P U B L I C H E A R I N G

before

PUBLIC EMPLOYER-EMPLOYEE RELATIONS STUDY COMMISSION

(Constituted under P. L. 1974, c. 124)

Held:
March 5, 1975
Senate Chamber
State House
Trenton, New Jersey

MEMBERS OF COMMISSION PRESENT:

Dr. Richard A. Lester (Chairman)
Senator Wayne Dumont
Senator Martin L. Greenberg
Senator Peter J. McDonough
Senator Carmen Orechio
Assemblyman Albert Burstein
Assemblyman Robert E. Littell
Assemblyman John H. Ewing
Vincent J. Apruzzese
Joel H. Sterns
Roger McGlynn

ALSO:

Dr. William M. Weinberg, Executive Director
Peter P. Guzzo, Secretary

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I N D E X

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DR. RICHARD A. LESTER (Chairman): I think we should start the hearing. I have a few preliminary remarks to make before we hear the first witness.

This is a public hearing of the Public Employer-Employee Relations Study Commission, constituted under Chapter 124 of the Laws of 1974, as approved October 21, 1974.

I am Dr. Richard A. Lester, Chairman of the Public Employer-Employee Relations Study Commission. Seated with me here are other members of the Commission: Joel Sterns; Senator Dumont; Vincent Apruzzese; Roger McGlynn; and William Weinberg, who is the Executive Director.

Today's hearing is the first of two hearings to be held here in Trenton. The second hearing is scheduled two weeks hence on March 19th in this Chamber or a more appropriate place, I hope.

The purpose of these hearings is to assist the Commission to fulfill its mandate under Chapter 124 of the Laws of 1974, which empowered the Commission to analyze and report its findings and recommendations to the Governor and to the Legislature on such questions as were set forth in the notice of the hearing. I will not read them. There are five items.

We have a list of those persons who have already indicated a desire to testify today. If there are other persons in the Chamber who wish to testify, please register with Peter Guzzo, who is right here and who is serving as Secretary to the Commission.

As each participant is called to speak, we ask that you sit at the desk in front of the microphone and speak into the microphone.

We also ask that you first identify yourself by stating your name, your address and your organization,

if any, that you represent. If you have prepared statements, we request that you make copies available to Mr. Guzzo, for distribution to the Commission members, the hearing reporter and the members of the press.

Any prepared statements that you have need not be read in full. You may request that your statements be made a part of the record and they will be considered by the Commission and by the Legislature. Additional statements or documents may also be provided to the Commission and they too will be considered, even if they are not made a part of the record.

After each participant has made his or her statement, the Commission may have some questions and we trust that you will make yourself available to answer these questions. I am told to make this remark too, which is a little odd in a way, that no questions may be directed to members of the Commission, and all questioning will be conducted by the members of the Commission. That is like the professors in oral examinations. You can't question them. And I knew some professors who said they only knew the questions, but they didn't necessarily know the answers - they were trying to get them from the witness. However, if anyone in the audience wishes, you may submit questions to me through Mr. Guzzo for consideration by this Commission and I will try to raise those questions.

Our only purpose is to provide for the convenience of each participant and the Commission in conducting this hearing.

I want to welcome all those here to testify this morning. The Commission wants to make a thorough, well-informed, objective study of the statute, of the problems that have been encountered in enforcing the statute, and of the administration of the statute in practice.

We hope to use New Jersey's past experience and the analysis of the experience in other states and the

wisdom of the practitioners who are in this operation, with a view to improving our Public Employment Relations Act, making the statute and its administration as intelligent and practical in promoting good on-the-job relations, including work satisfaction, efficient operations which are conflict-free, as we possibly can.

I believe our first witness is Jeffrey Tener, who is Executive Director and, I guess, Acting Chairman of the Public Employment Relations Commission.

Mr. Tener, you have a statement which I believe has been distributed, at least to all members of the Commission.

J E F F R E Y B. T E N E R:

Mr. Chairman and Members of the Commission:

My name is Jeffrey B. Tener and I am the Executive Director of the Public Employment Relations Commission. I welcome the opportunity to appear before you and hope to be able to provide information which may assist you in meeting your mandate under Chapter 124 of the Public Laws of 1974. In my statement, I shall indicate positions which the Public Employment Relations Commission has taken on certain issues. I also intend to raise a number of technical matters which I would suggest that you consider.

As you are aware, PERC is a tripartite Commission with 7 members appointed by the Governor with the advice and consent of the Senate. Two members are to be representative of public employers, two are to be representative of public employee organizations, and three are to be representative of the public. Although the Commission is not always unanimous, the Commission has taken a reasonably unified position on some issues and I shall report these to you. Individual Commissioners, and especially those who are representative of public employers and public employee organizations, may well want to address you as individual members of the Commission, as representatives of the organization by which they are employed, or both.

In this presentation, I shall be guided by the framework set forth in the Act which created the Study Commission.

The first point concerns dispute resolution. This is an area that was modified by the recent amendments to the New Jersey

Employer-Employee Relations Act only to the extent that the costs of fact-finding are now to be borne by the Commission. Heretofore, the parties were obligated to share the costs of fact-finding. However, the basic impasse machinery was unaltered. The statute provides that:

> "Whenever negotiations between a public employer and an exclusive representative concerning the terms and conditions of employment shall reach an impasse, the Commission...shall, upon request of either party, take such steps as it may deem expedient to effect a voluntary resolution of the impasse." 1/

The Commission has implemented that language and subsequent language by providing mediators to assist the parties when they fail to reach an agreement in direct negotiations. In fiscal year 1973, the Commission received 338 requests for mediators. This increased to 389 requests in fiscal year 1974 and is running ahead of that pace so far this year.

During this period, approximately 75% of these impasses have been resolved through mediation. The remaining cases have been submitted to fact-finding. The fact-finder, following hearings, issues recommendations for settlement. It should be noted that the fact-finder is only authorized to issue recommendations. There is, at present, no finality to the negotiations process. In a limited number of cases, the Commission has continued to work with the parties following the issuance of the fact-finder's recommendations by selecting or providing a so-called super-mediator to assist the parties.

1/ N.J.S.A. 34:13A-6(b)

Nevertheless, the process does lack finality. Neither PERC nor its mediators or fact-finders is empowered to impose a settlement on the parties or to compel either party to modify its position. In my opinion, that has not been changed by the recent amendments to the Act.

In a number of states and jurisdictions, there is some form of finality to the negotiations process. This takes two major forms: the right to strike (which does not result in the imposition of a settlement by a third party but presumably leads to a settlement based upon power) and some form of interest arbitration (which results in the imposition of a settlement by a third party when the parties are unable to reach an agreement).

Certain public employees under specified and limited conditions may legally strike in at least the following states: Pennsylvania, Alaska, Hawaii, Montana and Vermont.

In a number of other jurisdictions including New York City, New York State, Pennsylvania, Rhode Island, Massachusetts, Michigan, Wisconsin, Wyoming and South Dakota, at least certain public employees and public employers are subject to compulsory arbitration statutes.

On this highly complex, emotional and controversial subject, the Commission has taken no definitive position. However, the Commission several times has gone on record to the effect that, in an effort to resolve disputes concerning terms and conditions of employment in the public sector, the "fair and final offer" approach might be a solution and it has recommended that a study of this approach be undertaken. Accordingly, I am certain that the Commission would

welcome your consideration of this approach under which, with a number of possible variations, an arbitrator is obligated to select the final offer of one party or the other.

While on this general subject of impasse procedures, I would like to offer several other suggestions for your consideration. The Commission is on record as favoring binding arbitration of grievances, as opposed to impasses over terms and conditions of employment. This is the method of grievance resolution which is used overwhelmingly in the private sector but has been slower to gain acceptance in the public sector.

The Commission would favor statutory language which would permit it to intervene in existing, imminent or threatened labor disputes on its own motion. This authority exists for the Board of Mediation and the Commission believes that there should be a similar provision in the public sector statute.

Also, I would suggest that it would be wise to have statutory recognition of the confidentiality of information disclosed to an officer of the Commission while such individual is performing mediation functions. This is required to protect both the process as well as the continued acceptability of the individual officer. New York State has amended its Taylor Law to provide such protection. 2/

Additionally, the Commission takes the position that any right-to-know law should not require the disclosure of information relating to public sector labor problems at any time, either before

2/ New York Civil Service Law, Section 205.4(b)

or after they are resolved. The Commission would suggest that the same language contained in A-1188 as it applies to the private sector should apply to the public sector as well.

The second point relates to the advisability of establishing guidelines for the timing of negotiations. The recent amendments to the PERC Act did address this question. The law as amended provides that:

> The Commission shall adopt such rules as may be required...to regulate the time of commencement of negotiations and of institution of impasse procedures so that there will be full opportunity for negotiations and the resolution of impasses prior to required budget submission dates. 3/

In order to implement that provision, the Commission has adopted rules which create mandatory standards with respect to public sector negotiations utilizing the public employer's required budget submission date as a definitive reference point although the consensus of the Commission is that the budget submission date may not be as meaningful as the contract expiration date.

