REPORT OF

THE ADVISORY COMMITTEE ON COLLECTIVE BARGAINING

FOR

JUDICIAL DEPARTMENT EMPLOYEES

March, 1984

MEMBERS:

James W. Carignan, Chairman
Donald F. Fontaine
George A. Hunter
Charles J. O'Leary
Gerald E. Rudman

STAFF:

David Gregory, Reporter to the Committee
Sarah J. Hooke, Legislative Counsel

BATES COLLEGE
Lewiston, Maine 04240

Office of
Dean of the College

March 8, 1984

Hon. Gerard P. Conley
President of the Senate
State House
Augusta, ME 04333

Hon. John L. Martin
Speaker of the House
State House
Augusta, ME 04333

Dear Mr. President and Mr. Speaker:

Pursuant to P.L. 1983, chapter 412, I am pleased to present the Legislature with the full Report of the Advisory Committee on Collective Bargaining for Judicial Department Employees. The Committee hopes these documents will assist the Legislature in its consideration of the proposed legislation as well as serve as background materials for the participation of the courts, the Legislature and the public in the collective bargaining process.

Please contact me if the Committee can be of further assistance.

Sincerely,

James W. Carignan

James W. Carignan
Dean of the College

enclosure
JWC/elk

TABLE OF CONTENTS

		Page
I.	Introduction	1
II.	LD 1660, "AN ACT to Authorize the Supreme Judicial Court to Provide for Collective Bargaining for Judicial Department Employees," including statement of fact	2
III.	P.L. 1983, c. 412, enacting LD 1660	4
IV.	July 6, 1983, Order of the Supreme Judicial Court, "Establishment of Advisory Committee on Collective Bargaining for Judicial Department Employees"	6
V.	Letter of Dec. 30, 1983 from Chief Justice Vincent McKusick to President of the Senate Gerard Conley and Speaker of the House John Martin transmitting the Advisory Committee's recommendations	8
VI.	Introduction by the Advisory Committee	11
VII.	Proposed Administrative Order of Supreme Judicial Court, with Comment by the Advisory Committee	13
VIII.	Proposed Judicial Employees Labor Relations Act, with Comment by the Advisory Committee	22
IX.	LD 2175, "AN ACT to Create the Judicial Employees Labor Relations Act	47

I. INTRODUCTION

This report and accompanying documents result from the desire of the Legislature and the Supreme Judicial Court of Maine to extend collective bargaining rights to judicial employees. In its First Session, the 111th Legislature enacted PL 1983, chapter 412, which authorized the Supreme Judicial Court to propose appropriate procedures for defining and implementing the collective bargaining rights of judicial employees, designate an advisory committee to recommend these procedures, and report them back to the Second Regular Session. In its order of July 6, 1983, the Supreme Judicial Court established an Advisory Committee on Collective Bargaining for Judicial Department Employees composed of the following members:

James W. Carignan of Lewiston, Chair
Donald F. Fontaine of Portland
George A. Hunter of Augusta
Charles J. O'Leary of Brewer
Gerald E. Rudman of Bangor

After consultation with legislative leaders, representatives of labor and management in public employment, judicial employees and administrators and others knowledgeable in collective bargaining processes, the Committee reported back to the Court, which unanimously accepted the Committee's recommendations. The Chief Justice reported back to the Legislature on December 30, 1983 with the Committee's Introduction, a proposed Court Administrative Order with Committee Comment, and proposed legislation with Committee Comment.

All the documents involved in this process are contained in this report. The statements of fact in the legislative documents and comments and introduction accompanying the Advisory Committee's proposals are intended to convey the background, reasoning and intent behind the language in the Administrative Order and Legislative Document to those using and interpreting these documents in the future.

(New Draft of H.P. 333, L.D. 392)
(New Title)

FIRST REGULAR SESSION

ONE HUNDRED AND ELEVENTH LEGISLATURE

Legislative Document No. 1660

H.P. 1246 House of Representatives, May 23, 1983

Reported by the Majority from the Committee on Labor and printed under Joint Rule 2.

Original bill presented by Representative Hobbins of Saco. Cosponsored by Senator Carpenter of Aroostook and Senator Violette of Aroostook.

EDWIN H. PERT, Clerk

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-THREE

AN ACT to Authorize the Supreme Judicial Court to Provide for Collective Bargaining for Judicial Department Employees.

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 4 MRSA c. 1, sub-c. 1-E is enacted to read:

SUBCHAPTER 1-E
COLLECTIVE BARGAINING

§31. Purpose

It is declared to be the public policy of the State and it is the purpose of this subchapter to promote the continued improvement of the relationship

between the Judicial Department and its employees by providing a uniform basis for recognizing the right of judicial employees to join labor organizations of their own choosing and to be represented by these organizations in matters concerning their employment relations with the Judicial Department.

§32. Procedures; advisory committee

1. Collective bargaining. The Supreme Judicial Court may propose appropriate procedures for defining and implementing the collective bargaining rights of Judicial Department employees, including, without limitation, definition of employees and appropriate subjects of collective bargaining, determination of appropriate bargaining units, certification and election of a bargaining agent, appeals process, impasse resolution procedure and enforcement mechanisms.

2. Advisory committee. The Supreme Judicial Court shall designate an advisory committee to recommend procedures. The committee shall include representatives of public sector management and public sector bargaining agents. Opportunity shall be provided for the expression of views of Judicial Department employees.

Sec. 2. Report. The proposed procedures shall be reported back to the Legislature by the start of the Second Regular Session of the 111th Legislature.

STATEMENT OF FACT

This new draft adds a new subchapter to Title 4, chapter 1, which authorizes the Supreme Judicial Court to propose appropriate procedures for defining and implementing collective bargaining rights of Judicial Department employees. The court will designate an advisory committee to recommend procedures which will include both management and labor representatives from the public sector. The proposed procedures will be reported back to the Legislature by the start of the Second Regular Session of the 111th Legislature for further action.

3991051883

APPROVED
JUN 7 '83
BY GOVERNOR

CHAPTER
412
PUBLIC LAW

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-THREE

H.P. 1246 - L.D. 1660

AN ACT to Authorize the Supreme Judicial Court to Provide for Collective Bargaining for Judicial Department Employees.

Be it enacted by the People of the State of Maine as follows:

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2. Advisory committee. The Supreme Judicial Court shall designate an advisory committee to recommend procedures. The committee shall include representatives of public sector management and public sector bargaining agents. Opportunity shall be provided for the expression of views of Judicial Department employees.

Sec. 2. Report. The proposed procedures shall be reported back to the Legislature by the start of the Second Regular Session of the 111th Legislature.

STATE OF MAINE

SUPREME JUDICIAL COURT

Docket No. SJC-126

ESTABLISHMENT OF ADVISORY COMMITTEE ON
COLLECTIVE BARGAINING FOR JUDICIAL DEPARTMENT EMPLOYEES

Effective July 6, 1983

All of the Justices concurring therein,

1. There is hereby established an Advisory Committee on Collective Bargaining for Judicial Department Employees, whose duty shall be to recommend to the Supreme Judicial Court appropriate procedures for defining and implementing the collective bargaining rights of Judicial Department employees, as declared in chapter 412 of the Public Laws of 1983. The Advisory Committee shall provide Judicial Department employees an opportunity to express their views. The Advisory Committee is requested to make its report to the Supreme Judicial Court from time to time, but in no event later than November 15, 1983.

2. The following persons are hereby appointed as Chairman and members of the Advisory Committee on Collective Bargaining for Judicial Department Employees:

James W. Carrigan of Lewiston, Chairman
Donald F. Fontaine of Portland
George A. Hunter of Augusta
Charles J. O'Leary of Brewer
Gerald E. Rudman of Bangor

3. Professor David D. Gregory of the University of Maine School of Law is hereby appointed Reporter to the Advisory Committee on Collective Bargaining for Judicial department Employees.

4. Justice David G. Roberts is designated as Judicial Liaison to the Advisory Committee on Collective Bargaining for Judicial

~~This~~ order shall be recorded in the Maine Reporter.

Dated: July 6, 1983.

