COLLECTIVE BARGAINING IN THE PUBLIC SECTOR IN MAINE: AN OVERVIEW

A summary of remarks delivered by Professor Raymond G. McGuire of the Law Faculty, University of Maine, at a seminar on Public Sector Bargaining In Maine, held on April 29 and 30 in Portland, Maine and sponsored by the Continuing Legal Education Program of the University of Maine School of Law.

Collective bargaining between public employees and public employers in Maine is authorized and regulated by three comprehensive statutes: the Municipal Employees Labor Relations Law (hereinafter MPELRL), enacted in 1969, the State Employees Labor Relations Law (hereinafter SELRL) signed into law in 1974, and the University of Maine Labor Relations Law (hereinafter UMLRL), which became effective in 1975. These laws, together with amendments which added Maine Turnpike Authority employees to the State Employees Law and Maine Maritime Academy employees to the University Law, cover almost all employees working in the public sector in Maine.

These three laws are administered by the Maine Labor Relations Board (formerly the Public Employees Labor Relations Board), comprised of two part-time members representing management and labor and a part-time neutral chairman; the Board is assisted by a full-time executive director who serves at its will and pleasure. The Board has three primary functions:

1. To supervise and conduct representation elections.

2. To adjudicate prohibited practice charges.

3. To facilitate the resolution of impasses in contract negotiations between public employees and bargaining agents by supervising the parties' use of mediation, factfinding and arbitration.

Although each of these laws differs from the others in a few details, they are basically similar in structure and content. We have had the most experience with the Municipal Act and most

of the issues, I will discuss have arisen under that Act. Similar, if not identical, problems, however, will almost certainly arise under the State and University Acts.

A list of the important issues arising under the Municipal Act must include the following:

1. The scope of mandatory and permissive bargaining, especially between school boards and teacher associations.

2. The extent of the bargaining obligation during the term of an agreement.

3. The appropriate role of the courts in regulating the arbitration process.

4. The relationship of the courts, the Maine Labor Relations Board, and arbitrators in determining disputes arising out of the employment relationship.

5. The effectiveness of present dispute resolution procedures.

I. SCOPE OF BARGAINING:

Since Paul Frinsko will deal with this issue on Saturday afternoon, I will only attempt now to raise some of the issues which Paul will no doubt analyze in greater depth tomorrow. We know that the municipal law in section 965(1)(C) obligates public employers and bargaining agents to "confer and negotiate in good faith with respect to wages, hours, working conditions and contract grievance arbitration . . . except that public employers of teachers shall meet and consult but not negotiate with respect to educational policies . . . ." This "educational policy exception"

to the bargaining obligation, which received the close attention of the Law Court in the Biddeford Teachers case, 304 A.2d 387 (Me. 1973). has generated a disproportionate amount of litigation, both before the courts and the Maine Labor Relations Board. Two major issues, traceable to this limitation on the bargaining obligations, have emerged: First, how do you distinguish between matters of educational policy and matters involving wages, hours and working conditions? Second, assuming a workable test can be devised to distinguish between "policy" and "subjects of bargaining," is an employer absolutely precluded from bargaining matters of educational policy, or may he opt to bargain them at his own discretion.

For example, assuming that length of the school year is clearly a matter of educational policy, but a given school board (certainly not one represented by any of the astute lawyers in the audience today) agrees in a contract not to start the school year prior to Labor Day, but a newly elected school board changes its collective mind and announces that school will open for business on Thursday, September 1, will the teachers' association inevitable protest be effective, or will the School Board be able to argue that the limiting provision in the agreement was ultra vires and therefore void? And will it make any difference how the issue arises? Before which decision making institution? For example, the Teachers' Association may sue in court for breach of contract and seek an injunction requiring the school board to observe its agreement. Or, if the contract has the usual grievance-

it may grieve the decision and take it to an impartial arbitrator. Or it may file a prohibited practice charge, claiming the unilateral charge violated the school board's obligation to bargain in good faith.

Both the Law Court and the Board have moved very cautiously in this area; neither has yet directly confronted the issue, although a few tantalizing footnotes in Law Court opinions and some dictum in MLRB decisions suggest to me, at least, that educational policy matters will be regarded as permissive subjects of bargaining, so if the employer chooses to bargain a matter of educational policy, the ensuing agreement may well be binding.

