the council." Washington v. Johnson, supra at , 278 P.2d at 666.

The absence of a state statute authorizing binding arbitration did not appear to control the Court's reasoning in Johnson and the same rationale is expressed in Fellows v. LaTronica, 151 Colo. 300, 377 P.2d 547 (1962) where the Colorado Court found that another "home rule" charter amendment which authorized city officials to submit municipal labor disputes to binding arbitration constituted an unconstitutional delegation of authority.

In Joint School District No. 8, City of Madison v. Wisconsin Employment Relations Board, 37 Wis.2d 483, 155 N.W.2d 78, 80-81 (1967) the Court examined the language of the Wisconsin statute which provided that "municipal employees shall have ... the right to be represented by labor organizations of their own choice in conferences and in negotiations with their municipal

employers or their representatives on questions of wages, hours and conditions of employment." The Court decided that in using this language the legislature intended to distinguish between labor relations in the private sector and those in municipal employment. The statute, it found, required the City only to meet and negotiate and engage in fact finding. It said that, while this might affect a determination of the controversy by moral force, it is not an unlawful delegation of authority because it is not binding on the City. The final determination must still be made by the school board. If the statute required the City to participate in collective bargaining, the Court said, in dicta, it would be a surrendering by the members of the school board of the municipal function entrusted to them.

The constitutionality of a Rhode Island statute known as the Firefighters' Arbitration Act which provided for collective bargaining including binding arbitration was considered by the Rhode Island Supreme Court in City of Warwick v. Warwick Regular Firemen's Association, 256 A.2d 206 (R.I. 1969). The Court upheld the principles of the legislature's propriety of delegation of power to arbitrators in this language:

> "We concur in the conclusion of the trial justice that it is within the prerogative of the legislature to vest administrative boards or public bodies or officers with some portion of the legislative power where such action is necessary to give operative effect to the antecedent legislation. We are of the opinion that when the legislature, in an exercise of its law-making authority, enacts a statute the purpose of which is to secure to the public some right or benefit, it may delegate to an appropriate agency or officer some residuals of its legis-

> lative power in order to permit the selected agent to accomplish the ends contemplated in the original legislation. Of course, this is not to say that the legislature may abdicate its duty to legislate. Where the purposes of the antecedent legislative enactment may be best accomplished through the employment of an agent acting in its stead, the legislature may delegate to that agent a sufficient portion of its power to enable it to make the statute operative." City of Warwick v. Warwick Regular Firemen's Association, supra at 208-209.

Following the passage in 1955 of a New Hampshire statute permitting municipalities to "recognize unions of employees and make and enter into collective bargaining contracts with such unions" the City of Berlin entered into a contract with the local union representing the city police. A section in the contract provided for grievance arbitration by an impartial arbitrator to be appointed by the state board of arbitration whose decision was to be final and binding. In Tremblay v. Berlin Police Union, 108 N.H. 416, 237 A.2d 668 (1968), this was attacked as an unlawful delegation of municipal authority. The New Hampshire Court said:

> "If that were the end of the matter, it would present a serious question. But, as previously noted, the clause [of the contract] was specifically amended to provide that it 'shall comply and be subordinate to N.H. State Law'. This amendment subjects the grievance and arbitration procedure to Laws 1963, 275:5 as well as the state arbitration statute (RSA 273:12-27) which contains a provision that a party may give a notice in writing not to be bound by the arbitrator's decision." Tremblay v. Berlin Police Union, supra at , 237 A.2d at 672.

The contract also contained the Union's acceptance of the fact that the police department must operate with its budget as set by the city council and that nothing in the arbitration paragraph shall be construed so as to conflict with applicable

state laws. The Court concluded that the contract was not an unlawful delegation of the city's authority to control the police department.[20] Thus explained, the opinion constitutes only an approval of legislation permitting municipalities to contract for non-binding grievance arbitration which is not necessarily binding.