Vincent L. McKusick
Chief Justice

Edward S. Godfrey

David A. Nichols

David G. Roberts

Elmer H. Violette

Daniel E. Wathen
Associate Justices

STATE OF MAINE
SUPREME JUDICIAL COURT
PORTLAND, MAINE 04112

VINCENT L. McKUSICK
CHIEF JUSTICE

P O BOX 4810
207 775-0577

December 30, 1983

The Honorable Gerard P. Conley
President of the Senate
State House
Augusta, ME 04333

The Honorable John L. Martin
Speaker of the House
State House
Augusta, ME 04333

Dear Mr. President and Mr. Speaker:

On behalf of myself and my colleagues of the Supreme Judicial Court, I am pleased to report back to the Legislature pursuant to section 2 of P.L. 1983, chapter 412, "AN ACT to Authorize the Supreme Judicial Court to Provide for Collective Bargaining for Judicial Department Employees."

At the First Regular Session of the 111th Legislature, chapter 412 was enacted and was approved by the Governor on June 7, 1983, to authorize the Supreme Judicial Court to propose appropriate procedures for defining and implementing the collective bargaining rights of Judicial Department employees. By the same legislation, the Supreme Judicial Court was authorized to appoint an advisory committee, which was to include representation of public sector management and public sector bargaining agents and was to provide for expression of views of Judicial Department employees. The proposed procedures were to be reported back to the Legislature by the start of the Second Regular Session of the 111th Legislature.

Pursuant to chapter 412, the Supreme Judicial Court promptly appointed an Advisory Committee on Judicial Employees Collective Bargaining, consisting of the following five members: Professor James W. Carignan, Lewiston, Dean of Students of Bates College; Donald F. Fontaine, Esq., Portland; George A. Hunter, Augusta, of the Maine Municipal Association; Charles J. O'Leary, Brewer, of the Maine AFL-CIO; and Gerald E. Rudman, Esq., Bangor. Dean Carignan was designated as Chairman of the Committee, and Professor David D. Gregory of the University of Maine School of Law was asked to serve as Reporter to the Advisory Committee.

After several public hearings at various locations within the state and a number of working sessions, the Advisory Committee submitted to the Supreme Judicial Court its recommendations for a system of collective bargaining for judicial employees. In its basic structure, the Committee's proposal envisions parallel action by the Legislature and the Supreme Judicial Court. The Committee recommended that the Court promulgate an administrative order and that the Legislature enact statutory provisions essentially paralleling and supplementing the order.

The members of the Supreme Judicial Court have met twice with the Advisory Committee or its representatives and have carefully reviewed their recommendations. As a result of our consideration of the Committee's recommendations, we are prepared to adopt unanimously the proposed administrative order to be effective contemporaneously with the effective date of the proposed statute, when enacted. In order to preclude possible misinterpretation of our action in accepting the Committee's recommendations, however, we should make two additional observations.

The first concerns the separation of judges from the bargaining process. Pursuant to article VI of the Constitution of Maine and 4 M.R.S.A. § 1, the Supreme Judicial Court has general administrative and supervisory authority over the Judicial Department. By statute the Chief Justice of the Supreme Judicial Court serves as the head of the Judicial Department. Nothing contained in the proposed administrative order should be construed to suggest that this Court or the Chief Justice is permitted to abandon those constitutional and statutory responsibilities.

The second observation concerns the effect of our approval of the Committee's recommendation. We members of the Supreme Judicial Court, in the exercise of our administrative and supervisory authority, cannot determine in advance what decision may be reached in an actual litigated case when the Law Court's authority as an appellate court is invoked. If a constitutional question concerning, for example, the separation of powers doctrine should be presented to the Law Court, that question must be decided by that Court upon the basis of applicable law, applied to the facts of the particular case, without regard for the fact that the Law Court may be reviewing action taken by us in discharge of our administrative responsibilities.

The above observations do not detract from the value of the assistance we have received from the Advisory Committee. We are all much indebted to the Committee members and the Reporter, who are all persons of experience in public employee labor relations, for the dedicated and expeditious discharge of their task.

We transmit to you herewith the Committee's submission to us, which consists of the following:

1. Introduction by the Advisory Committee.

2. Proposed Administrative Order of the Supreme Judicial Court, entitled "Judicial Employee Labor Relations," with Comment by the Advisory Committee.

3. Proposed statute entitled "Judicial Employees Labor Relations Act," with Comments by the Advisory Committee.

We report the Committee's proposals to the Legislature with the recommendation that they be favorably considered at this Second Regular Session.

With all best wishes for the New Year,

Sincerely,

Vincent L. McKusick

ln
Enclosures

cc. Hon. Dennis L. Dutremble
Senate Chair, Labor Committee

Hon. Edith S. Beaulieu
House Chair, Labor Committee

ADVISORY COMMITTEE ON COLLECTIVE BARGAINING
FOR JUDICIAL DEPARTMENT EMPLOYEES

INTRODUCTION

The Supreme Judicial Court established this Advisory Committee with the concurrence of the Legislature for the purpose of recommending a system of collective bargaining for judicial employees. We have been assisted in our work by the advice of legislative leaders, representative of labor and management in public employment, judicial employees and administrators, and others knowledgeable about the processes of collective bargaining. We have confronted problems of practicality and principle. We have exercised our best judgment and submit herewith our recommendations.

Needless to say, the State Legislature, which establishes public policy for the state, has set the standard for collective bargaining by public employees. The statutory systems for state and local governments reflect legislative judgments on the scope of collective bargaining rights and proper methods of enforcement. We have sought to ensure that the same rights be extended to judicial employees without diminution and that they be protected by workable enforcement mechanisms. To this end, we have adhered as closely as may be to the existing statutory schemes.

As a practical matter, a body of experience and expertise has developed over the years in which state and local employees have been bargaining collectively. We believe that this experience and expertise should be used, not lost, when extending collective bargaining to the employees of the Judicial Department. Thus, we are recommending that the Maine Labor Relations Board exercise the same functions and authority with respect to judicial employees' collective bargaining as it now possesses with respect to other state employees.

There is disagreement among the authorities around the country as to whether the separation of powers doctrine forbids, or allows, the state legislatures to require collective bargaining in judicial departments. This division of opinion was reflected in our own deliberations.

The Committee did not find it necessary to seek a final resolution of this issue, because our recommendation consists of both a proposed statute and a proposed order of the Supreme Judicial Court establishing collective bargaining for employees of the Judicial Department. Taken together the two documents would continue a cooperative relationship, traditional in Maine,

between the legislature and the judiciary in this important intersection of public policy and judicial administration. The Supreme Judicial Court has the exclusive constitutional duty to supervise and regulate the administration of justice in this state. The proposed court order and statute extend the rights of collective bargaining to the Judicial Department's employees and empowers nonjudicial agencies to affect the collective bargaining process. In contrast, the proposed statute contains the details of collective bargaining. Once the Court and Legislature extend the rights and powers associated with collective bargaining, there is considerable practical utility in leaving the details to the Legislature. If changes of detail are deemed desirable for employees of the executive branch, commensurate changes can automatically be made in the judicial system as well. On the other hand, if a major change were to be made, giving a right to strike for example, then amendments to both the statute and court order would be appropriate after consultation between designated representatives of the Judicial Department and the Legislature.

We have attempted to exclude the judges themselves, as the holders of the judicial power, from the actual process of collective bargaining. The courts will inescapably be required to review agreements and grievances and awards which collective bargaining have produced. The integrity of the judicial power in such cases requires some distance from the process of bargaining. The proposed order for the Supreme Judicial Court would set the process in motion which would thereafter be in the hands of others except when changes intimately affecting judicial administration are proposed.

In the event that fundamental changes in the system are suggested, changes which require amendment to both the statute and court order, we suggest that a new advisory committee be established, similar to ours, to assess the proposals and make recommendations to both the Legislature and the Court.

PROPOSED ADMINISTRATIVE ORDER OF SUPREME JUDICIAL COURT

JUDICIAL EMPLOYEES LABOR RELATIONS

(Proposed by Advisory Committee)

Whereas it is the policy of the Judicial Department to promote improvement of the relationship between the Judicial Department and its employees by recognizing the right of judicial 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, all of the Justices concurring therein, it is hereby ORDERED:

¶ 1. Right of judicial employees to join labor organizations

No one shall directly or indirectly interfere with, intimidate, restrain, coerce or discriminate against judicial employees or a group of judicial employees in the free exercise of their rights, hereby given, voluntarily to join, form and participate in the activities of organizations of their own choosing for the purposes of representation and collective bargaining, or in the free exercise of any other right under this chapter.