Briefly, the Commission's Rules provide for the commencement of negotiations 120 days prior to the required budget submission date, upon 15 days prior notice by the party initiating negotiations of its intention to commence negotiations. If no agreement has been reached by 90 days before the required budget submission date, PERC shall appoint a mediator. When there has been no settlement by 60 days before the budget submission date, the Commission shall invoke

3/ N.J.S.A. 34:13A-5.4(e)

fact-finding. The fact-finder must make findings of fact and recommend the terms of settlement no later than 30 days prior to the budget submission date. The parties are obligated to meet within five days after receipt of the fact-finder's report to exchange positions and to afford them an opportunity to reach an agreement.

My own experience suggests that budget submission dates may not serve as effective proxies for some form of finality. However, we have not yet had experience under these regulations. If it was not intended that there be a mandatory timetable for negotiations, then I suggest that the law be clarified.

As I see it, this question is intimately related to the previous point regarding impasse procedures. The section of the statute that I quoted is apparently intended to provide a meaningful deadline for public sector negotiations. My personal reservations relate to the efficiency of budget submission dates as creating such deadlines.

One interesting point in this connection is that Title 18A and Title 40A, although containing somewhat similar language[4/] regarding emergency appropriations, have not been interpreted in parallel fashion. The Supreme Court of New Jersey has said in In re Salaries for Probation Officers of Bergen County, 58 N.J. 422 (1971), that the statute authorizing emergency appropriations is applicable if funds are needed to meet retroactive negotiated salary increases. On the other hand, the Superior Court in 1969[5/] cited an earlier Supreme

4/ N.J.S.A. 40A:4-46.
N.J.S.A. 18A:22-21.

5/ Newark Teachers Assoc. v. Board of Education, 108 N.J. Super. 34 (Law Div. 1969).

Court decision[6] in which it was found that a general salary increase does not constitute an emergency under the emergency appropriation provision of Title 18A. Although the matter was eventually heard by the Supreme Court, the Supreme Court did not pass upon that issue.[7]

If emergency appropriations can be utilized to fund salary increases negotiated after budget submission dates, then the budget submission date is a less meaningful reference point than would otherwise be the case. Perhaps the Legislature should clarify the laws in this area to provide consistency.

I might also suggest that the Study Commission consider, assuming that negotiations are to be tied to public employers' required budget submission dates, offering some definition of the required budget submission dates. Budgets generally can be modified at any time prior to legislative adoption. What date is intended? Adoption by the Legislature? Submission to the Legislature by the Executive? Submission by Department Heads to the Chief Executive? There is some logic behind each of the possibilities.

There are some situations in which the budget submission date is not clear with reference to the statute pursuant to which the body was created. There could be confusion if these dates are not known by the parties.

Thirdly, you have been asked to consider whether or not it is necessary and desirable to define the phrase "terms and conditions

6/ Board of Education of Elizabeth v. Elizabeth, 13 N.J. 589 (1953).
7/ Newark Teachers Assn. v. Board of Education of Newark, 57 N.J. 100, at 103 (1970).

of employment", to specify subjects as mandatory, voluntary or illegal within the scope of bargaining or of grievance arbitration, or to require that procedural guidelines be established for determining such questions.

The recent amendments to the Employer-Employee Relations Act also set forth procedural guidelines. The Act provides:

> The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. 8/

In order to implement this provision, the Commission has adopted rules under which such determinations can be made.

The Act does not define the phrase "terms and conditions of employment." However, an examination of the various amendments and proposed amendments to the Act indicates that the Legislature did consider adopting some language limiting the scope of negotiations, setting forth certain management rights, and requiring negotiations on the impact of certain decisions on employees. The failure of the Legislature to agree upon language in this area suggests the difficulty of the undertaking and provides some support for my view that it is better to leave this matter to a determination by the administrative agency with expertise in this area. This will permit a flexible approach which can be molded and modified to fit unique and changing circumstances.

I would like to raise several other points in this area.

8/ N.J.S.A. 34:13A-5.4(d)

The Employer-Employee Relations Act provides that the Commission "...shall have exclusive power...to prevent anyone from engaging in any unfair practice..." In comparison, with respect to scope of negotiations determinations, the Act provides that "/T/he Commission shall at all times have the power and duty...to make a determination...." It is not clear whether scope of negotiations determinations are intended to be exclusively within the jurisdiction of the Commission, as is the case with unfair practice proceedings, or whether the Commissioner of Education or the Civil Service Commission also have jurisdiction in this area. Also, must a party exhaust his administrative remedies by seeking a determination from the Commission on such matters, or may he by-pass the Commission and go directly to court? Clarification in this area might be desirable.

Additionally, I would like to point out that there is no provision in the scope of negotiations subsection for the issuance of an order by the Commission, although a subsequent subsection[9/] permits the Commission to apply to the Appellate Division for an order enforcing an order issued by the Commission under either the unfair practice or scope of negotiations subsections.

The next item relates to the structure of the Commission. While the Commission is not unanimous, it did vote in July 1973 by a 5-1 margin to adopt a position calling for a nine-member Commission with five public voting members and four non-voting advisory members, of whom two would represent the interests of public employers and two would represent the interests of public employee organizations.

9/ N.J.S.A. 34:13A-5.4(f)

Turning now to the last point listed, the Commission has taken no position on whether various classes of public employees should be granted differentiated rights based on their "essentiality". I might point out that the Taylor Law in New York State has recently been amended to provide for arbitration of disputes involving employees of police and fire departments.

I would also like to raise some largely technical points with you, point out some questions that the existing statute raises, and offer several recommendations for your consideration. These are presented in no particular order or priority.

There is a jurisdictional question relating to the coverage of employees of bi-state agencies. The Commission several times has voted to endorse legislation which would extend the jurisdiction of PERC to employees of such agencies in New Jersey including employees of the Palisades Interstate Park Commission.

The term "supervisor" is not defined in the statute in the section which contains definitions, although certain attributes of supervisors are contained in a subsequent section of the Act.[10/]

There appears to be an inconsistency in the statute in that, in the definition of "managerial executive,"[11/] in a school district, only the superintendent or other chief administrator and the assistant superintendent are included as managerial executives. In a subsequent section[12/] on employee rights, however, the Act provides that the term managerial executive shall mean only the superintendent

10/ N.J.S.A. 34:13A-5.3
11/ N.J.S.A. 34:13A-3(f)
12/ N.J.S.A. 34:13A-5.3

of schools or his equivalent. A second question arises in districts where there is more than one assistant superintendent.

The Commission believes that multi-year agreements should be encourged as contributing to the overall purpose of the Act: the promotion of peace, harmony and stability in public sector labor relations. Perhaps there should be specific statutory authority for multi-year agreements up to three years. This would be consistent with the Commission's contract bar rule.

There are several items relating to unfair practices. The section of the Act under which PERC is authorized to issue subpoenas[13/] relates to the Commission's pre-existing jurisdiction. There is no specific authority for the Commission to issue subpoenas in the new section of the Act[14/] relating to unfair practices. The Commission is satisfied that the legislative intent is clear. However, it might be helpful if this were specified.

The Act does not specifically provide for the granting of injunctive relief in pending unfair practice cases. I believe that this should be clarified so that the parties are aware of the appropriate forum for such relief. The Commission believes that it has jurisdiction to grant interim relief as appropriate, but this has not been tested.

Although our experience with unfair practices is very limited, it seems to me that it is awkward for an agency such as PERC, which is called upon to assist the parties in achieving volun-

13/ N.J.S.A. 34:13A-6
14/ N.J.S.A. 34:13A-5.4

tary agreements, to issue complaints in unfair practice cases. Particularly in view of the fact that the charging party must prosecute the complaint, it might be better for PERC simply to hear and decide the matter without being called upon to investigate and issue complaints. In New York State, this problem is avoided simply by having the charging party prosecute his charge. No complaint is issued. This is the way PERC operated when, prior to the decision of the Supreme Court in the Cooper case in 1970,[15/] PERC believed that it had jurisdiction in this area. In Wisconsin and Michigan, complaints are issued automatically without investigation.

As far as I am aware, only under the National Labor Relations Act does the agency investigate charges and issue complaints. But the NLRB is distinguishable from PERC in at least two major ways: (1) the NLRB does not provide a mediation service to the parties and (2) the NLRB prosecutes the complaint itself. A very elaborate structure is required to differentiate between the prosecutorial and the judicial functions of the NLRB in such proceedings.

The statute as amended provides that it is an unfair practice for both the employers and employee organizations to violate any of the rules and regulations established by the Commission. I do not know what the intent of this provision was nor how it is to be applied.

It would be helpful if the sentence were clarified which provides that no provision hereof shall "...annul or modify any

15/ Burlington County Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579 (1970).

pension statute or statutes of this state."[16/] There does appear to be uncertainty and disagreement as to the intent of this provision.