While there is a little legal precedent, some of the writers on the subject seem to feel that the problem of delegation is more easily satisfied if the arbitrators themselves are public officials.[21] It will be remembered that our own statute authorizes the appointment of arbitrators who are private citizens and not in any way responsible to the public although their decisions might affect the quantity, quality and cost of essential public service.

The Rhode Island statute, earlier discussed, authorized a delegation of authority to a board of arbitrators such as our own — one arbitrator to be chosen by the city, one by the union and those two to select the third — whose decisions are to be

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20. Our Legislature enacted a Fire Fighters' Arbitration Law in 1965 (26 M.R.S.A. § 980-992) which provided for binding arbitration, both interests and grievance. It was repealed simultaneously with the enactment of the Act now under consideration. P.L. 1969, Chap. 424, § 2. This Court was called upon to interpret the arbitration features of the law in Rockland Professional Fire Fighters Ass'n. v. City of Rockland, Me., 261 A.2d 418 (1970) but the issue of its constitutionality was not raised.

21. Wellington & Winter, Structuring Collective Bargaining in Public Employment, 79 Yale L.J. 805 (1970); Comment in 68 Mich. L. Rev. 260, 284 (1969). For example, a Nebraska statute allows submission of public labor disputes to a Court of Industrial Relations. Nebraska Public Laws 1965, Chap. 396.

binding. It was contended in City of Warwick v. Warwick Regular Firemen's Association, supra, that the statute contemplated an unconstitutional delegation of governmental authority to private individuals but the Court found the delegation to be proper, employing reasoning, however, which appears to be tautological. The Court considered that since the statute provided that the person chosen as arbitrator receives a portion of the sovereign power of the state, that person necessarily becomes a public officer while he is performing these duties.

It appears, then, that most of the cases holding that agreements to submit public employee labor disputes to binding arbitration are invalid attempts to delegate official responsibility come from states that had no legislation authorizing such agreements. On the other hand, serious concern over the problem is apparent in all the decisions and several of those often spoken of as favorable to the position urged here by the Association limit their holdings to grievance arbitration of contracts which municipalities have already entered into. It may be that the Rhode Island statute is the only one imposing upon the municipalities binding arbitration in the areas of both interest and grievance, without specific constitutional authorization, which has been finally upheld. We consider that decisions involving arbitration in essential industries in the private sector such as hospitals and public utilities give us little assistance as to this problem.

With scant solid precedent to guide us, we return to our own situation. We find that our Constitution gave the Legislature

full responsibility over the subject matter of public schools and education and empowered it to make all reasonable laws in reference to schools and education for the "benefit of the people of this state". Opinion of the Justices, 68 Me. 582 (1876). Except for the areas where the Legislature has from time to time seen fit to impose its own requirements and except for the authority later given to the Commissioner of Education, the responsibilities for operating the public schools have remained in the local school boards.

The Legislature has now decided to take from the school boards the ultimate authority they have exercised in certain areas of school management — that is, as to "hours, and working conditions" and contract grievance arbitration — and to give it to ad hoc boards of arbitration.[22]

It is settled beyond question that the Legislature may properly conclude that the purposes of its legislation may best be carried out through agents and that it may delegate to the agents a portion of its power to facilitate the functioning of the legislative program. McGary v. Barrows, 156 Me. 250, 163 A.2d 747 (1960); McKenney v. Farnsworth, 121 Me. 450, 118 A. 237 (1922).

There can be no doubt but that the Legislature, which is

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22. It will be remembered that the school boards are required only to consult as to educational policy, that the arbitrators may only recommend terms of settlement in controversies over salaries, pensions and insurance and that school boards' power to comply with the arbitrators' awards in matters that are subject to binding arbitration is limited by other existing statutory enactments and orders of the Commissioner of Education.

the source of all municipal authority (Squires v. Inhabitants of City of Augusta, 155 Me. 151, 153 A.2d 80 (1959), has also the power to take back from municipal officers portions of the authority it has earlier given them.