¶ 2. Prohibited acts

1. Judicial Department prohibitions. The Judicial Department, its representatives and agents are prohibited from:

A. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed in paragraph 1;

B. Encouraging or discouraging membership in any employee organization by discrimination in regard to hire or tenure of employment or any term or condition of employment;

C. Dominating or interfering with the formation, existence or administration of any employee organization;

D. Discharging or otherwise discriminating against an employee because he has signed or filed any affidavit, petition or complaint or given any information or testimony under this chapter;

E. Refusing to bargain collectively with the bargaining agent of its employees as required by paragraph 3;

F. Blacklisting any employee organization or its members for the purpose of denying them employment.

2. Judicial employee prohibitions. Judicial employees, judicial employee organizations, their agents, members and bargaining agents are prohibited from:

A. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed in paragraph 1, or the Judicial Department in the selection of its representative for purpose of collective bargaining or the adjustment of grievances;

B. Refusing to bargain collectively with the Judicial Department as required by paragraph 3;

C. Engaging in:

(1) A work stoppage;

(2) A slowdown;

(3) A strike; or

(4) The blacklisting of the Judicial Department for the purpose of preventing it from filling employee vacancies.

¶ 3. Obligation to bargain, and methods of resolving disputes

1. Negotiations. It shall be the obligation of the Judicial Department and the bargaining agent for judicial employees to bargain collectively.

2. Mediation. Mediation procedures shall be followed whenever either party to a controversy requests such services prior to arbitration or at any time on motion of the Maine Labor Relations Board or its executive director.

3. Fact-finding. If the parties are unable to settle a controversy, they may agree either to call upon the Maine Labor Relations Board for fact-finding services or to pursue some other mutually acceptable fact-finding procedure.

4. Arbitration

A. Binding on all issues. The parties may agree to an arbitration procedure which will result in a binding determination of their controversy.

B. Binding except as to salaries, pensions, and insurance. If the parties do not agree to the arbitration procedure of subparagraph A, either party may petition the board to initiate arbitration which shall be binding except as to salaries, pensions, and insurance.

5. Mediation-Arbitration. The parties may agree to a mediation-arbitration procedure. The parties may agree in advance that all issues will be subject to binding arbitration. Otherwise, arbitration shall be binding except as to salaries, pensions, and insurance.

¶ 4. Determination of bargaining unit

1. Disputes between the Judicial Department and a judicial employee or employees over the appropriateness of a unit for purposes of collective bargaining or over whether a supervisory or other position is included in a bargaining unit or over unit clarification shall be resolved by the executive director of the Maine Labor Relations Board.

¶ 5. Determination of bargaining agent

1. The Judicial Department may recognize as the bargaining agent any judicial employee organization which files a request alleging that a majority of the judicial employees in an appropriate bargaining unit wish to be represented by that organization.

2. The Judicial Department or thirty percent of the judicial employees of a bargaining unit may request that the executive director of the Maine Labor Relations Board conduct an election in accordance with rules prescribed by the board to determine whether a majority of the judicial employees within a unit wish to be represented by a bargaining agent.

3. Thirty percent of the employees in a certified bargaining unit may request that the executive director of the Maine Labor Relations Board conduct an election to determine whether a bargaining agent shall be decertified.

¶ 6. Maine Labor Relations Board; Rule-making procedure and review of proceedings

1. Rule-making procedure. Proceedings conducted under this order shall be subject to the rules and procedures of the Maine Labor Relations Board promulgated under 26 M.R.S.A. § 968, subsection 3.

2. Review of representation proceedings. Any person aggrieved by any ruling or determination of the executive director under paragraphs 4 and 5 may appeal, within 15 days of the announcement of the ruling or determination, except that in the instance of objections to the conduct of an election or challenged ballots the time period shall be five working days, to the Maine Labor Relations Board. Upon receipt of such an appeal, the board shall, within a reasonable time, hold a hearing, having first caused seven days' notice in writing of the time and place of such hearing to be given to the aggrieved party, the labor organizations or bargaining agent and the Judicial Department. Such hearings and the procedures established in furtherance thereof shall be in accordance with 26 M.R.S.A.§ 968. Decisions of the board made pursuant to this subsection shall be subject to review by the Superior Court in the manner specified in paragraph 10.

¶ 7. Prevention of prohibited acts

1. The Maine Labor Relations Board is empowered to prevent any person, the Judicial Department, any judicial employee, any judicial employee organization or any bargaining agent from engaging in any of the prohibited acts enumerated in paragraph 2.

2. The executive director of the Maine Labor Relations Board may investigate complaints of prohibited acts and may recommend proposed settlements. The executive director may cause a formal hearing to be held before the Maine Labor Relations Board on any complaints of prohibited acts.

3. After hearing and argument, if, upon a preponderance of the evidence received, the board shall be of the opinion that any party named in the complaint has engaged in or is engaging in any such prohibited practice, then the board shall in writing state its findings of fact and the reasons for its conclusions and shall issue and cause to be served upon such party an order requiring such party to cease and desist from such prohibited practice and to take such

affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Order. No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

4. After hearing and argument, if the board is not persuaded by a preponderance of the evidence received that the party named in the complaint has engaged in or is engaging any such prohibited practice, then the board shall in writing state its findings of fact and the reasons for its conclusions and shall issue an order dismissing said complaint.

5. If after the issuance of an order by the board requiring any party to cease and desist or to take any other affirmative action, said party fails to comply with the order of the board, then the party in whose favor the order operates or the board may file a civil action in the Superior Court in Kennebec County, to compel compliance with the order of the board. In such action to compel compliance, the Superior Court shall not review the action of the board other than to determine questions of law. If an action to review the decision of the board is pending at the time of the commencement of an action for enforcement pursuant to this subparagraph or is thereafter filed, the two actions shall be consolidated.

6. Whenever a complaint is filed with the executive director of the board, alleging that the public employer has violated paragraph 2.1F or alleging that a judicial employee or judicial employee organization or bargaining agent has violated paragraph 2.2C, the party making the complaint may simultaneously seek interim injunctive relief from the Superior Court in the county in which the prohibited practice is alleged to have occurred pending the final adjudication of the board with respect to such matter.

7. Either party may seek a review by the Superior Court in Kennebec County of a decision or order of the Maine Labor Relations Board by filing a complaint in accordance with rule 80C of the Maine Rules of

Civil Procedure, provided the complaint shall be filed within 15 days of the effective date of the decision. Upon the filing of the complaint, the court shall set the complaint down for hearing at the earliest possible time and shall cause all interested parties and the board to be notified. Pending review and upon application of any party in interest, the court may grant such temporary relief or restraining order and may impose such terms and conditions as it deems just and proper; provided that the board's decision or order shall not be stayed, except where it is clearly shown to the satisfaction of the court that substantial and irreparable injury will be sustained or that there is a substantial risk of danger to the public health, safety or welfare or interferes with the exercise of the judicial power. The executive director shall forthwith file in the court the record in the proceeding certified by the executive director or a member of the board. The record shall include all documents filed in the proceeding and the transcript, if any. After hearing, which shall be held not less than seven days after notice thereof, the court may enforce, modify, enforce as so modified or set aside in whole or in part the decision of the board, except that the finding of the board on questions of fact shall be final unless shown to be clearly erroneous. Any appeal to the law court shall be the same as an appeal from an interlocutory order under 26 M.R.S.A. § 6.

8. In any judicial proceeding authorized by this subsection in which injunctive relief is sought, 26 M.R.S.A. § 5 and § 6 shall apply, except that neither an allegation nor proof of unavoidable substantial and irreparable injury to the complaint's property shall be required to obtain a temporary restraining order or injunction.

9. The Maine Labor Relations Board shall not have the power to interfere with the exercise of the judicial power.

¶ 8. Hearings before Maine Labor Relations Board

1. Hearings conducted by the board shall be informal and the rules of evidence prevailing in judicial proceedings shall not be binding. Any and all documentary evidence and other evidence deemed relevant by the board may be received.

2. The chairman shall have the power to administer oaths and to require by subpoena the attendance and testimony of witnesses, the presentation of books, records and other evidence relative or pertinent to the issues presented to the board for determination. Witnesses subpoenaed by the board shall be allowed the same fees as are paid to witnesses in the Superior Court. These fees, together with all the necessary expenses of the board, shall be paid by the Treasurer of State on warrants drawn by the State Controller.