The second major limitation on bargaining, besides the educational policy restriction, is competing legislation also purporting to regulate the specific matter bargained. Two illustrations of this kind of limitation can be found in Law Court cases. In Lewiston Firefighters Association v. City of Lewiston, 354 A.2d 154 (Me. 1976), the Law Court held that an ordinance in the Lewiston City Charter which required parity in the pay of firefighters and policemen must be regarded as impliedly repealed by the requirement of MPELRL that the employer bargain wages in good faith. The Court carefully analyzed the particular ordinance involved, and the nature of the conflict it created with the State-imposed bargaining law, and found a legislative intent to impliedly repeal local law addressing the "same area" and inconsistent with the uniform state legislation.

Lewiston suggested that where statutory law and some part of the bargaining obligation appear to conflict, each instance of apparent inconsistency would be closely scrutinized before giving priority to the bargaining law or conflicting legislation.

Unfortunately, subsequent decisions of the Court and the Maine Labor Relations Board seem to suggest that where at least a state statute addresses an issue, the parties are automatically disallowed from bargaining the matter. For example, in Superintending School Committee of Winslow v. Winslow Education Association, 363 A.2d 229 (Me. 1976), the Law Court held that a "just cause" provision could not be forced on a resisting school board since the Legislature had created an exclusive statutory procedure for the use of school boards in making decision to hire and fire teachers. See 20 M.R.S.A. §161(5) and §473(4). The Court failed to analyze carefully, or at all, the nature of the conflict between the bargaining law and prior legislative enactments, nor did it consider possible ways of avoiding or at least minimizing the conflict.

The MLRB, in Brunswick School Board v. Brunswick Teachers Ass'n., No. 75-19 (MLRB, 1975) also seemed to adopt an unlawful delegation of legislative authority theory, suggesting that where the Legislature creates power in a local governmental unit or officer, this power cannot be shared with a bargaining agent or arbitrator in the give and take of collective bargaining. In some instances, this kind of approach makes sense; for example, where a school board is only authorized to grant leaves of absence

for one year (see 20 M.R.S.A. §473(9)) and the Teachers Association attempts to negotiate a provision permitting three year leaves. But in other instances, for example where the Teachers Association seeks a provision requiring new hires to have at least one year experience, and no state law prohibits this requirement, it does not seen an adequate response to say that the proposal interferes with the Commissioner of Education's certification authority and is therefore non-negotiable.

On the other hand, the Law Court was not absolute in its handling of the just cause issue in Winslow, suggesting that a School Board might voluntarily agree to such a provision; and the Board, in Brunswick, found that "just cause" was a mandatory subject of bargaining despite a state statute addressing the same matter. So perhaps neither is saying that every time there is a conflict between a state statute and a bargaining proposal involving wages, hours or employment conditions, the bargaining proposal must give way; and in subsequent decisions both the Board and Court will, I am sure, refine the theory underlying their resolution of this issue.

II. THE EXTENT OF THE BARGAINING OBLIGATION DURING THE TERM OF AN AGREEMENT.

The Board has held that if the employer unilaterally changes a term or condition of employment not covered by a collective bargaining contract, during the term of the contract, he violates his obligation to bargain in good faith unless the issue had

previously been raised and "bargained away," Cape Elizabeth Teachers Ass'n v. Cape Elizabeth School Baord, No. 75-24 (1975), or where the parties had executed a "zipper clause." This means, for example, if the Teachers Association introduces a seniority proposal to control order of layoff in the event of a reduction in force, and it is not included in the contract, the School Board will have the power to determine this matter unilaterally. Or if the parties execute a zipper clause, typically saying that all matters that could have been raised in bargaining will be deemed to have been raised and disposed of, the same result will follow.

I am bothered a bit by both these rules, particularly the first. First it is extremely difficult to get the straight story on what was said and done during bargaining; and even if one could find out what actually went on, does it correspond to the reality of negotiations to say that just because an issue is raised and withdrawn, that the party withdrawing it thereby lost on the question of who will have power over the issue?

Similarly the Board's reaction to the zipper clause, see Sanford Teachers Association v. Sanford School Committee, No. 76-16 (1976) seems to give a preeminent position to the "residual rights of management" theory of bargaining; but it does have the virtue of certainty -- the parties will know the effect of including a zipper clause -- which the reliance on bargaining history does not have.

III. THE APPROPRIATE ROLE OF THE COURTS IN REGULATING THE ARBITRAL PROCESS.

Should the courts assume that virtually every dispute between a public employer and bargaining agent is subject to arbitration? And a dispute having been submitted to arbitration, should the courts be reluctant to closely scrutinize the subsequent decision? The Law Court has been quite grudging in what it allows to go to arbitration, see, for example, Superintending School Committee of Portland v. Portland Teachers Ass'n., and also has suggested that it will exercise very close appellate review over arbitral decisions. Board of Directors SAD #75 v. Merrymeeting Education Ass'n. This is in sharp contrast to the U.S. Supreme Court's clearly stated preference for sending virtually all disputes to arbitration, and it's similarly announced reluctance to review closely the arbitrator's decision. Perhaps the newness of the process in Maine is the best explanation of the Court's seeming distrust, and until all parties have more experience with the institution of arbitration, close judicial control may not be a bad thing.