It is clear that the Legislature has recognized that the maintenance of a satisfactory quality of public education requires harmonious relations between school officials and the teaching staffs and that disagreements inevitably arise during the carrying out of their respective responsibilities. The abrasive effect of the existence of unresolved grievances is one of the threats to harmonious relations which the Legislature considers should be removed.

The lawmakers have recognized that policy making decisions should remain in the local officials, responsible to the public, and that while the citizens may properly be subjected to moral suasion as to such matters as wages and pensions, the ultimate determination of such matters with such heavy impact upon — and so limited by — municipal appropriations should be made by local officials.

The Legislature has apparently concluded, on the other hand, that experience has taught that certain aspects of this dynamic and complicated municipal employer-employee relationship no longer need remain subject to arbitrary decision by the employer and that in the area of working conditions and hours and of contract grievances the interests of the employees must in fairness be examined by impartial persons. The Legislature appears to believe that

this much can be done without serious disruption of the balancing of operating costs against municipal appropriations.

We realize that in providing that the contract making process itself (as it affects working conditions and hours) is subject to binding arbitration, our Legislature has moved into an area forbidden by many courts. The Legislature must have concluded that the benefits which are sought by the statute can never be achieved if an impasse occurs at the very beginning of the relationship. This conclusion is not unreasonable.

True, the statute does not contemplate the delegation of authority to public administrative boards or agencies but instead gives it to ad hoc panels whose memberships are not to be controlled by governmental action. Here we are of the opinion that the Legislature, mindful of the denial to municipal employees of such economic weapons as strikes and work stoppages which are available to employees in private employment, has sought to avoid the disruptive feelings of resentment and bitterness which may result if the governmental employee may look only to the government for redress of his grievances.

Where the ultimate arbiter of the dispute is a representative of one side of the dispute, adverse decisions will be hard to accept and the tendency toward alienation will be strong.[23]

We consider that there is a rational reason for the

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23. James M. Ringer, Legality and Propriety of Agreements to Arbitrate Major and Minor Disputes in Public Employment, 54 Cornell L. Rev. 129 (1968).

Legislature's decision that its purposes would be best effectuated if the parties are left to choose their own arbitrators in the limited non-policy areas which are subject to arbitration.

PART II

While we consider that the Legislature may justifiably choose to permit private citizens to exercise the limited portions of its sovereign power (as it concerns teacher-school board labor relations) which we have just discussed, it is well established that a legislative body cannot delegate the legislative power without including in the delegating statute sufficient standards to guide the agents in the exercise of the legislative authority. Small v. Maine Board of Registration and Examination in Optometry, Me., 293 A.2d 786 (1972); Waterville Hotel Corp. v. Board of Zoning Appeals, Me., 241 A.2d 50 (1968); Opinion of the Justices, 155 Me. 30, 48, 152 A.2d 81 (1959); Local 170, Transport Workers Union of America v. Gadola, 322 Mich. 332, 34 N.W.2d 71 (1948); City of Warwick v. Warwick Regular Firemen's Association, supra.[24]

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24. As an apparent response to the decision in Erie Firefighters (earlier discussed), a constitutional amendment was presented to and passed by the electorate which specifically authorized the delegation to panels or commissions of the authority to determine municipal labor disputes.

The legislature then enacted a statute which authorized collective bargaining between policemen and firemen and their public employers, culminating, when the parties have bargained to an impasse, in binding arbitration. City policemen then brought mandamus to compel the Borough Council to enact legislation to carry out the arbitrators' award. The City objected that the statute provided no standards. The Court held that the new constitutional amendment obviated the need for standards which the Court had on earlier occasions held are demanded if legislative power is to be delegated. The Pennsylvania Court added that

In 1947 the New Jersey Legislature enacted a law which provided for compulsory arbitration of labor disputes in public utilities and authorized ad hoc boards of arbitration chosen much as our own statute provides. The statute contained no statement of criteria to guide and limit the discretion of the arbitrators. The opinion by Chief Justice Vanderbilt said, in part:

> "If no standards are set up to guide the administrative agency in the exercise of functions conferred on it by the legislature, the legislation is void as passing beyond the legitimate bounds of delegation of legislative power and as constituting a surrender and abdication to an alien body of a power which the Constitution confers on the Senate and General Assembly alone. Nowhere in this act is there any guide furnished to the board of arbitration other than that it shall arbitrate 'any and all disputes then existing between the public utility and the employees ...' ... There is, thus, an even greater need of specific standards than there would be in the case of a continuous administrative body which might gather experience as it went along. ... Standards of delegation are peculiarly required, moreover, where the legislature is enacting a new pattern of social conduct ..." State v. Traffic Telephone Workers' Federation of New Jersey, 2 N.J. 335, 66 A.2d 616, 625-626 (1949).[25]

The extent to which the standards must be detailed must depend upon the nature of the service which the legislative body has determined should be performed by the administrative agency.

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even if the constitutional amendment did not apply, the statute revealed a legislative purpose to protect the public from strikes by policemen and firemen which furnished sufficient standards and that a more explicit expression of legislative policy in a statute providing for labor arbitration would be "folly". Harney v. Russo, 435 Pa. 183, 255 A.2d 560 (1969).

25. The succeeding legislature enacted a new statute with standards which the New Jersey Supreme Court, in a new case, found to be adequate. New Jersey Bell Tel. Co. v. Communications Workers of America, New Jersey Traffic Division No. 55, 5 N.J. 354, 75 A.2d 721 (1950).

The need here is to protect both the public and the employee from unnecessary and uncontrolled discretionary power.[26]

Mr. Justice Wernick's opinion agrees that even though the present law involves an area of internal governmental employer-employee relationship, the statute delegates to the arbitrators a portion of the police power of the State (to the extent that it empowers the public employer to force binding arbitration upon the teachers against their wills). It also agrees that there are carry-over effects upon the personal and property rights of the citizenry in general. Although that opinion does not agree that standards are constitutionally mandated in this Act, it appears to concede that, because of the presence of those two factors, potential constitutional infirmities could develop if the Act does not reveal a combination of 1) a "primary standard" or "intelligible principle", and 2) adequate procedural safeguards and opportunity for effective judicial review which can protect the teachers and the public against irresponsible, arbitrary action. That opinion looks for these primary standards and intelligible principles and is satisfied that they can be found in the totality of the Act.

We, on the other hand, consider that the constitutional issue is unavoidably presented now. The question is whether there can be found in the Act sufficient standards — specific or generalized, explicit or implicit — to protect the teachers and the public from possible arbitrary and irresponsible exercise of this delegated power by these ad hoc boards of arbitration. We arrive

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26. Theodore W. Kheel, Strikes and Public Employment, 67 Mich. L. Rev. 931 (1969); Kenneth Culp Davis, Administrative Law Treatise, §§ 2.11 - 2.14.

at the conclusion that no such standards can be found.

We do not concede that the fact that the Act has its primary effect upon the internal governmental employer-employee relationship makes the need for standards more easily satisfied. Neither do we find in the Act procedural safeguards or adequate review techniques which could make the need for standards more easily satisfied.

We recognize that in an area such as labor arbitration where a great variety of issues may be expected to be presented and where considerable flexibility is essential, it is not reasonable to require that the arbitrators' evaluations and options be restricted rigidly.

> "It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. 'If Congress shall lay down by legislative act an intelligible principle ... such legislative action is not a forbidden delegation of legislative power.'" Lichter v. United States, 334 U.S. 742, 785, 68 S.Ct. 1294, 92 L.Ed. 1694, 1726 (1948).

While it is essential to the success of arbitration that arbitrators deal with each case on its own merits, it is not necessary — or constitutionally possible here — that the legislative body give the arbitrators uncontrolled discretionary power.