¶ 9. Scope of binding contract arbitration

A collective bargaining agreement may provide for binding arbitration as the final step of a grievance procedure, but the only grievances which may be taken to such binding arbitration shall be disputes between the parties as to the meaning or application of the specific terms of the collective bargaining agreement. An arbitrator with the power to make binding decisions pursuant to any such provision shall have no authority to add to, subtract from or modify the collective bargaining agreement.

¶ 10. Review of arbitration awards

1. Either party may seek a review by the Superior Court of a binding determination by an arbitration panel. Such review shall be sought in accordance with rule 80C of the Maine Rules of Civil Procedure.

2. In the absence of fraud, the binding determination of an arbitration panel or arbitrator or mediator-arbitrator shall be final upon all questions of fact.

3. The court may, after consideration, affirm, reverse or modify any such binding determination or decision based upon any erroneous ruling. An appeal may be taken to the law court as in any civil action.

¶ 11. Definition of Judicial Employee

For the purposes of this Order "judicial employee" means any employee of the Judicial Department except any person:

1. Who is appointed by the Governor;

2. Who serves as the State Court Administrator;

3. Whose duties necessarily imply a confidential relationship to the Judicial Department's bargaining representative with respect to matters subject to collective bargaining;

4. Who is a department or division head;

5. Who is appointed to serve as a law clerk to a judge or a justice;

6. Who is a temporary, seasonal or on-call employee, including interns; or

7. Who has been employed for less than six months.

¶ 12. Judicial Department bargaining representative

Subject to Article VI of the Maine Constitution and 4 M.R.S.A. § 1, the State Court Administrator shall be the Judicial Department's bargaining representative.

ADVISORY COMMITTEE'S
COMMENT

This order is a companion to the proposed legislation entitled, "Judicial Employees Labor Relations Act." Together they would establish a complete system of collective bargaining for Judicial Department employees. We propose that the order be entered by the Supreme Judicial Court in the exercise of its constitutional and statutory authority to administer and supervise the Judicial Department. The order sets forth the rights associated with collective bargaining, defines who shall participate in collective bargaining, and designates agencies having authority to take action with respect to collective bargaining, including the State Court Administrator, the Maine Labor Relations Board, its executive director, and mediators, fact-finders, arbitrators, and mediator-arbitrators. The proposed order is more general than the proposed legislation. Details of collective bargaining procedures are set out exclusively in the statute. Such details can be altered by the Legislature after consultation with the Court. If major changes are

needed, this proposal contemplates parallel amendments to both the court order and the statute. Coordination between the Legislative and Judicial Departments would be required.

The entire process is necessarily subject to both the constitutional judicial power and the constitutional legislative power. Two issues of separation of powers inhere in the system. First is whether the source of a collective-bargaining system is properly legislative or judicial; and second is whether executive agencies can be authorized to review actions of the judiciary. Both issues are mentioned in District Court v. Williams, 268 A.2d 812 (1970). We have sought to avoid the separation of powers problems by recommending both a proposed court order and statute. While we could have attempted to resolve the separation problems on principle now, we believe that they can be more appropriately resolved in specific cases on specific facts should they later arise. Similarly, issues may arise presenting conflicts between collective-bargaining agreements or decisions on prohibited acts and the constitutional power of the judiciary: the Court's authority to operate a court for the purpose of entertaining and deciding litigation cannot be superseded. While we hope to minimize any such controversies by the Court's acceptance of the proposed court order, we recognize that the Court cannot constitutionally consent to infringement or divestment of its judicial power. Surely the act of the Court in establishing a collective-bargaining system, which is itself an exercise of the necessary powers of the judiciary, see Maine Constitution, Article VI, § 1; 4 M.R.S.A. § 1, should go far toward avoiding these controversies.

JUDICIAL EMPLOYEES LABOR RELATIONS ACT

(Proposed by Advisory Committee)

§ 1. PURPOSE

It is declared to be the public policy of this State and it is the purpose of this chapter to promote improvement of the relationship between the Judicial Department of the State of Maine and its employees by cooperating with the Supreme Judicial Court in recognizing the right of judicial 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.

Advisory Committee's
Comment

Both the Legislature of Maine and the Supreme Judicial Court of Maine have formally expressed their commitment to collective bargaining for judicial employees. The commitment of the 111th Legislature is embodied in chapter 412 of the Public Laws of 1983, "An Act to Authorize the Supreme Judicial Court to Provide for Collective Bargaining for Judicial Department Employees." The Supreme Judicial Court's commitment is found in its order of July 6, 1983, establishing "an Advisory Committee on Collective Bargaining for Judicial Department Employees, whose duty shall be to recommend to the Supreme Judicial Court appropriate procedures for defining and implementing the collective bargaining rights of Judicial Department employees, as declared in chapter 412 of the Public Laws of 1983." This cooperative commitment of two great branches of government is simply the latest in a series of steps to extend the right of collective bargaining to public employees in this State. Beginning in 1965 with the enactment of the Fire Fighters Arbitration Law collective-bargaining rights have progressively been extended to municipal employees, state employees, state university employees, the Maine Turnpike Authority's employees, and county employees. See McGuire & Dench, Public Employees Labor Relations Law: The First Five Years, 27 Maine Law Review 29 (1975). Public employee collective bargaining was sufficiently expansive in Maine that in 1975 it could be said, "Employees of judicial and legislative branches and county employees are the only remaining public servants not covered by bargaining legislation." Ibid. County employees were included in 1981, see 26 M.R.S.A.§ 962, definition 7 (Supp.), and the present proposal would place judicial employees on the list of public servants who have the right to bargain collectively.

By cooperating to achieve this goal the Legislature and the Supreme Judicial Court are continuing a tradition of reciprocal respect between coordinate branches of government. Thus the Legislature has recognized the authority of the Court to prescribe rules of civil procedure, rules of criminal procedure, rules of evidence, rules on court records and abandoned property, and rules on judicial discipline. See 4 M.R.S.A. §§ 8, 9, 9-A 8-A, and 9-B. Indeed, the Legislature has recognized the power of the court to "prescribe by rule a personnel classification plan for all courts in the Judicial Department." 4 M.R.S.A. § 23. Because the Legislature and the Court agree on the desirability of bringing collective bargaining to the Judicial Department the tradition of cooperation can be perpetuated by the present proposal.

§ 2. DEFINITIONS

As used in this chapter the following terms shall, unless the context requires a different interpretation, have the following meanings:

1. **Bargaining agent.** "Bargaining agent" means any lawful organization, association or individual representative of such organization or association which has as its primary purpose the representation of employees in their employment relations with employers, and which has been determined by the public employer as defined in subsection 5 or by the executive director of the board to be the choice of the majority of the unit as their representative.

2. **Board.** "Board" means the Maine Labor Relations Board as defined in 26 M.R.S.A. § 968.

3. **Cost items.** "Cost items" means the provisions of a collective bargaining agreement which require an appropriation by the Legislature.

4. **Executive director.** "Executive director" means the Executive Director of the Maine Labor Relations Board as defined in 26 M.R.S.A. § 968, subsection 2.

5. **Public employer.** "Public employer" means the Judicial Department of the State of Maine. It is the responsibility of the Judicial Department to negotiate collective bargaining agreements and to administer such agreements.

It is the responsibility of the legislative branch to act upon those portions of tentative agreements negotiated by the Judicial Department which require legislative action. To coordinate the employer position in the negotiation of agreements the Legislative Council or its designee shall maintain close liaison with the bargaining representative of the Judicial Department relative to negotiating cost items in any proposed agreement. The Supreme Judicial Court may designate a bargaining representative for the Judicial Department who may:

A. Develop and execute employee relations policies, objectives and strategies consistent with the overall objectives and constitutional and statutory duties of the Judicial Department;

B. Conduct negotiations with certified and recognized bargaining agents;

C. Administer and interpret collective bargaining agreements, and coordinate and direct Judicial Department activities as necessary to promote consistent policies and practices;

D. Represent the Judicial Department in all bargaining unit determinations, elections, prohibited practice complaints and any other proceedings growing out of employee relations and collective bargaining activities;

E. Coordinate the compilation of all data and information needed for the development and evaluation of employee relations programs and in the conduct of negotiations;

F. Coordinate the Judicial Department's resources as needed to represent the Department in negotiations, mediation, fact finding, arbitration, mediation-arbitration and other proceedings; and

G. Provide staff advice on employee relations to the courts, judges, and supervisory personnel including providing for necessary supervisory and managerial training.