One additional suggestion for your consideration that I would like to offer relates to counsel for the Commission. I would like to preface this remark by stating that we have had no difficulty whatsoever in this regard. At the present time, PERC has a General Counsel and is seeking a Deputy General Counsel. Technically, these appointments are made by the Attorney General as required by statute.[17/] However, I believe that it would be desirable if the statute specifically authorized PERC to employ counsel as appropriate and independent of the Attorney General. I believe that this would contribute to the appearance of independence of PERC which is so important for the agency if it is to enjoy continued acceptability as a truly neutral agency.

One of the biggest problems that this agency has faced since its inception has been that of employee turnover. Our experience to date indicates that professional employees will stay with the agency an average of just over two years. This means that we are constantly recruiting, training, and breaking in new employees and suggests the need for professional salaries that will attract and, most importantly, retain well-qualified employees. This is even more true now with the expanded jurisdiction which the Commission has been given. This would help to overcome what in my judgment has been the greatest shortcoming of the Commission to date: the time that elapses between the filing of petitions and, hereafter, charges, and the

16/ N.J.S.A. 34:13A-8.1
17/ N.J.S.A. 52:17A-13

issuance of decisions. The Commission requires a larger and better paid staff in order to carry out its functions effectively.

Gentlemen, I appreciate your time and attention. I hope that I have not created the impression that the situation is chaotic. It is not. On balance, I believe that the law has worked very well in the more than six years that it has been in effect. Many thousands of public employees are organized and negotiate agreements every year or every several years. Public employers continue to function and to govern. The system is working. Undoubtedly some refinements and improvements are possible.

I shall be happy to attempt to answer any questions that you may have.

Thank you.

DR. LESTER: Thank you. This is a very comprehensive, analytical statement.

Do any members of the Commission have questions?

SENATOR MC DONOUGH: I would like to ask one question. In 1968 or 1969, we introduced a bill in the Assembly - I was one of the co-sponsors of the bill - calling for the fair and final offer concept to which you referred. I see that you suggest that this might be an avenue. But you recommend what I thought was one of the weakest points of that piece of legislation, that an arbiter is obligated to selecte the final offer of one party or the other. Don't you think this would have a better chance of becoming acceptable if this arbiter were to sit in and try to find the fair ground between the two and come up with a final offer, but it might be part of one and part of the other, rather than one or the other?

MR. TENER: What you are describing is conventional arbitration in which the arbitrator is free to impose an award based upon the positions taken by the parties,

but choosing freely from each or modifying those positions and taking some middle ground. The essence of the final offer selection or fair and final offer concept is that the arbitrator is obligated to select without change the last position submitted to him by either party - either one party or the other party.

SENATOR MC DONOUGH: Don't you think, however, this would foster the two parties putting in totally unacceptable plans, the arbiter having to take one or the other?

MR. TENER: The position that the Commission has taken is that this is an approach which should be studied. I can't speak with certainty on what result there would be. There have been several years of experience with a fair and final offer approach involving policemen and firemen in the states of Michigan and Wisconsin. The results there, to date at least, suggest that what you are raising as a possibility has not occurred. The theoretical idea is that both parties would be concerned that the other side would put in a reasonable position and their unreasonable position would not be accepted, so it compels both to be reasonable.

SENATOR MC DONOUGH: I can say this, that that was the thing that blocked that bill at that time, the fact it looked to be a little too difficult and would not be acceptable by the Legislature - and that was the end of the bill. It died in committee.

MR. TENER: Let me indicate one alternative which has been implemented by statute in Iowa. It is a variation on that theme. In that situation, the arbitrator can take any of three positions. He can take the final position of either of the two parties or he can impose the fact-finder's recommendation. So that would presumably be a middle ground.

DR. LESTER: Could I just interject and say that

Senators Orechio, McDonough and Greenberg; and Assemblymen Burstein, Ewing and Littell are now present in the Chamber.

Assemblyman Burstein, did you have a question?

ASSEMBLYMAN BURSTEIN: Yes. Mr. Tener, with regard to the statement that appears on page 4 as it relates to the distinction in the use of binding arbitration between impasses on grievances as opposed to impasses on terms and conditions of employment - and you make mention of the fact it is used in the private sector - can you explain to us what the rationale is for having it in one area, that is to say, grievances, as opposed to the terms and conditions of employment?

MR. TENER: Yes. The arbitration of grievances relates simply to an interpretation of what it was that the parties themselves had on their own agreed upon. And grievance arbitration results in a determination by an arbitrator as to what that agreement means. It is a means of enforcing their agreement. It is an independent means of doing that by a third party as opposed to a unilateral determination of what was intended by the parties when they made their agreement by generally the public employer.

Impasse arbitration over contract terms is an altogether different matter in that that relates to the terms of an agreement and can result in the imposition of terms on the parties by an outside third party. That outside third party when he is a grievance arbitrator, however, simply interprets the contract that exists between the parties. He does not add to, modify or in any way change that agreement.

ASSEMBLYMAN BURSTEIN: I can understand that. And you have given me the definition of what the two phrases mean really. But what I am trying to get at is what the rationale is for the use of compulsory arbitration in

the one case as opposed to not using it in the other.

MR. TENER: The position of the Commission, I believe, is that the fair and impartial interpretation of agreements is a desirable thing. Once a contract has been reached, that is the agreement, it should govern the relationship between the parties; and whatever they have agreed to should be impartially interpreted and administered. The Commission is not prepared, however, to support the concept of binding arbitration of contract terms.

DR. LESTER: Are there other questions the Commission may have? (No response.)

I would like to ask something. On page 9, there is this recommendation apparently by the Commission that there be a 9-member Commission with 5 voting members who are public and 4 non-voting advisory members. Is it the concept there that the 4 non-voting advisory members would always meet every time that the 5 public members were meeting?

MR. TENER: Yes. That was my understanding. As I indicated in the statement, that was the position that was taken in July, 1973. What the current positions of each of those members are, I cannot say with certainty. The idea at the time though was that those advisory members would be present, they would be permitted to provide input in assisting the Commission in reaching decisions, but would not participate in the decisions.

As you are aware, there is a Conflicts of Interest statute in this State. The Commission has adopted a Code of Ethics pursuant to that statute. Under that Code of Ethics, the so-called partisan members of the Commission are sometimes precluded from participating to any extent whatsoever, including discussion, in matters before the Commission in which the agency which they represent is involved. This advisory concept would permit

at least the participation of those members in the informal information-gathering, discussion stages of the process, but they would be precluded from participating in the formal decision-making aspects.

DR. LESTER: When the formal decision would be made, would they be present?

MR. TENER: I believe that they would be present.

DR. LESTER: That was the point I had in mind.

MR. TENER: They would not vote.

SENATOR MC DONOUGH: These would not be a permanent four people?

MR. TENER: Subject to the same method of appointment I assume as now exists, a three-year term presumably from the Governor, with Senate approval.

SENATOR MC DONOUGH: If you were negotiating a fireman's problem, you wouldn't have on there a policeman and an NJEA person representing employees. It would be a police and fire representative.

MR. TENER: No. The composition of the Commission has been, and under that proposal would remain, fixed. At the present time, for your information, the partisan members are Dr. Fred Hipp, who is the Executive Secretary of the New Jersey Education Association; Dr. Mark Hurwitz, who is the Executive Director of the School Boards Association; William Druz, who is the Chief Examiner and Secretary of the Civil Service Commission; and Francis Forst, who is the Business Manager of Local 195 of the Interational Federation of Professional and Technical Engineers. Those members are there to represent the interest of employee organizations and of public employers. They are not there specifically to represent the NJEA or the School Boards Association. It would be possible, I suppose, if you wanted to, to expand the number of advisory members

to permit a more representative group of individuals by including representatives from municipal or county government, police and fire organizations, and other employee organizations.

DR. LESTER: If I could just follow up with one other question: Is there any other state that has a tripartite, so to speak, board?

MR. TENER: New York State has a tripartite board --- no. New York City has a tripartite board. It is a unique situation perhaps in that there is a single employer that is involved, the City of New York. But they do have a seven-member commission, with six part-time members, one full-time chairman, three public members and two members selected by the City of New York and two representatives selected by an organization called the Municipal Labor Council. Most other commissions, and all that come to my mind, are composed exclusively of so-called public members with appropriate partisan representation sometimes provided by statute. Sometimes there is a distinction as to whether members are full time or part time with the Commission.

ASSEMBLYMAN BURSTEIN: You had suggested the possibility of the Commission being given the power to intervene on its own motion with respect to impending disputes and impasses. Would that not entail an expansion of the numbers of employees of the Commission in order to fulfill that function properly?

MR. TENER: I don't believe that there would be any significance to that change in terms of the caseload of the agency. There are certain situations in which for tactical reasons neither party wants to request a mediator. The request of it might appear to be a sign of weakness. So we are sometimes not able to get involved easily in a situation in which we think we should get involved.