We do not agree that the "primary standard" or "intelligible principle" which some of the federal cases have found sufficient in their situations would necessarily satisfy our own constitutional demand for standards in this case. However, we do not believe that even the "primary standard" or "intelligible principle" of which Lichter v. United States, supra and Mr. Justice Warnick's

opinion speak — can be found here from the totality of legislative expression in the several aspects which are discussed in his opinion and on which we wish to comment with full respect to the points of view of our disagreeing colleagues.[27]

As Mr. Justice Wernick's opinion indicates, in some jurisdictions it has been found that an Act's statement of policy furnishes sufficient guidance to assure that the individuals to whom the power has been delegated are not free to exercise unrestricted legislative authority according to their own discretions. Fairview Hospital Ass'n. v. Public Building Service and Hospital and Institutional Employees Union Local No. 113, 241 Minn. 523, 64 N.W.2d 16 (1954). This Act's stated purpose is to promote improvement in the relationship between the public employer and employee by providing adequate machinery for the employers and representatives of the employees to use in settlement of their disagreements. It is the Legislature's aspiration that the availability and use of this new collective bargaining machinery will result in a more harmonious employer-employee relationship but this purpose can hardly be considered as a meaningful criterion for the arbitrators' determination, issue by issue, of the individual subject matters before them.

In Kovak v. Licensing Board, City of Waterville, 157 Me. 411, 173 A.2d 554 (1961) we ourselves found to be constitutional a statute which authorized a municipal licensing board to revoke a victualer's license when it is "satisfied that the licensee is

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27. Note, Maine's Public Labor Law, 24 Maine L. Rev. 73 (1972).

unfit to hold the license". The Court found that the need for adequate criteria to guide the Board in such determinations — although absent in the section which authorized revocation — was found in several separate but related sections of the same chapter which mandated certain specific good conduct on the part of victualers. We are unable to discern any such related legislation here which supplies the need for standards which the Kovak Court recognized to be required.

We agree that the Legislature contemplated that these private individuals to whom it has given such authority over the functioning of public education would act fairly and reasonably. Unquestionably, a similar expectation is implicit in every statute which delegates power to administrative bodies. The unspoken demand for integrity is, of course, a standard for the arbitrators' conduct, but it does not furnish the crucial criteria to guide the arbitrators as to what factors should be given consideration in their examination of the issues presented to them.

While we share our disagreeing colleagues' expectations that when the issues reach the arbitrators they will have been sharply delineated by the preliminary procedures of collective bargaining — a probable contribution to the efficiency of the arbitration process — this cannot obviate the need for standards. The arbitrators are still left to act upon these issues with undirected and unlimited discretion.

We cannot agree with Mr. Justice Wernick's opinion that the Act's exclusion of educational policies from consideration by

negotiators, fact finders and arbitrators — or its limiting the arbitrators' authority as to salaries, pensions and insurance to recommendations and fact finding — constitute an indication of legislative purpose which can be considered a criteria to guide the arbitrators in their determinations in areas outside the excluded portions. We cannot so construe it. The exclusion of educational policies, salaries, pensions and insurance from binding arbitration only defines the boundaries of the area in which the arbitrators may act with binding effect — to wit, the area of working conditions and hours — without indicating the factors the arbitrators should consider as entering into their decisions concerning working conditions and hours.

We have considered Mr. Justice Wernick's opinion's reference to the last paragraph in section 965(1) which reads:

> "Whenever wages, rates of pay or any other matter requiring appropriation of money by any municipality are included as a matter of collective bargaining conducted pursuant to this chapter, it is the obligation of the bargaining agent to serve written notice of request for collective bargaining on the public employer at least 120 days before the conclusion of the current fiscal operating budget."

We construe this paragraph as requiring a timely caveat whenever a future bargaining agreement by the parties or a binding award by the arbitrators may necessitate an increased or additional appropriation so that the municipality may anticipate it in the next municipal budget. The language falls short of being a directive to the arbitrators that they are to give consideration to the

municipality's ability to meet the cost of the award in view of its other obligations and responsibilities.

While it is apparent that the draftsmen of the Act took care to omit from this legislation many elements which have given other courts their greatest concern, we consider that the absence from the Act of any standards to guide and limit the arbitrators invalidates the Act as far as its applicability to binding arbitration of labor disputes in the public school area is concerned.