All state departments and agencies shall provide such assistance, services and information as required by the Judicial Department and shall take such administrative or other action as may be necessary to implement and administer the provisions of any binding agreement between the Judicial Department and employee organizations entered into under law.

Advisory Committee's
Comment

This section defines who is to sit on the employer side of the table in collective bargaining with Judicial Department employees. The differences between this section and the parallel provision in the State Employees Labor Relations Act, 26 M.R.S.A. § 979-A, definition 5 (Supp.), are not designed to alter the responsibilities of the public employer. Nevertheless, changes are required to recognize constitutional differences between the Executive and Judicial branches of government. By command of the Constitution the Governor possess "[t]he supreme executive power of this State," Constitution of Maine, art. V, § 1, while "[t]he judicial power of this State" is vested in the Supreme Judicial Court, id. art. VI, § 1. This means that the courts have the ultimate power and duty to adjudicate issues arising from collective-bargaining disputes. The Supreme Judicial Court also has "general administrative and supervisory authority over the Judicial Department." 4 M.R.S.A. § 1; Board of Overseers of the Bar v. Lee, 422 A.2d 998 (1980). The Chief Justice is the head of the Judicial Department. Ibid. Because of the judicial function of deciding controversies concerning collective-bargaining agreements, it is advisable for the Court to remove itself, to the extent consistent with the Constitution and laws of Maine, from the process of collective bargaining by designating some other office to perform the function of bargaining representative for the Judicial Department.

A logical choice is the State Court Administrator. The present duties of that office are consistent with functions assigned to the public employer. See 4 M.R.S.A. § 17. Inasmuch as the Supreme Judicial Court possesses an inherent power to regulate the judiciary, see 4 M.R.S.A. § 1, it is within that Court's prerogative to designate who shall serve as the Department representative for collective-bargaining purposes. The bargaining representative's authority would permit consultation with the chief judges of the District and Superior Courts on matters affecting the operation of the courts.

In keeping with the State Employees Labor Relations Act, this proposal recognizes that the Legislature assumes special responsibilities when it acts to extend collective-bargaining rights to public employees. Cost items in particular must ultimately be passed upon by the Legislature. For that reason it is desirable that the legislative branch maintain liaison with those persons in the Judicial Department who are negotiating with judicial employees.

6. Judicial employee. "Judicial employee" means any employee of the Judicial Department except any person:

A. Who is appointed by the Governor;

B. Who serves as the State Court Administrator;

C. Whose duties necessarily imply a confidential relationship to the Judicial Department's bargaining representative with respect to matters subject to collective bargaining;

D. Who is a department or division head;

E. Who is appointed to serve as a law clerk to a judge or a justice;

F. Who is a temporary, seasonal or on-call employee, including interns; or

G. Who has been employed for less than six months.

Advisory Committee's
Comment

This section defines those who can participate in selecting a bargaining agent and who otherwise are entitled to enjoy the rights of collective bargaining. The section is designed to be as inclusive as possible unless there is some good reason for exclusion. Judges are excluded because their judicial duties must inevitably include deciding issues arising from collective-bargaining disputes and because the performance of their judicial duties is subject to review and regulation by the Supreme Judicial Court. The State Court Administrator is excluded even if he is not designated as the Judicial Department's bargaining representative because of his inherently managerial functions. See 4 M.R.S.A. § 17. Law clerks to the judges and justices are excluded because of their participation in assisting judges in performing their essential judicial function. (Law clerks, who are typically appointed for one-year terms, would in any case be eligible for participation for only a six-month period.) Other persons who serve the judiciary, such as referees, receivers, and appointees to advisory committees, are not specifically excluded because they would not be considered to be "employees" of the Judicial Department. Personnel of the Board of Overseers of the Bar are not "employees" of the Judicial Department.

This proposal does not exclude supervisory personnel, such as clerks of the various courts, or persons who stand in a confidential relationship to the judges, such as the judges' personal secretaries. While supervisory employees may well require separate representation, they remain Judicial Department employees who can fruitfully negotiate on the terms and conditions of their employment. Because the judges and justices are removed from the collective-bargaining process, there is no apparent need to exclude their personal secretaries from collective bargaining.

Regional Court Administrators would be excluded if the functions of their offices bring them within subparagraph C or D. A small number of employees in the State Court Administrator's office will likely be excluded under subparagraph C.

§ 3. RIGHT OF JUDICIAL EMPLOYEES TO JOIN LABOR ORGANIZATIONS

No one shall directly or indirectly interfere with, intimidate, restrain, coerce or discriminate against judicial employees or a group of judicial employees in the free exercise of their rights voluntarily to join, form and participate in the activities of organizations of their own choosing for the purposes of representation and collective bargaining, or in the free exercise of any other right under this act.

§ 4. PROHIBITED ACTS OF THE PUBLIC EMPLOYER, JUDICIAL EMPLOYERS, AND JUDICIAL EMPLOYEE ORGANIZATIONS

1. **Public employer prohibitions.** The public employer, its representatives and agents are prohibited from:

A. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed in section 3;

B. Encouraging or discouraging membership in any employee organization by discrimination in regard to hire or tenure of employment or any term or condition of employment;

C. Dominating or interfering with the formation, existence or administration of any employee organization;

D. Discharging or otherwise discriminating against an employee because he has signed or filed any affidavit, petition or complaint or given any information or testimony under this act;

E. Refusing to bargain collectively with the bargaining agent of its employees as required by section 5;

F. Blacklisting any employee organization or its members for the purpose of denying them employment.

2. **Judicial employee prohibitions.** Judicial employees, judicial employee organizations, their agents, members and bargaining agents are prohibited from:

A. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed in section 3 or the public employer in the selection of its representative for purposes of collective bargaining or the adjustment of grievances;

B. Refusing to bargain collectively with the public employer as required by section 5;

C. Engaging in:

(1) A work stoppage;

(2) A slowdown;

(3) A strike; or

(4) The blacklisting of the public employer for the purpose of preventing it from filling employee vacancies.

3. **Violations.** Violations of this section shall be processed by the board in the manner provided in section 9.

S 5. OBLIGATION TO BARGAIN, AND METHODS OF RESOLVING DISPUTES

1. **Negotiations.** On and after [date] it shall be the obligation of the public employer and the bargaining agent to bargain collectively. "Collective bargaining" means, for the purpose of this chapter, their mutual obligation:

A. To meet at reasonable times;

B. To meet within 10 days after receipt of written notice from the other party requesting a meeting for collective bargaining purposes, provided the parties have not otherwise agreed in a prior written contract;

C. To execute in writing any agreements arrived at, the term of any such agreement to be subject to negotiation but shall not exceed 2 years; and

D. To participate in good faith in the mediation, fact finding, arbitration, and mediation-arbitration procedures required by this section;

E.

(1) To confer and negotiate in good faith with respect to wages, hours, working conditions 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. 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 law. Such matters appropriate for collective bargaining to the extent they are not prescribed or controlled by law include but are not limited to:

(a) Wage and salary schedules to the extent they are inconsistent with rates prevailing in commerce and industry for comparable work within the State;

(b) Work schedules relating to assigned hours and days of the week;

(c) Use of vacation or sick leave or both;

(d) General working conditions;

(e) Overtime practices;

(f) Rules and regulations for personnel administration, except the following: Rules and regulations relating to applicants for employment and employees in an initial probationary status, including any extensions thereof, provided such rules and regulations are not discriminatory by reason of an applicant's race, color, creed, sex or national origin.

(2) Cost items shall be included in the Judicial Department's next operating budget in accordance with 4 M.R.S.A. § 23. If the Legislature rejects any of the cost items submitted to it, all cost items submitted shall be returned to the parties for further bargaining.

Advisory Committee's
Comment

The obligation to bargain is explicitly not a duty to agree or concede. It is an obligation to confer and negotiate on specified subjects of mutual concern to employer and employee: wages, hours, working conditions, and contract grievance arbitration. Should there be some exception to the obligation to bargain, analogous to "educational policies" for teachers, 26 M.R.S.A. § 965, in recognition of the special responsibilities and needs of the judiciary? This proposal would create no such exception.