As a practical matter, it hasn't caused too much difficulty because we have been able to get ourselves involved under one guise or another. A recent example of that was the Hoboken fire situation, in which there was not a formal request that the agency intervene and assign a mediator; yet we do have a mediator who met with the parties on an intensive basis.

ASSEMBLYMAN LITTELL: At your informal meeting with us, I think we asked you for some statistics. I just wonder if you have those prepared for us, number one.

MR. TENER: Yes. I gave to Mr. Guzzo several days ago all the information that was requested, including information on public sector strikes in New Jersey over the years to the extent that we had that information available.

ASSEMBLYMAN LITTELL: Thank you.

Question number two: You may have covered this earlier. I just came in late and I apologize for that. Is there any practical reason or does it make any sense to negotiate for special benefits as much as a year in advance? We just ran into a situation in the Legislature where we had to pass a special appropriation to cover a holiday benefit that caused some disruption amongst the members of the Legislature because it was being passed as a special appropriation.

MR. TENER: Yes. There are difficulties with that. The budget submission date, of necessity, in public employment must be well in advance in most instances, at least, of the fiscal year under consideration. That is not true in the case of municipal and county governments. The budget submission date takes place during the calendar year, which is the fiscal year employed by those employing entities. But in State government and also in school districts, there is that difficulty. The budget submission date in school districts is approximately the 1st of February. The parties

are engaged in negotiations covering an agreement that will become effective either July 1 or September 1 hence, which is four to six months in advance of the time that the budget is completed. I don't know what can be done to change that without bringing about rather drastic modification of the bargaining process as it has existed. One thing that could be done, of course, would be to modify the termination dates of the agreements to make them conform with the budget submission dates. That might be a way.

As far as I am aware, the only contract covering school districts in the State that is coincidental with the budget submission date is the contract involving the Newark Teachers Union. They do have an expiration date, I believe, of February 1. But other contracts all expire June 30 or August 31, to my knowledge, in school districts.

DR. LESTER: Any further questions? Senator Dumont.

SENATOR DUMONT: Mr. Tener, what percentage of your total caseload involves disputes between boards of education and teachers or other employees of boards of education?

MR. TENER: Approximately 70 percent of our impasse cases, mediation and fact-finding, are cases involving boards of education as public employers and their organized employees. That is going down somewhat over time as policemen are making increasingly active use of the Act and the impasse procedures.

SENATOR DUMONT: Do you have any personal recommendation or would you rather not comment on how you feel about whether the Commission should be continued as a tripartite commission?

MR. TENER: My preference would be to have the Commission converted into an all-public body. The concept of having advisory members has appeal to me. I know that

it has been very helpful, speaking now as a member of the staff of the Commission, to have the opportunity to have input from those partisan members.

My feeling is that I would be in a position, again speaking as a staff member, to more freely utilize and receive input from those individuals if they were not members of the Commission. For reasons of their own concern about appearing to interfere, the Commissioners have been very, very reluctant to talk to me on a matter which I think it would be appropriate to talk about, but they are afraid that they will be accused of abusing their privileges in their access to me. Because of that, I feel as though I have to some extent lost important input from the School Boards Association and the New Jersey Education Association, particularly.

DR. LESTER: You could gain that, couldn't you, by having an advisory group that would meet with the Commission periodically, say, once a month or every two months or whatever; and also, then you would have access to them in the interval?

MR. TENER: That is my belief, yes.

ASSEMBLYMAN EWING: When you have these hearings, don't you call in people, say, that represent the firemen's group or the policemen's group, even though they are not members of your board?

MR. TENER: No. The Commission, upon request of a party, will permit them to attend meetings and appear before them if they want to address the Commission with respect to a particular subject or in connection with a particular decision. However, as a matter of routine, only members of the Commission are there. It is basically a decision-making body and they act in a formal capacity to adopt or reject decisions that have been submitted to them for their consideration.

ASSEMBLYMAN EWING: But to get the expertise, don't they call people in before they make their decision?

MR. TENER: No. The decision to the extent that they make formal decisions must be based on the formal proceedings: the record that has been developed in the previous hearing, the Hearing Officer's report and recommendations, and the exceptions that have been filed, briefs that have been submitted, and the formal evidence that is available. It is a judicial function that they are performing.

MR. APRUZZESE: Mr. Tener, I was interested in your comments on page 12 of your remarks, with regard to the handling of unfair labor practice charges. You point out the distinction between the NLRB and the PERC agency. Do you personally feel that it would be better in the unfair labor practice aspect of the Board's work, to have the parties, themselves, file charges so that the deliberative body can just concern itself with deliberations and decisions rather than the investigative function?

MR. TENER: That is my preference, yes.

MR. APRUZZESE: That would also, of course, save staff and the time of PERC people, would it not?

MR. TENER: Yes, it would.

MR. APRUZZESE: I have a request now, not so much a question. I wonder if you could submit to our Commission the salary schedules for the various people and their positions within the PERC agency.

MR. TENER: Yes. I have that information available. If you are interested, I can submit some comparative information for comparable people in other state agencies if you would like.

MR. APRUZZESE: Yes, I think that would be very helpful.

DR. LESTER: This is the ranges; it isn't the salary of particular individuals? Or do you have it by average?

MR. TENER: No, we would provide the salary ranges and the basic structure.

DR. LESTER: That would be very helpful to have, I think.

MR. STERNS: With regard to your comments on scope of negotiations and the process, can you describe how the Commission under the circumstances that you have listed will handle this matter?

MR. TENER: Yes. The hope is that a party will submit a request for a scope of negotiations determination, indicating that a particular matter then in the process of being negotiated is in dispute as to its negotiability, as to whether or not it is a term and condition of employment. The party will then file a brief, indicating legal arguments in support of its contention that the matter is or is not within the scope of negotations, within seven days after his original request. The respondent will have fourteen days from the date of receipt of the brief from the filing party in which to file a response to that.

If either party requests a formal hearing on the matter, that request will be granted under the Commission's rules and regulations. Our hope is that there will not be questions of fact in dispute and that the parties will be prepared to submit the matter on the basis of their written submissions for determination by the full Commission. We have had no decisions under those provisions yet.

MR. STERNS: Will that determination be denominated an order? I see that is one of the points of clarification that you raise here. Will you call that an order?

MR. TENER: Yes. In appropriate circumstances, if it is found, for example, that a particular item is a required subject of negotiation, the Commission contemplates the issuance of an order that that subject be negotiated upon request of the requesting party.

ASSEMBLYMAN LITTELL: At the informal hearing we discussed the problem of professional hearing officers or arbitrators and the possibility of using some of the people from the public sector in their off-season. Does that appeal to the Commission or what is your opinion on it?

MR. TENER: The question relates to the possible combination, I believe, of the mediation functions of the Public Employment Relations Commission and the State Board of Mediation. The Commission has not taken a formal position on that. I am not aware of any sentiment, however, favoring a combination of that function on the part of the Public Employment Relations Commission. I am not authorized to speak for the State Board of Mediation. However, my information is that they too are not seeking a combination of the mediation functions.

One thing that has happened over the limited years of our experience has been that the workload has evened itself out. It used to be very highly concentrated in a period of several months around budget submission dates in February for the school districts. While it is still heavily concentrated in that area, it is going down and we are finding that our workload is relatively even throughout the year with a pretty substantial peak in January, February and March.

My information also is that the caseload of the Board of Mediation is relatively even and not subject to the kind of annual peaks and valleys that may have existed in the past. So it may be that at least in terms of pure efficiency of utilization of personnel, there is less advantage than I might have thought a while ago to the combination of those two functions.

DR. LESTER: Any further questions?

SENATOR ORECHIO: Regarding fact-finding, I was wondering what the track record has been regarding reports

that they may submit after hearing both sides, especially when you have some men who become rather popular representing employers and employees? I was wondering whether or not the Commission takes into account in the scheduling process that factor. For example, I am involved now in fact-finding. We have a 30-day wait for a decision. It appears to me that probably some men who are selected to participate in the process may be in such great demand that we could develop an imbalance and also an inordinate period of time to get a decision. I was wondering what has been the history so far with respect to that.

MR. TENER: That is an interesting point, and it is one that we are aware of and would very much like to remedy.

The fact-finding process is a selection process. The parties are given a panel of fact-finders and they are permitted to strike a name and the one who is remaining or the most acceptable of the remaining names is designated by the agency as the fact-finder. So the parties themselves have a major role in the selection of the fact-finder and our experience repeatedly and consistently is that those parties prefer the ones who are also the busiest ones. I guess they must know when they engage in the selection process that they are picking a very busy individual and that they will probably have to wait some period of time to receive a decision or recommendation from the fact-finder.

In one effort to overcome that difficulty, we strongly encourage the parties to jointly request particular fact-finders to work with them. We feel that an individual selected by the parties mutually has a greater likelihood of being able to achieve an acceptable result to them and produce a settlement. However, our experience in that area has been similar: they select from the same relatively small group all the time, the well-known, established, acceptable individuals. And they have the same difficulties

of having to wait for decisions.