There are many features of the bill the cumulative effect of which appear to us especially to demand that the Legislature include standards which will effectuate the carrying out of its purposes. The Act distinguishes between the arbitrators' authority as to disputes involving educational policy and those concerned with working conditions but neither educational policy nor working conditions is defined by the Act. Also, the Act provides the arbitrators with no criteria for dealing with the likely situations where a single decision may bear with substantial importance upon both educational policies and working conditions. The arbitrators are not public officials and are not required to answer to the electorate or to the elected representatives of the electorate. They are completely free to determine issues by the application of their own political, social or economic theories. They will not be members of a permanent panel but will be chosen on a case by case basis which militates against an accumulation of experience and their development of standards. The Act specifies that the

third arbitrator shall be "neutral" and strongly suggests a legislative intention that the two arbitrators chosen by the parties may be partisan advocates, following a practice prevailing in labor arbitration in the private sector. Thus the discretion being delegated may, in fact, be reposed in one private individual who may not even be a resident of the State.

This Act — unlike those in some other states — does not provide that the arbitrators' award is to be subject to existing statutory restrictions in the educational field, to existing or future appropriations or to proper orders of the Commissioner of Education. Although decisions in this area of disputes can have serious impacts upon the public interest in general, the quality of education and a municipality's ability to meet its other serious responsibilities, the arbitrators are left completely free to ignore these factors and to use whatever criteria they choose for their final determinations.

Although provision is made for review by the Superior Court on questions of law, the arbitration panels' determinations as to questions of fact are final, in the absence of fraud. There is no requirement that the arbitrators make findings of fact, even as to matters in which their determinations are final and binding, which seriously limits the ability of the courts on appeal to protect against unbridled discretion.

Finally, the arbitrators — like those discussed by Chief Justice Vanderbilt in Traffic Telephone Workers' Federation of New Jersey — would be putting into operation a pattern of

social conduct which is entirely new to us.

We do not suggest that all of these elements must -- or can profitably -- be the subject of specific standards. Rather, we say that, in total, they emphasize the need for standards here. The Constitution has specifically reposed in the Legislature full responsibility over the conduct of public school education for the "benefit of the people of this state"[28] and the Legislature has chosen to delegate a final responsibility in the important area of hours and working conditions. It has done so, however, without any clear indication as to what factors the arbitrators must consider in making these final decisions.

We hold that the Legislature's attempt to delegate to arbitrators binding determination of labor disputes between teachers and their public employers is void for lack of adequate standards.

We are satisfied that the provisions of the Act concerning arbitration are severable from the remainder of the statute and we find no constitutional infirmity in the Legislature's imposing upon teachers and their public employers the other obligations of collective bargaining found in the Act.[29]

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28. Opinion of the Justices, 68 Me. 582 (1876), supra.

29. Our holding is confined to the particular situation of teachers under the Act. We do not intend to suggest any opinion as to the validity of the Act as applied to other public employees.

The Court being equally divided on the question of constitutionality, but being in unanimous agreement that the Arbitrators exceeded their statutory jurisdiction in their determination as to "Class size", "Length of a Teacher's Working Day" and "Scheduling and Length of School Vacations and of the Commencement of the School Year", the cases are ordered remanded to the Superior Court for action:

1) In Docket No. 2688-71, City of Biddeford by its Board of Education vs. Biddeford Teachers Association, et als., the decision of the arbitration panel of November 17, 1971 is to be modified by striking therefrom the determinations concerning "Class size", "Length of a Teacher's Working Day" and "Scheduling and Length of School Vacations and of the Commencement of the School Year".

After such modification, the Superior Court should enter Judgment affirming the decision of the arbitration panel, as modified.

2) In Docket No. 2690-71, Biddeford Teachers Association vs. Board of Education of the City of Biddeford, et als., the case, as remanded, is to await the entry of judgment in case No. 2688-71. Thereafter, the Superior Court shall proceed in such manner as the subsequent conduct of the parties might make necessary or appropriate.