Suppose a trial is being held and a jury is still deliberating past the normal closing hours for the court. The presiding justice directs court employees to remain on duty while the jury continues to consider its verdict. The judge is exercising a judicial power which cannot be bargained away. On the other hand, exercising this power affects the working conditions of judicial employees. The effect of this power should be a proper subject for negotiation--for example, whether overtime wages must be paid or comparable leave time allowed. The commitment of judicial employees to the proper administration of justice probably suffices to prevent the existence of the judge's power from being questioned in the collective bargaining context. In the unlikely event that it were questioned, nothing in the obligation to bargain requires or indeed permits the public employer to bargain the power away. In these circumstances, nothing is gained by attempting to formulate an escape clause from collective bargaining.

The dangers all lie on the side of creating an exception. For an exception to bargaining is an invitation to fruitless controversy from categorical refusals to discuss. If a matter affects the working conditions of judicial employees, then it is better that the matter be discussed--on the understanding, however, that there is no duty to agree or concede.

2. Mediation.

A. It is the declared policy of the State to provide full and adequate facilities for the settlement of disputes between the employer and employees or their representatives and other disputes subject to settlement through mediation.

B. Mediation procedures as provided by 26 M.R.S.A. § 965, subsection 2, shall be followed whenever either party to a controversy requests such services prior to arbitration, or at any time on motion of the Maine Labor Relations Board or its executive director.

C. The employer, union or employees involved in collective bargaining shall notify the executive director of the Maine Labor Relations Board, in writing, at least 30 days prior to the expiration of a contract, or 30 days prior to entering into negotiations for a first contract between the employer and the employees, or whenever a dispute arises between the parties threatening interruption of work, or under both conditions.

D. Any information disclosed by either party to a dispute to the panel or any of its members in the performance of this subsection shall be privileged.

Advisory Committee's
Comment

Mediation is ordinarily the first step in resolving disputes which stand in the way of reaching a collective-bargaining agreement. Mediation need not be initiated at all, but it can be commenced by either party prior to arbitration. The provisions below specify that the first step can be fact-finding upon mutual agreement of the parties, mediation-arbitration also by mutual agreement, or traditional arbitration either initiated by mutual agreement or by one side alone.

3. Fact-finding.

A. If the parties, either with or without the services of a mediator, are unable to effect a settlement of their controversy, they may agree either to call upon the Maine Labor Relations Board for fact-finding services with recommendations or to pursue some other

mutually acceptable fact-finding procedure, including use of the Federal Mediation and Conciliation Service or the American Arbitration Association according to their respective procedures, rules and regulations.

B. If so requested, the executive director shall appoint a fact-finding panel, ordinarily of 3 members, in accordance with rules and procedures prescribed by the board for making such appointment. Any person who has actively participated as the mediator in the immediate proceedings for which fact-finding has been called shall not sit on that fact-finding panel. The panel shall hear the contending parties to the controversy. It may request statistical data and reports on its own initiative in addition to the data regularly maintained by the Bureau of Labor and Industry, and shall have the power to administer oaths and to require by subpoena the attendance and testimony of witnesses, the production of books, records and other evidence relative or pertinent to the issues presented to them. The members of the fact-finding panel shall submit their findings and recommendations only to the parties and to the executive director of the Maine Labor Relations Board.

C. The parties shall have a period of 30 days, after the submission of findings and recommendations from the fact finders, in which to make a good faith effort to resolve their controversy. If the parties have not resolved their controversy by the end of said period, either party or the executive director of the Maine Labor Relations Board may, but not until the end of said period unless the parties otherwise agree, make the fact-finding and recommendations public.

Advisory Committee's
Comment

Subsections **B** and **C** above are derived from the Municipal Public Employees Labor Relations Act, 26 M.R.S.A. § 965 (Supp.), which is incorporated by reference in the State Employees Labor Relations Act, 26 M.R.S.A. § 975-D, subsection 3.C. Fact-finding can be a useful device for assisting the parties in reaching an agreement particularly in complicated cases. This proposal retains the option of invoking fact-finding by mutual

agreement. In the event that fact-finding is invoked, it can be followed by mediation-arbitration if both sides agree or by arbitration whether by agreement or unilateral action. If the parties do not agree to fact-finding, then the same options exist: mediation-arbitration by agreement or arbitration either by agreement or unilateral action.

4. Arbitration

A. Binding of all issues. The parties may agree to an arbitration procedure which will result in a binding determination of their controversy.

B. Binding except as to salaries, pensions, and insurance. If the parties do not agree to the arbitration procedure of subsection A, either party may petition the board to initiate arbitration which shall be binding except as to salaries, pensions, and insurance. On receipt of the petition, the executive director of the board shall investigate to determine if an impasse has been reached. If he so determines, he shall issue an order requiring arbitration and requesting the parties to select one or more arbitrators. If the parties within 10 days after the issuance of the order have not selected an arbitrator or an arbitration panel, the board shall then order each party to select one arbitrator, and if these 2 arbitrators cannot in 5 days select a 3rd neutral arbitrator, the board shall submit a list from which the parties may alternately strike names until a single name is left, who shall be appointed by the board as arbitrator.

In reaching a decision under this paragraph, the arbitrator shall consider the following factors:

(1) The interests and welfare of the public and the financial ability of the State Government to finance the cost items proposed by each party to the impasse;

(2) Comparison of the wages, hours and working conditions of the employees involved in the arbitration proceeding with the wages, hours and working conditions of other employees performing similar services in the

Executive and Legislative branches of government and in public and private employment in other jurisdictions competing in the same labor market;

(3) The over-all compensation presently received by the employees including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received;

(4) Such other factors not confined to the foregoing, which are normally and traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment, including the average consumer price index;

(5) The need of the Judicial Department for qualified employees;

(6) Conditions of employment in similar occupations outside State Government;

(7) The need to maintain appropriate relationships between different occupations in the Judicial Department;

(8) The need to establish fair and reasonable conditions in relation to job qualifications and responsibilities.

With respect to controversies over salaries, pensions and insurance, the arbitrator will recommend terms of settlement and may make findings of fact. Such recommendations and findings shall be advisory and shall not be binding upon the parties. The determination by the arbitrator on all other issues shall be final and binding on the parties.

Any hearing shall be informal, and the rules of evidence for judicial proceedings shall not be binding. Any documentary evidence and other information deemed relevant by the arbitrator may be received in evidence. The arbitrator shall have the power to administer oaths and to require by subpoena attendance and testimony of witnesses and production of books and records and other evidence relating to the issues presented.

The arbitrator shall have a period of 30 days from the termination of the hearing in which to submit his report to the parties and to the board, unless that time limitation is extended by the executive director.

Advisory Committee's
Comment

The arbitration provisions are derived from the State Employees Labor Relations Act, 26 M.R.S.A. § 979-D, subsection 4. Two forms of arbitration are available: (A) arbitration which is binding on all issues but which requires the parties' assent in advance and (B) arbitration which is binding except as to salaries, pensions, and insurance but which can be initiated by one side alone. Arbitration can, but need not be, preceded by mediation or fact-finding. Binding determinations of an arbitrator are subject to judicial review in accordance with section 12 below.

5. Mediation-Arbitration

A. The parties may agree to a mediation-arbitration procedure. The parties may agree in advance that all issues will be subject to binding arbitration. Otherwise, arbitration shall be binding except as to salaries, pensions, and insurance.

B. The parties may jointly select a mediator-arbitrator. If they are unable to agree, either party may request the executive director of the Maine Labor Relations Board to select a mediator-arbitrator from a panel of mediators or from the Maine Board of Arbitration and Conciliation. The executive director may not, however, select a person who has served as a mediator at an earlier stage of the same proceedings.

C. The mediator-arbitrator shall encourage the parties to reach a voluntary settlement of their dispute but may, after a reasonable period of mediation as he may determine, initiate an arbitration proceeding by notifying the parties of his intention to serve as a single arbitrator.

D. Any hearing shall be informal, and the rules of evidence for judicial proceedings shall not be binding. Any documentary evidence and other information deemed relevant by the mediator-arbitrator may be received in evidence. The mediator-arbitrator shall have the power to administer oaths and to require by subpoena attendance and testimony of witnesses and production of books and records and other evidence relating to the issues presented.