We are attempting at all times to expand the group of people for inclusion on our panel as mediators, as fact-finders and as arbitrators. But our experience is that the parties prefer the known quantities, the acceptable individuals; and they are not particularly willing to experiment when it is their own cases that are involved with new, inexperienced mediators, fact-finders or arbitrators.

SENATOR ORECHIO: As a follow up, it appears to me that a defendant appearing before a judge because of violation of a law doesn't have an option to pick a judge. Neither side has that option. Can't that system be improved whereby these men are assigned rather than having the option of both sides selecting? Doesn't that delay the process?

MR. TENER: The aspect of the process that we are talking about now relates to the determination of contract terms. As I suggested, the present statute provides no finality to that process. It is simply a voluntary process and the fact-finder simply makes recommended terms of settlement. He does not have authority to impose a settlement on the parties. So crucial to his effective service of the parties in terms of helping them reach an agreement is his acceptability. It is for that reason that the Commission encourages the parties jointly to select an individual or to select an individual as a fact-finder from a panel. But in that connection, he is not really serving as a judge. If that individual had the authority - and they do in some states - to impose settlements on the parties, then he would be acting as an arbitrator over contract terms. That would be a much more judicial-like function. However, in those states where that process is established, there too the procedure

invariably permits the parties to have some role in the selection of the individual, again the idea being that if he is acceptable to them, there is a greater likelihood thathis award will enjoy acceptability, will be a reasonable one and with which both parties can live.

DR. LESTER: Are there any additional questions? If not, thank you very much. You have been very helpful.

We now have the people from the N.J.E.A.: Kathryn Stilwell, Jack Bertolino, and Cassel Ruhlman.

Will you please identify yourselves for the record and then proceed as you wish with your statements.

K A T H R Y N E. S T I L W E L L: Thank you, Dr. Lester. and members of the Public Employer-Employee Relations Study Commission. I wish to thank you for allowing me the opportunity to speak here today.

I am Kathyrn E. Stilwell, President of the New Jersey Education Association, 180 West State Street, Trenton, New Jersey. The NJEA represents more than 102,000 active, associate and retired school employees in this State. NJEA affiliates are the sole and exlusive legal bargaining representatives for teachers in all but five of the State's 580 school districts.

With me today are Jack Bertolino, NJEA's director of field services, and Cassel Ruhlman, an NJEA attorney. In a few moments, Mr. Bertolino will discuss some of the technical sections of the new Public Employer-Employee Relations Act which you are studying and analyzing. All three of us will remain for any questions you may have.

You probably realize that NJEA, for the most part, is pleased with the strengthened negotiations law as amended by S-1087. Chapter 123, Public Laws 1974, should enhance efforts to improve public employee-employer relations, and help prevent or bring prompt settlement of labor disputes, if it is allowed an opportunity to function.

I want to reiterate today the serious problem that was not resolved by the new changes to PERC.

Teachers and other public employees in New Jersey are still being penalized as second-class citizens by the courts. Without a statutory right to strike, we are victimized by a common law interpretation of the courts which brings almost automatic injunctions against employees for a walkout, no matter what the provocation.

Almost 300 teachers in New Jersey have been jailed on sentences ranging from 2 days to 90 days when they faced these court injunctions. As a teacher in Fair Lawn, I was among 14 sentenced to 30 days for striking in 1971. While eight of these 14 were either officers or members of the teachers' negotiating team, the other six apparently were selected at random from among 400 on strike for punishment by the Board of Education. Even though it is the Board of Education which frequently provokes a strike, by refusing to bargain or by negotiating in bad faith, it is only the teachers who are penalized and punished with harsh fines and jail terms.

In New Jersey, there is no constitutional nor state statute which prohibits strikes by public employees. It is inconceivable that in today's times a school board can attempt to resolve its difficulties by having employees thrown in jail and severely fined.

We contend that, at the very least, an injunction against public employees should not be automatic; and that a judge should be required to weigh the issues before making a decision.

NJEA is asking for nothing more at this time than a system which grants public employees their day in court, which gives them an opportunity to show whether the employer is unreasonable or intransigent.

We believe that employees should have the opportunity to show a court that a strike or a job action would not jeopardize the health and safety of the public.

Leading jurists have agreed, and many have asked the State Legislature to enact laws to stop the jailing of teachers. In other states, courts have declined to grant automatic injunctions, ruling that to grant a school board ex parte relief

"can make the judiciary an unwitting third party at the bargaining table and a potential coercive force in the collective bargaining process."

A learned justice of the Rhode Island Supreme Court observed that negotiations without the right to strike is nothing more than "sterile ritualism."

Strikes are permitted for public employees under certain circumstances in 11 states. NJEA maintains that a limited right to strike law in New Jersey would encourage the public employer to negotiate more expeditiously and would contribute to the diminution of teacher-school board strife.

If the Study Commission seeks to promote the conclusive and equitable resolution of labor dispute impasses, then a limited right to strike for public employees is the only fair answer to the problem.

Thank you.

And now may I present Jack Bertolino, NJEA Director of Field Services.

J A C K B E R T O L I N O: Dr. Lester and members of the Commission, as Kay has stated, I am Jack Bertolino, Director of Field Services for the New Jersey Education Association. The NJEA offices are here on State Street in Trenton, and I live in Pennington, New Jersey.

About four months ago, Governor Byrne signed into law S-1087 (Chapter 123 of the Laws of 1974), the bill which significantly strengthened the New Jersey Public Employer-Employee Relations Act. Less than two months ago, on January 20, 1975, Ch. 123 became effective.

The enactment of Ch. 123 did strengthen the bargaining process. However, it did not come to grips with a major challenge faced by public employees in this state and one faced by this Study Commission. As stated in Chapter 124, the Act creating this Commission, that challenge is "...the important, timely, and effective resolution of negotiating impasses in the public sector..." NJEA is hopeful, as suggested by NJEA President Stilwell, that the Study Commission will ultimately conclude that true collective bargaining cannot take place in public employment without granting public employees the limited right to strike.

Despite this major shortcoming, however, the provisions of Ch. 123 should help to eliminate some roadblocks to the bargaining process which have been all too apparent during the past few years. The obvious improvements include:

- clarification of the right of individuals and organizations to grieve under provisions of a negotiated grievance procedure
- state assumption of fact-finding costs
- training of public employee representatives
- appointment of a full-time PERC chairperson

In addition, Ch. 123 strengthened the bargaining process by granting PERC the authority to take affirmative action in the following areas:

- unfair labor practices
- scope of negotiations
- the commencement of negotiation and the institution of impasse procedures

As you know, PERC has already adopted emergency rules to carry forward its mission in these vital areas.

Now that its machinery is in operation, PERC should be given the time and the opportunity to carry out its responsibility through the rules it so recently adopted. In other words, PERC should be given a chance to succeed.

For example, PERC is right on target concerning two issues which the Legislature asked the Study Commission to address itself:

1. Timing of negotiations - PERC has adopted specific rules which set time limits for negotiation and impasse including the commencement of negotiations and the initiation of mediation and fact-finding procedures. Some 10 pages are devoted to this important subject which provide guidance to employer and employee groups alike.

2. Scope of bargaining - Ch. 123 grants PERC the authority to determine whether a matter in dispute is within the scope of negotiations --- i.e., is an item negotiable? On this subject as well as that of timing of negotiations, PERC has adopted rules which set forth a procedure intended "...to effectuate that which the Commission views as legislative intent to avoid protracted administrative litigation with respect to disputes which normally will invoke solely questions of law and policy." Included in PERC's decisions will be "...its determination as to whether the disputed matter is a required, permissive, or illegal subject for collective negotiations..." Relying on PERC's expertise to make such determinations should be more meaningful than gambling with different courts throughout the state which may not have a full understanding of this complex and specialized field.

Also, the amendment of Section 10 in the negotiation law which added the word "pension" should give PERC an additional guideline upon which to make a scope determination. As you know, Section 10 now reads

"...nor shall any provision hereof annul or modify any pension statute of this state." School boards have caused much mischief with this provision since 1968. Boards have continually used this section to diminish the authority of negotiated agreements by appealing unfavorable arbitrators' decisions to the courts and by maintaining the absolute superiority of Title 18A over the negotiations statute. Adding the word "pension" to this section should at least give the negotiation law a fighting chance in the world of negotiation.

Actually, back in 1970, before the Supreme Court ruled in the Cooper case that PERC had no enforcement power, PERC had held hearings and was ready to issue a decision on scope of negotiation in a contractual dispute involving the Ramsey Teachers Association and the Ramsey School Board. Even then, without Ch. 123, PERC thought it had the authority to rule on scope and would have done so had not the Supreme Court's Cooper decision interfered. Now, with the enactment of Ch. 123, that confusion has been eliminated. PERC has the clear authority to define "terms and conditions of employment" within the scope of bargaining. NJEA believes that PERC should be given the opportunity to carry out its legislative mandate and that case law should be allowed to develop in order to clarify this issue.