IV. THE APPROPRIATE ROLE OF THE COURTS, THE BOARD AND ARBITRATORS IN REGULATING EMPLOYMENT DISPUTES.

This issue is certainly the most confused and perhaps, in the long run the most important conundrum that currently is puzzling lawyers, judges and administrators involved in public sector bargaining. Who decides what?

In a given dispute between a public employer and a bargaining agent, it may be possible to bring a breach of contract action in court, to invoke the grievance arbitration procedures of the agreement, or to file prohibited practice charges with the Board.

The Board, following the lead of the National Labor Relations Board, recently stated that where there is a grievance arbitration provision in the contract, it will defer to the arbitrator, although it will retain jurisdiction over the matter and review the arbitrator's award. Bangor Education Ass'n v. Bangor School Committee, No. 76-11 (1976). The Law Court has delivered a mixed message, in one case suggesting that where there is an arbitration clause, the parties ought to go to arbitration rather than to court, M.S.A.D. #5 v. M.S.A.D. #5 Teachers Ass'n, 324 A.2d 308 (1974), but then retreating from that position a scant year later. Fernald v. City of Ellsworth Superintending School Committee, 342 A.2d 704 (1975).

The Court has still not addressed an even more important issue: under what circumstances should the courts defer to the MLRB? When a matter is arguably a prohibited practice as well as a breach of contract, should the courts defer to the presumed expertise of the Board, or allow the parties to have the option of judicial resolution.

Some coherent division of authority has to be worked out and fairly quickly. Both labor and management are presently engaged in blatant forum shopping, with the choice depending on the particular issue and the changing exigencies of time and money.

Forum shopping of this kind not only tends to be unseemly, it inevitably produces a confusing array of inconsistent rules allegedly governing the same conduct. For example, in Brunswick Teachers, supra, the Labor Board found that "just cause" was a mandatory subject of bargaining, citing in partial defense the decision of an arbitrator in an unrelated case that had found it also to be a bargainable issue. In contrast, a Superior Court justice had already found it not to be a mandatory subject of bargaining. The Law Court, in reviewing the Superior Court's decision eventually found it not to be bargainable. Here we have four decision making institutions confronting the same issue in different procedural contexts and splitting two to two. Is this a system of justice worthy of respect?

We might consider as a possible model the federal approach: the NLRB has primary jurisdiction over all labor disputes, save breach of contract suits. The NLRB has the discretion to defer to arbitration in the appropriate case, but most important policy decisions are made by the Board in the first instance. The courts have jurisdiction over breach of contract actions, but where there is an arbitration provision the case is usually deferred to arbitration. In effect the Labor Board has primary jurisdiction over disputes not involving breaches of contract, with arbitrators having primary jurisdiction over breaches of contract. The courts then exercise a restricted power of review over the labor board and arbitrators' decisions.

If there are not sufficient trained arbitrators to handle all the disputes in this state, we ought to try to remedy that. If the MLRB is too understaffed and overworked to handle its growing caseload, we ought to do something about that. But we cannot tolerate for very long the confused, criss-crossing avenues of decision making that characterize today's non-system.

V. EFFECTIVENESS OF DISPUTE RESOLUTION PROCEDURES

We are not sure whether the present system of resolving disputes -- mandatory mediation, factfinding and binding arbitration -- is working; and if it is working, in the sense of being a system that encourages the parties to solve their own disputes and one that helps them to an expeditious resolution of issues that they cannot solve themselves, we do not know whether it is worth the cost. In fact we do not even know the cost.

I suspect that in some important respects, the system is not working. Mediation, all agree, is good, because it moves the parties to their own solution; but it is a waste of time if the mediator is not sufficiently trained and experienced in this difficult art form. Factfinding, I submit, whatever it's uses at an earlier stage of public sector bargaining, is today not only expensive and time consuming, but probably encourages obstructive behavior at the bargaining table. Binding arbitration is a necessary evil, but again the parties complain it takes too long and costs too much.

Is legalizing the strike the answer? If not, should we make mediation voluntary, eliminate factfinding and move toward binding arbitration on all issues? Should binding arbitration be final offer? On an issue by issue basis?

Before reforming our present system, we should carefully examine the experiences of other states with different forms of impasse resolution techniques. But we are all ready, I suspect, to at least think about a reform of the present system.