E. In reaching a decision the mediator-arbitrator shall consider the factors specified in section 5, subsection 4 above. With respect to controversies over salaries, pensions, and insurance, the mediator-arbitrator will recommend terms of settlement and may make findings of fact unless the parties have agreed in advance to binding arbitration of all issues. Such recommendations and findings shall be advisory and shall not be binding on the parties. The determination of the mediator-arbitrator on all other issues shall be final and binding on the parties.

F. The mediator-arbitrator shall have a period of 30 days from the termination of the hearing in which to submit his report to the parties and to the board unless the period is extended by the executive director.

Advisory Committee's
Comment

Mediation-arbitration is proposed as simply one additional option available to the parties for resolving impasses in contract negotiation. Mediation-arbitration can be invoked only by mutual agreement of the parties. The principal advantages of this combined procedure are that it tends to speed up the process of settling and resolving contract disputes and, hence, tends to be less costly than separate procedures.

6. Reports of Arbitration. The results of all arbitration and mediation-arbitration proceedings, recommendations and awards conducted under this section shall be filed with the Maine Labor Relations Board at the offices of its executive director simultaneously with the submission of the recommendations and award to the parties. In the event the parties settle their dispute during the arbitration or mediation-arbitration proceeding, the arbitrator, the chairman of the arbitration panel, or the mediator-arbitrator will submit a report of his activities to the executive director of the Maine Labor Relations Board not more than 5 days after the proceeding has terminated.

7. Costs. The costs for the services of the mediator, the members of the fact-finding board, the neutral arbitrator, and the mediator-arbitrator including, if any, per diem expenses, and actual and necessary travel and subsistence expenses and the costs of hiring the premises where any mediation, fact-finding, arbitration or mediation-arbitration proceedings are conducted, will be shared equally by the parties to the proceedings. All other costs will be assumed by the party incurring them. The services of the members of the State of Maine's Panel of Mediators, to a maximum of 3 mediation days per case and of the Maine Board of Arbitration and Conciliation are available to the parties without cost.

8. Arbitration Administration. The cost of services rendered and expenses incurred by the Maine Board of Arbitration and Conciliation, as defined in 26 M.R.S.A. § 911, shall be paid by the State from an appropriation for said Board of Arbitration and Conciliation which shall be included in the budget of the Maine Labor Relations Board. Authorization for services rendered and expenditures incurred by members of the State Board of Arbitration and Conciliation shall be the responsibility of the executive director.

§ 6. BARGAINING UNIT: HOW DETERMINED

1. In the event of a dispute between the public employer and an employee or employees over the appropriateness of a unit for purposes of collective bargaining or between the public employer and an employee or employees over whether a supervisory or other position is included in the bargaining unit, the executive director or his designee shall make the determination, except that anyone excepted from the definition of judicial employee under § 2 may not be included in a bargaining unit. The executive director or his

designee conducting unit determination proceedings shall have the power to administer oaths and to require by subpoena the attendance and testimony of witnesses, the production of books, records and other evidence relative or pertinent to the issues represented to them.

2. In determining whether a supervisory position should be excluded from the proposed bargaining unit, the executive director or his designee shall consider, among other criteria, if the principal functions of the position are characterized by performing such management control duties as scheduling, assigning, overseeing and reviewing the work of subordinate employees, or performing such duties as are distinct and dissimilar from those performed by the employees supervised, or exercising judgment in adjusting grievances, applying other established personnel policies and procedures and in enforcing a collective bargaining agreement or establishing or participating in the establishment of performance standards for subordinate employees and taking corrective measures to implement those standards.

3. In determining the unit appropriate for purposes of collective bargaining, the executive director or his designee shall seek to insure to employees the fullest freedom in exercising the rights guaranteed by this chapter, to insure a clear and identifiable community of interest among employees concerned, and to avoid excessive fragmentation among bargaining units.

4. **Unit Clarification.** Where there is a certified or currently recognized bargaining representative and where the circumstances surrounding the formation of an existing bargaining unit are alleged to have changed sufficiently to warrant modification in the composition of that bargaining unit, the public employer or any recognized or certified bargaining agent may file with the executive director a petition for a unit clarification, provided that the parties are unable to agree on appropriate modifications and there is no question concerning representation.

7. DETERMINATION OF BARGAINING AGENT

1. **Voluntary Recognition.** Any judicial employee organization may file a request with the public employer alleging that a majority of the judicial employees in an appropriate bargaining unit wish to be represented for the purpose of collective bargaining between the public employer and the employees' organization. Such request shall describe the grouping of jobs or positions which constitute the unit claimed to be appropriate and shall include a demonstration of

majority support. Such request for recognition shall be granted by the public employer unless the public employer desires that an election determine whether the organization represents a majority of the members in the bargaining unit.

2. Elections.

A. The executive director of the board or his designee upon signed request of a public employer alleging that one or more judicial employees or judicial employee organizations have presented to it a claim to be recognized as the representative of a bargaining unit of judicial employees, or upon signed petition of at least 30% of a bargaining unit of judicial employees that they desire to be represented by an organization, shall conduct a secret ballot election to determine whether the organization represents a majority of the members of the bargaining unit. Such an election may be conducted at suitable work locations or through the United States mail provided, nevertheless, that the procedures adopted and employed by the board shall maintain the anonymity of the voter from both the employee organizations and the management representatives involved.

3. The ballot shall contain the name of such organization and that of any other organization showing written proof of at least 10% representation of the judicial employees within the unit, together with a choice for any judicial employee to designate that he does not desire to be represented by any bargaining agent. When more than one organization is on the ballot and no one of the 3 or more choices receives a majority vote of the judicial employees voting, a run-off election shall be held. The run-off ballot shall contain the 2 choices which received the largest and 2nd largest number of votes. When an organization receives the majority of votes of those voting, the executive director of the board shall certify it as the bargaining agent. The bargaining agent certified as representing a bargaining unit shall be recognized by the public employer as the sole and exclusive bargaining agent for all of the employees in the bargaining unit unless and until a decertification election by secret ballot shall be held and the bargaining agent declared by the executive director of the board as not representing a majority of the unit.

B. Whenever 30% of the employees in a certified bargaining unit petition for a bargaining agent to be decertified, the procedures for conducting an election on the question shall be the same as for representation as bargaining agent herein before set forth.

C. No question concerning representation may be raised within one year of a certification or attempted certification. Where there is a valid collective bargaining agreement in effect, no question concerning unit or representation may be raised except during the period not more than 90 nor less than 60 days prior to the expiration date of the agreement. Unit clarification proceedings are not subject to this time limitation and may be brought at any time consistent with § 6, subsection 4.

D. The bargaining agent certified by the executive director of the board or his designee as the exclusive bargaining agent shall be required to represent all the judicial employees within the unit without regard to membership in the organization certified as bargaining agent, provided that any judicial employee at any time may present his grievance to the public employer and have such grievance adjusted without the intervention of the bargaining agent, if the adjustment is not inconsistent with the terms of a collective bargaining agreement then in effect and if the bargaining agent's representative has been given reasonable opportunity to be present at any meeting of the parties called for the resolution of such grievance.

§ 8. MAINE LABOR RELATIONS BOARD: RULE-MAKING PROCEDURE AND REVIEW OF PROCEEDINGS

1. Rule-Making Procedure. Proceedings conducted under this chapter shall be subject to the rules and procedures of the board promulgated under 26 M.R.S.A. § 968, subsection 3.

2. Review of Representation Proceedings. Any person aggrieved by any ruling or determination of the executive director under sections 6 and 7 may appeal, within 15 days of the announcement of the ruling or determination, except that in the instance of objections to the conduct of an election or

challenged ballots the time period shall be 5 working days, to the Maine Labor Relations Board. Upon receipt of such an appeal, the board shall, within a reasonable time, hold a hearing, having first caused 7 days' notice in writing of the time and place of such hearing to be given to the aggrieved party, the labor organizations or bargaining agent and the public employer. Such hearings and the procedures established in furtherance thereof shall be in accordance with 26 M.R.S.A. § 968. Decisions of the board made pursuant to this subsection shall be subject to review by the Superior Court in the manner specified in section 12.