Another issue which the Study Commission will ponder is the present composition of PERC. PERC has operated well in highly controversial areas with few criticisms by employer or employee groups. Its tripartite structure has guaranteed input from the general public as well as from employer and employee groups. The full-time chairperson called for by Ch. 123 should strengthen the entire operation. NJEA believes that any move at this time to alter PERC's successful operation cannot be supported or justified.

As stated earlier, NJEA believes that the newly-enacted provisions of Ch. 123 strengthened the negotiating process and should be given ample opportunity to prove their effectiveness. Two outstanding deficiencies do exist, however. NJEA strongly urges the Commission to recommend amendments which would (1) require mandatory binding arbitration as the terminal step in all negotiated grievance procedures, and (2) provide for the limited right to strike.

1. Binding arbitration of grievances - Last year the NJEA Research Division conducted a survey of contracts negotiated between school boards and teacher organizations in effect for the 1973-74 school year. The study indicated that 210 (36%) of the 584 operating school districts had negotiated contracts containing grievance procedures terminating with final and binding arbitration. The school boards which negotiated this provision recognized that the right of aggrieved employees to seek binding judgments by a disinterested third party is fundamental to fair and enlightened employment practices. Unfortunately, most school boards still refuse to accept the concept of binding arbitration of grievances as the most expeditious, rational method devised to settle disputes arising under the provisions of a negotiated contract. Often those school boards are the very ones which most need such a system for the resolution of grievances. NJEA respectfully urges the Study Commission to recommend to the Legislature that binding arbitration of grievances be guaranteed statewide through the enactment of appropriate legislation.

2. Limited right to strike - Congressman Thompson spoke at the Legislative Conference a couple of weeks ago and he made that statement. The Director of the Federal Mediation and Conciliation Service supports the right of teachers to strike. Theodore Kheel has spoken to it and others. NJEA, of course, concurs. NJEA is committed to bring balance to the bargaining table and fairness to the courts.

The major problem in New Jersey is the absence of a law granting teachers any semblance of due process in the courts. At the present time, if a strike appears imminent, a school board merely appears in court and automatically secures an immediate temporary restraining order. This order usually prohibits the teacher organization from engaging in any concerted activity, including picketing, mass meetings, and demonstrations.

Since a judge has no authority to do otherwise, he or she is forced to issue such an order regardless of circumstances and the impact the strike may or may not have on the public health or safety. As a result, teachers can be enjoined from striking even though the public health or safety is not endangered and despite

possible extreme provocation by a school board -- a board which may very well have corrupted the negotiating process.

To most reasonable people, such a situation smacks of unfairness. Without a guarantee of even minimal elements of due process, teachers can be hauled before a judge and possibly sentenced to jail. This is why a limited "right to strike" law must be enacted if true collective bargaining is to take place in New Jersey. Simple justice demands that teachers be given "their day in court." Except in rare cases, teachers have no opportunity to show whether the employer has been unreasonable or intransigent. In most instances, New Jersey judges have simply granted an injunction when it was sought by the employer.

The New Jersey Education Association believes public employees should not be automatically blocked from taking a job action in the face of bad faith negotiating by a public employer. Such rights should be guaranteed while still protecting the public interest.

If a certain strike action does present a clear and present danger to the public health or safety, a judge should be able to enjoin it. When the public health or safety is not endangered, however, elemental fairness dictates that public employees should have the same rights presently enjoyed by millions of their fellow Americans.

Just across the river in Pennsylvania, teachers are given their day in court. In some cases, injunctions are granted and in other cases they are not. The law is working to the best interests of Pennsylvania's citizens, school boards, students, and teachers. Teachers tell us that, in most instances, fairness reigns at the bargaining table. Since automatic strike injunctions cannot be issued, school boards know their actions risk careful scrutiny by the courts. As a result, collective bargaining for public employees exists in Pennsylvania.

As members of this Study Commission probably know, the Pennsylvania legislature authorized the appointment of a similar joint legislative committee to examine and report on the effects of the public

employee bargaining law (1970 Act No. 195) in that state. The membership of the committee was equally divided between Republicans and Democrats and consisted of a total of six leaders from the State Senate and the House of Representatives.

The report was submitted to the Pennsylvania legislature in November 1974.

Two conclusions in the report are worth noting:

1. In the summary statement the Joint Committee indicated that:

   "The evidence given by people most intimately concerned with the Act and its administration was positive, constructive and concerned. It appears that Act 195 has not caused an adverse relationship to develop in regard to public schools or public employers and their employees at other levels of government. The legislature should continue to monitor the impact of collective bargaining upon schools and local government units."

2. Under the section titled, "Effectiveness of the Act" the "CONCLUSION" states:

   "The Committee concludes that Act 195 (1970) is working well. The testimony indicates that public employers and employees in general have successfully entered a period of collective negotiations."

Without belaboring the point, it is clear that collective bargaining with the limited right to strike is alive and well in Pennsylvania. The machinery of government has not come to a halt. Anarchy does not reign. Even the Executive Director of the Pennsylvania School Boards Association is quoted in the report as stating ..."Despite some shortcomings, ...Act 195 is a sound law which, with proper administration and with certain shoring up of obvious shortcomings can function as it was designed to do."

In conclusion, let me say that NJEA believes that the basic provisions of New Jersey's negotiation law are sound and should remain intact. The law's major weakness can be strengthened by requiring mandatory binding arbitration of grievances and by adding a limited right-to-strike provision. NJEA respectfully urges this Study Commission to make such a recommendation to the Legislature.

Thank you, Mr. Chairman.

We are prepared now to answer any questions you may have.

DR. LESTER: Do any members of the Commission have questions?

SENATOR DUMONT: Mr. Bertolino, you talk about a limited right to strike. What do you mean by that specifically and how is it to be distinguished from a general right to strike?

MR. BERTOLINO: Well, with a limited right to strike, Senator, a public employee group could not go out on strike willy-nilly without attempting to prove and presenting evidence to an appropriate court that the health and safety is not affected at that particular moment.

SENATOR DUMONT: Does the health and safety include the example that it might set for children who are being instructed in the public schools when the teachers go out on strike, whether limited or general?

MR. BERTOLINO: Of course, that would be up to a judge to decide, but I would think not. I don't know that that definition would come under "health or safety."

SENATOR DUMONT: Well, don't you think it should?

MR. BERTOLINO: I think there is a question as to whether it is improper for public employees to withhold their services as millions of other Americans have the right to do. I am not sure that it is.

SENATOR DUMONT: There is nothing that makes anybody

work in the public sector employment rather than in the private sector where the right to strike is guaranteed, is there?

MR. BERTOLINO: No, I would say not. Of course, I think it depends on where you are starting. If you are starting from the premise that public employees are citizens and should have the elemental rights of due process and rights to withhold their services, then you come to the conclusion that they shouldn't be second-class citizens and, therefore, should have the right that others enjoy. I don't see that being a public employee means that you should necessarily give up rights that are given to other persons in our democracy.

SENATOR DUMONT: Nobody denies their rights as citizens, least of all would I, but at the same time, if the services to the people are going to be interrupted for reasons that are not always good reasons, it would seem to me you are certainly getting into a situation where those services can be interrupted for long periods of time by granting even a limited right to strike.

MR. BERTOLINO: I think, Senator, that this is the type of an issue that should be confronted by a judge in a court of law.

As I mentioned in the direct testimony, the problem right now is that even in cases where the school board may be at fault - and you know there have been such cases in this State - a judge has no right legally to do anything other than issue an injunction. This would at least give him or her an opportunity to hear the facts in the case and then pass judgment.

I might say, Senator, that this situation became crystal clear to me a couple of years back during the Trenton strike. The Trenton Education Association was out for about eight days. On the second or third day, the

board went in to Judge Fritz's court over in the Annex - he is now in the Appellate Division - and asked for this temporary restraining order. That occurred about 9:30 in the morning. It happened that we read about it in the newspaper. We went over to the judge's chamber. The judge did not sign that order immediately. He brought in the parties. He attempted to secure a settlement. He, in fact, attempted to mediate the dispute. As the day wore on, it became obvious that there could be no immediate resolution of the issue. I'll never forget it because it was 7:30 that night, the board was to meet at 8:00 o'clock that evening, and the board attorney was insisting and demanding that that temporary order be signed, period. I happened to have been there alone - I am not a lawyer. I asked Judge Fritz - and I don't think he would mind if I say this - "Is there any law that I don't know about that perhaps I could present to you to stop you from signing that?" He said, "no." I said, "Is there anything I could do or say to persuade you that you should not sign that order? Could I show you that the board is intransigent? Could I bring you any evidence?" He said, "No, there is no way you could stop me. I must sign it, period." He signed it. As a result of his signing it, the teachers were found guilty of violating a court order.

What we say, Senator, is this: In a situation of that kind, the teachers or the public employee group ought to be able to bring evidence to show that the public health or safety is not affected or perhaps that the boards are intransigent. I don't think that is taking away any rights of government to make such judgments. It is merely elemental fairness that ought to be applied across the board to public employees, including teachers.

SENATOR DUMONT: Is that the basis of the bill which you have in the Assembly today? Isn't there a limited right to strike bill in the Assembly?

MR. BERTOLINO: No, there is not at the present time. I think,if you remember, a year or so ago we had Bill A 521. That bill was not introduced. That is the essence of what I was saying. What I said was in 521 and I have copies of it if you wish to see them.

That bill, as I understand it, was not introduced by the sponsors in the hope that perhaps the Study Commission would come up with such recommendations and that the Legislature could act appropriately.

My guess is that it probably will be presented again sometime during this session.

SENATOR DUMONT: In Kathryn Stilwell's statement, she says on page 2, "In New Jersey, there is no constitutional nor state statute which prohibits strikes by public employees." That is not exactly the way I would read the New Jersey Constitution. I think it guarantees the right to collective bargaining by public employees, but it does not grant the right to strike.

MR. BERTOLINO: You are speaking of Section 19 of the Constitution --

SENATOR DUMONT: Right.

MR. BERTOLINO: (Continuing) -- which gives public employees the right to make known their grievances to public agencies. It does not state specifically, however, that employees do not have the right to strike; it is only by implication.

SENATOR DUMONT: I notice in Miss Stilwell's statement she talks about 580 school districts; and, in your statement, you have 584. It doesn't seem to me you are getting together any better than the Department of Education as to the exact number of school districts.

MR. BERTOLINO: You are right. I noticed that as she was reading it. I have heard 600, 620, etc., and it is tough. I agree with you.

SENATOR DUMONT: Are you including in the 580 or 584 the regional school districts or are you just talking about Type I and Type II school districts?

MRS. STILWELL: No, regional -- all of them.

ASSEMBLYMAN BURSTEIN: Mr. Bertolino, your premise for asking for statutory authorization for a limited right to strike seems to be premised on the intransigence of school boards. Isn't that largely taken care of by S 1087, by means of the insertion of the Unfair Labor Practices section in that bill?

MR. BERTOLINO: I don't think it is, Assemblyman.

ASSEMBLYMAN BURSTEIN: Why not?

MR. BERTOLINO: Because it speaks to the issue of unfair labor practices, but it does not speak to the issue of the balance of the bargaining process. In other words, a board may very well be guilty of an unfair labor practice, but, as I understand it, at least in the private sector, before such a judgment comes down it sometimes takes years. By the time you get involved with appeals and everything else, the negotiations have been completed. Many times the issue of whether an employing agency or a collective bargaining agent is participating in an unfair labor practice can be a long and complicated process. And it goes on long after the negotiating has been complete, if, in fact, you are waiting for a final decision.

ASSEMBLYMAN BURSTEIN: Let's assume for the moment that speed is no factor, that the present Commission can act with deliberate speed and come in with a decision that would be timely with respect to your negotiating process, how would you react in those circumstances? In other words, leave out the time factor.

MR. BERTOLINO: I understand. At the present time, of course, you have unfair labor practice provisions in the

NLRA and you also have the right to strike. In a sense, they are two separate issues.

ASSEMBLYMAN BURSTEIN: But you are not really answering the question. Whether it exists in the NLRA or not, frankly at the moment is immaterial to me. What I am trying to find out from you is: What is the rationale for giving the limited right to strike, as you have requested, in the light of the "unfair labor practices" insertion in 1087 and now law, and exclusive of the time problem you have just mentioned? If that is a problem, that is something to consider.

MR. BERTOLINO: Of course, my opinion is that they are two different issues and that because you have an unfair labor practice provision in a statute does not preclude the necessity of having some kind of right to withhold one's services in order to bring balance to the bargaining table. I don't think that they are related. You can bring an unfair labor practice charge against an employer or the employer can bring it against the employee organization, but that is not a substitute for a limited right to withhold one's services, which is part of the bargaining process.

ASSEMBLYMAN BURSTEIN: What you are saying now is that you want to use it as an economic threat. That leads me into the next question, which is: Given the fact that you are asking for a limited right to strike, which incorporates within it the notion that at some point there is a cross-over between legitimacy and illegitimacy in the strike action, is that a real economic threat? In other words, are you asking for something which is inherently self-defeating in that it doesn't have the same impact as the unlimited right to strike does in the private sector?

MR. BERTOLINO: I think it could be self-defeating, but I think it is a responsible position to take. I

think that the New Jersey Education Association recognizes its members are public employees, that there is a difference perhaps between the private sector and the public sector, and we are taking a position in order to be responsible in this respect. I grant - I understand - that if teachers were looking strictly for power, period, then, of course, the unlimited right to strike should be pushed. But the NJEA is a responsible organization and it recognizes that there are other factors involved, such as, health or safety. We recognize that the public has a part to play and we are willing to say that a judge listening to all sides of the story should make a judgment about this. We think, as I say, it is a responsible position to take and we are willing to take our chances with it.

As I described before, it is not happening now and we have case after case, which we can document, to show we have not been given a fair shake, that we can't argue anything before a court because the judge must sign this restraining order without giving us even an opportunity to argue why it shouldn't be. That is the essence of what we are saying.

ASSEMBLYMAN BURSTEIN: One further question: Act 195 in Pennsylvania, was that in effect when the Philadelphia teachers were out on strike?

MR. BERTOLINO: I believe it was.

ASSEMBLYMAN BURSTEIN: And their strike lasted a rather lengthy period, did it not?

MR. BERTOLINO: Yes, it did.

ASSEMBLYMAN BURSTEIN: Was there any kind of injunctive procedure brought in that to your knowledge?

MR. BERTOLINO: As I understand it, there was.

ASSEMBLYMAN BURSTEIN: And did the courts allow them to stay out on strike during that period of time or was it in defiance of a court order?

MR. BERTOLINO: As I understand it, the judge did not sign the order immediately. For a long while, the strike was not enjoined.

ASSEMBLYMAN BURSTEIN: How long did that strike last, do you know?

MR. BERTOLINO: I think it lasted maybe about --- it wasn't three months. It was more like eight or nine weeks, something like that.

SENATOR MC DONOUGH: You say the NJEA is a responsible organization, and I agree with you. Sometimes we lose sight of the fact that the NJEA does a lot more than just negotiate contracts.

Going back to your statement on the elemental fairness of the limited right to strike, presently I am negotiating a contract for my own lumber company. There are a lot of things that my people don't have that you do have. Would the NJEA, recognizing it had the limited right to strike be willing to give up tenure, sabbatical leave and those things, if you had the limited right to strike?

MR. BERTOLINO: I doubt that very much.

SENATOR MC DONOUGH: How can you have that protection and then try to compare yourselves with the private employees' contracts?

MR. BERTOLINO: First of all, we are talking about a limited right to strike, which means that a judge could issue an order immediately after a hearing. So, therefore, we do not have to begin with the total rights --- we would not under our plan have the total rights that private employees have in the first place. And I think there are certain benefits that are legislated even for private employees that certainly should not be taken away.

SENATOR MC DONOUGH: One last question: Then in the fair and final offer legislation, I assume you are saying that you would be willing to live with that, providing the

school board or the negotiating unit, whether it be school boards or police and fire - I know you can't speak for them - and where the school board itself or whoever is negotiating on the other side would have equal responsibility to comply with the regulations of the fair and final negotiation. Do you support this or not?

MR. BERTOLINO: Fair and final offer, as was described by Mr. Tener?

SENATOR MC DONOUGH: Yes.

MR. BERTOLINO: No, we do not support that because that in a sense is compulsory arbitration. Now, when I talked about binding arbitration, I was talking about grievances. I am sure you understand that. Fair and final offer procedure is no different in our mind than compulsory arbitration. It would inhibit the bargaining process because both sides would know that some other party would make the final decision with regard to an issue. We believe that the voluntary negotiations or the voluntary agreement or voluntary settlement is the way to do it and that legislation should provide for that kind of settlement.

SENATOR MC DONOUGH: You don't agree with Mr. Tener when he says that both sides would come in with fair demands initially or would handle their problems in a fair way initially, so they wouldn't have to have the other ---

MR. BERTOLINO: I think Mr. Tener makes a point that in some instances that could happen. But we think that the end result is the same, that the final decision would be a mandated one, an arbitrary one. We think that the collective bargaining process which provides for voluntary settlement of the dispute is the way to handle something like that.

MR. APRUZZESE: Mr. Bertolino, would you say that

your organization is interested in finality to the collective bargaining process? Are you more interested in finality or are you more interested in imposing your will?

MR. BERTOLINO: The New Jersey Education Association and its affiliates are not interested in imposing its will or the will of the local associations it represents on anybody or on the school boards. We are interested in reaching fair agreements in a voluntary way through the collective bargaining process.

MR. APRUZZESE: This type of a discussion, of course, can easily become argumentative and I don't mean to be argumentative; I'm sure you don't. But let's analyze that a bit. Are you interested in finality as opposed to no final method of resolving an impasse?

MR. BERTOLINO: We are interested in finality in a sense that it is voluntarily agreed upon - that it is not imposed. When you say "finality," that to me implies imposition by another party.