§ 9. PREVENTION OF PROHIBITED ACTS

1. The board is empowered to prevent any person, the public employer, any judicial employee, any judicial employee organization or any bargaining agent from engaging in any of the prohibited acts enumerated in section 4. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.

2. The public employer, any judicial employee, any judicial employee organization or any bargaining agent which believes that any person, the public employer, any judicial employee, any judicial employee organization or any bargaining agent has engaged in or is engaging in any such prohibited practice may file a complaint with the executive director of the board stating the charges in that regard. No such complaint shall be filed with the executive director until the complaining party shall have served a copy thereof upon the party complained of. Upon receipt of such complaint, the executive director or his designee shall review the charge to determine whether the facts as alleged may constitute a prohibited act and shall forthwith cause an investigation to be conducted. The executive director shall attempt to obtain and evaluate sworn affidavits from persons having knowledge of the facts. If it is determined that the sworn facts do not, as a matter of law, constitute a violation, the charge shall be dismissed by the executive director, subject to review by the board. If it is determined from the sworn facts that the complaint is meritorious, the executive director shall recommend a proposed settlement. The parties have 30 days after the recommendations are made to resolve their dispute. If the parties have not resolved their dispute by the

end of the 30-day period, either party or the executive director may make the recommendations public but not until the expiration of the 30-day period unless the parties otherwise agree. If a formal hearing is deemed necessary by the executive director or by the board, the executive director shall serve upon the parties to the complaint a notice of the prehearing conference and of the hearing before the board, that notice to designate the time and place of hearing for the prehearing conference or the hearing, as appropriate, provided that no hearing shall be held based upon any alleged prohibited practice occurring more than 6 months prior to the filing of the complaint with the executive director. The party complained of shall have the right to file a written answer to the complaint and to appear in person or otherwise and give testimony at the place and time fixed for the hearing. In the discretion of the board, any other person or organization may be allowed to intervene in that proceeding and to present testimony. Nothing in this subsection shall restrict the right of the board to require the executive director or his designee to hold a prehearing conference on any prohibited practice complaint prior to the hearing before the board and taking whatever action, including dismissal, attempting to resolve disagreements between the parties or recommending an order to the board, as he may deem appropriate, subject to review by the board.

Advisory Committee's
Comment

These are the enforcement provisions for the prohibited acts set forth in section 4. The proposed changes in section 9, subsection 2 are predicated on the belief that charges of unfair labor practices take on an added dimension of seriousness when they pertain to the Judicial Department of government. In this light the proposal seeks to establish an expeditious system for resolving prohibited-acts disputes. Investigation by the executive director would unquestionably speed up the process. Opportunity is given for private resolution of disputes to encourage settlement.

3. After hearing and argument, if, upon a preponderance of the evidence received, the board shall be of the opinion that any party named in the complaint has engaged in or is engaging in any such prohibited practice, then the board shall in writing state its findings of fact and the reasons for its conclusions and shall issue and cause to be served upon such party an order

requiring such party to cease and desist from such prohibited practice and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act. No order of the board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

4. After hearing and argument, if the board is not persuaded by a preponderance of the evidence received that the party named in the complaint has engaged in or is engaging in any such prohibited practice, then the board shall in writing state its findings of fact and the reasons for its conclusions and shall issue an order dismissing said complaint.

5. If after the issuance of an order by the board requiring any party to cease and desist or to take any other affirmative action, said party fails to comply with the order of the board, then the party in whose favor the order operates or the board may file a civil action in the Superior Court in Kennebec County, to compel compliance with the order of the board. In such action to compel compliance, the Superior Court shall not review the action of the board other than to determine questions of law. If an action to review the decision of the board is pending at the time of the commencement of an action for enforcement pursuant to this subsection or is thereafter filed, the 2 actions shall be consolidated.

6. Whenever a complaint is filed with the executive director of the board, alleging that the public employer has violated section 4, subsection 1, paragraph F or alleging that a judicial employee or judicial employee organization or bargaining agent has violated section 4, subsection 2, paragraph C, the party making the complaint may simultaneously seek interim injunctive relief from the Superior Court in the county in which the prohibited practice is alleged to have occurred pending the final adjudication of the board with respect to such matter.

7. Either party may seek a review by the Superior Court in Kennebec County of a decision or order of the Maine Labor Relations Board by filing a complaint in accordance with Rule 80C of the Maine Rules of Civil Procedure, provided the complaint shall be filed within 15 days of the effective date

of the decision. Upon the filing of the complaint, the court shall set the complaint down for hearing at the earliest possible time and shall cause all interested parties and the board to be notified. Pending review and upon application of any party in interest, the court may grant such temporary relief or restraining order and may impose such terms and conditions as it deems just and proper; provided that the board's decision or order shall not be stayed, except where it is clearly shown to the satisfaction of the court that substantial and irreparable injury will be sustained or that there is a substantial risk of danger to the public health, safety, or welfare or interferes with the exercise of the judicial power. The executive director shall forthwith file in the court the record in the proceeding certified by the executive director or a member of the board. The record shall include all documents filed in the proceeding and the transcript, if any. After hearing, which shall be held not less than 7 days after notice thereof, the court may enforce, modify, enforce as so modified or set aside in whole or in part the decision of the board, except that the finding of the board on questions of fact shall be final unless shown to be clearly erroneous. Any appeal to the law court shall be expedited in the same manner as an appeal from an interlocutory order under 26 M.R.S.A. § 6.

8. In any judicial proceeding authorized by this subsection in which injunctive relief is sought, 26 M.R.S.A. §§ 5 and 6 shall apply, except that neither an allegation nor proof of unavoidable substantial and irreparable injury to the complainant's property shall be required to obtain a temporary restraining order or injunction.

9. The Maine Labor Relations Board shall not have power to interfere with the exercise of the judicial power.

§ 10. HEARINGS BEFORE THE MAINE LABOR RELATIONS BOARD

1. Hearings conducted by the board shall be informal and the rules of evidence prevailing in judicial proceedings shall not be binding. Any and all documentary evidence and other evidence deemed relevant by the board may be received.

2. The chairman shall have the power to administer oaths and to require by subpoena the attendance and testimony of witnesses, the presentation of books, records and other evidence relative or pertinent to the issues presented to the board for determination. Witnesses subpoenaed by the board shall be allowed the same fees as are paid to witnesses in the Superior Court. These fees, together with all necessary expenses of the board, shall be paid by the Treasurer of State on warrants drawn by the State Controller.

§ 11. SCOPE OF BINDING CONTRACT ARBITRATION

A collective bargaining agreement between the public employer and a bargaining agent may provide for binding arbitration as the final step of a grievance procedure, but the only grievances which may be taken to such binding arbitration shall be disputes between the parties as to the meaning or application of the specific terms of the collective bargaining agreement. An arbitrator with the power to make binding decisions pursuant to any such provision shall have no authority to add to, subtract from or modify the collective bargaining agreement.

§ 12. REVIEW OF ARBITRATION AWARDS

1. Either party may seek a review by the Superior Court of a binding determination by an arbitration panel. Such review shall be sought in accordance with Rule 80C the Maine Rules of Civil Procedure.

2. In the absence of fraud, the binding determination of an arbitration panel or arbitrator or mediator-arbitrator shall be final upon all questions of fact.

3. The court may, after consideration, affirm or reverse or modify any such binding determination or decision based upon any erroneous ruling. An appeal may be taken to the law court as in any civil action.

§ 13. SEPARABILITY

1. If any clause, sentence, paragraph or part of this chapter, or the application thereof to any person or circumstances, shall, for any reason, be adjudged by a court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of this chapter and the

application of such provision to other persons or circumstances, but shall be confined in its operation to the clause, sentence, paragraph or part thereof, directly involved in the controversy in which such judgment shall have been rendered and to the person or circumstances involved. It is hereby declared to be the legislative intent that this chapter would have been adopted had such invalid provisions not been included.

2. Nothing in this chapter or any contract negotiated pursuant to this chapter shall in any way be interpreted or allowed to restrict or impair the eligibility of the State of Maine or the Judicial Department in obtaining the benefits under any federal grant in aid or assistance programs.

§ 14. AMENDMENT

This Act shall not be amended without first consulting the Supreme Judicial Court.

LEGISLATIVE DOCUMENT

The legislation proposed by the Advisory Committee is contained in H.P. 1649, L.D. 2175

AN ACT to Create the Judicial Employees Labor Relations Act.