MR. APRUZZESE: No, not necessarily.

MR. BERTOLINO: If you are saying finality in terms of reaching an agreement, a settlement that is mutually acceptable, I say, yes, of course.

MR. APRUZZESE: Let me put it this way: The lowest common denominator - whether it is a strike, whether it is a limited right to strike or a general right, or arbitration or final offer selection procedure -- in any event, the lowest common denominator to either of those is finality, is it not?

MR. BERTOLINO: I will accept that.

MR. APRUZZESE: So, consequently, you would certainly be interested in finality. Now the question is: Punctuated throughout your statement and that of your President, Kathryn Stilwell, are statements about intransigence, unreasonableness, refusal to bargain in good faith, that

sort of thing. As has been pointed out by Mr. Burstein, you do now have available the unfair labor practice tool of trying to assert bargaining in bad faith or what have you. In addition to that, if you had the opportunity for fact-finding, if, as another possibility, you might have an opportunity for last best offer selection as a procedure, obviously if you were before a panel or an arbitrator trying to urge the reasonableness of your position as a last best offer, for example, would not that particular individual,in just the same way as a judge might, not have to make a judgment as to whether you are being reasonable and whether the school board is being unreasonable or intransigent or acting in bad faith? Would he not necessarily have to make that decision if there were a last best offer selection?

MR. BERTOLINO: Again I couldn't speak for that individual when presumed to do so, and we are speculating about something that I know nothing about. Maybe you know a little bit more about it than I do.

First of all, fact-finding is in effect right now. We have that and it has worked, as Mr. Tener said, in some instances and in some instances it has not. I doubt very much that an arbitrator or fact-finder, one who would look at the best and final offer, would necessarily take into consideration the factors leading up to his making that particular decision. We have sat in with fact-finders that have been involved in just about every teacher dispute we have had in this State. I don't know that a hard-nosed arbitrator or fact-finder could care one iota about the fighting and the intransigence of school boards or the bad faith of some groups. I don't think he cares. All he would be interested in would be looking at the facts in the case as represented to him as far as a settlement and making a recommendation and letting it go at that.

It has been my experience they don't get involved in all of that. All a fact-finder, an arbitrator or mediator wants is a settlement, period. He will put it to both sides in order to get it. I really don't see that that enters into it at all.

MR. APRUZZESE: Mr. Bertolino, let me just press that one step further. If you had a last best offer selection procedure, the school board would of necessity have to submit its position on the entire contract.

MR. BERTOLINO: That's right.

MR. APRUZZESE: Obviously it could not say, "We are not prepared to make an offer on that issue," or "We don't want to make an offer." It is going to have to state its position. It has to get off the dime. Correct?

MR. BERTOLINO: Right.

MR. APRUZZESE: So does the union.

MR. BERTOLINO: Right.

MR. APRUZZESE: Now my question - and again I want to urge it to you - is: Doesn't that necessarily mean that by comparing your position with the position of the school board, if their position smacks that particular arbiter as unreasonable - and, after all, isn't that what both parties are trying to seek, a fair and reasonable solution? -- if it smacks him as unreasonable, then the likelihood is that that position will be rejected, is it not?

MR. BERTOLINO: Possibly, yes.

MR. APRUZZESE: Therefore, you do have your day in court on your position.

MR. BERTOLINO: I think they are two separate things, sir. When we are talking about day in court, we are talking about whether or not and under what circumstances public employees should have the right to withhold their services. I don't see where intransigence or unreasonableness or anything else comes to play here in terms of a

report that a fact-finder or an arbitrator is going to submit. I don't see the relationship, if I may say so respectfully.

MR. STERNS: I wanted to clarify one thing. If I am correct, did not the Supreme Court say that there was not a constitutional bar and that it was a matter for the Legislature to determine?

MR. RUHLMAN: Yes. I wanted to point that out to Senator Dumont. The Supreme Court clearly said that. Section 19 of the Constitution does not prohibit public employees from striking, but rather the court read that in as a part of common law.

SENATOR DUMONT: That is a matter of interpretation.

MR. RUHLMAN: That is our highest court's interpretation. We may not agree with it or you may not, but there is no other place to go.

SENATOR GREENBERG: Mr. Bertolino, the questions that Vince Apruzzese and you have just been discussing really have to do with a method of obtaining finality. And without, if you will please, getting into the question of whether public employees should have the right to withhold their services as a matter of concept, putting that to one side for a moment, I gather your organization opposes the concept of arbitration as a method of obtaining that finality and instead favors voluntarily-arrived-at agreements. And I would like you to explain to us, please, why as a matter of principle - and I assume this is a matter of principle you are dealing with - you oppose arbitration in the face of impasse in favor of no arbitration and the limited right to strike. What is wrong with a conclusion brought about by arbitration in any form?

MR. BERTOLINO: There is nothing wrong with it as long as the parties agree to it. I think even at the present time under the old Chapter 100 the parties can, if they wish, agree to arbitration and accept it as final and

binding.

Maybe I am repeating myself and maybe I am not being as clear as I should be. But we start with the point as to whether or not the bargaining process should call for a voluntary settlement or whether it should be imposed by anybody else under any circumstances, period. We say, no.

SENATOR GREENBERG: Why?

MR. BERTOLINO: Because we happen to believe in the collective bargaining process which calls for free and open discussion, give and take, negotiation, proposal and counter proposal, dragged out to the point where final settlement is finally reached and not through presenting a written proposal to a third party and then having him select one or the other. That is binding arbitration full and simple, period.

SENATOR GREENBERG: I understand that. You oppose one and support the other. But what are the results of one as opposed to the other that compel you to support it; that is, what will be the bottom line - what would be the net effect of the collective bargaining without arbitration that you will not have or are afraid you might lose if there is,in fact, arbitration imposed by the Legislature?

MR. BERTOLINO: The obvious net effect is that an employee group or a public agency could have imposed on it by a third party an agreement or a settlement that it had not voluntarily entered into. The line of questioning is: Why should it be so bad for the employee organization? What about the employer? The employer would have imposed upon it perhaps the proposal suggested by the employee group. And I am not sure that is for the public interest.

SENATOR MC DONOUGH: From a reasonable organization?

MR. BERTOLINO: You know what is reasonable to you may or may not be reasonable to me. I think the better way to do it is to have us sit down and bang it out and try

to come up with a solution that you and I agree on rather than having Mr. Greenberg decide for us.

SENATOR MC DONOUGH: You are giving yourself the right to strike, but you are not giving the school board the right to strike.

MR. BERTOLINO: The school board has plenty of bullets they can use, believe me. I don't know of any school board member that has gone to jail yet, but I know that almost 300 teachers have.

SENATOR GREENBERG: Do I still have the floor?

DR. LESTER: Yes, I think you do. You didn't lose it.

SENATOR GREENBERG: Then carrying out your position to a conclusion, assuming there were no clear and present danger or no reason to terminate a peaceful strike - concerted action following an impasse - in the absence of compulsory arbitration of some sort imposed by a statute, your conclusion would then be that that status could continue and should continue until one side or the other capitulates?

MR. BERTOLINO: I don't think that is it at all. I don't think that that is the way it works. And if you look at Pennsylvania --- Mr. Chairman, does the Commission have copies of the report?

DR. LESTER: Yes, we have very adequate material on Pennsylvania.

MR. BERTOLINO: I just wanted to make sure you had that.

No, I think there could be times if a strike continued and if a judge decided that the health or safety was affected, that he would enjoin that strike and presumably bring it to a close.

SENATOR GREENBERG: In the absence of that determination that health or safety is involved, you merely have -- I say "merely," but I mean merely as opposed to health and safety being involved -- a work stoppage of public employees and a cessation of some governmental function as

a result thereof. And in the absence of judicial intervention, that should be permitted to continue without limit and without time. You are not proposing any limitation, are you?

MR. BERTOLINO: No. We are not because I think history shows us or practice shows us ---

SENATOR GREENBERG: Everything comes to an end.

MR. BERTOLINO: (Continuing) --- practice shows us that sooner or later by one method or another a settlement is reached. Strikes don't last forever. There are other pressures being brought to bear on all parties. And certainly a lot of pressures are brought to bear on teachers during a strike, as you know.

SENATOR GREENBERG: If you were asked to choose between fair and final form of arbitration and the normal type of arbitration, the common type that we are all familiar with, where an arbitrator is permitted to make a decision without regard to the offers or demands finally made by the parties, which of the two would you select?

MR. BERTOLINO: I would select neither because I think neither one makes any sense.

SENATOR GREENBERG: Thank you.

DR. LESTER: Are there any other questions?

ASSEMBLYMAN EWING: Unfortunately, Miss Stilwell had to leave. But she said in her statement, "Even though it is the Board of Education which frequently provokes a stike, by refusing to bargain or by negotiating in bad faith, it is only the teachers who are penalized. . ." Does your organization really feel that, that children are not penalized by the lack of having teachers in the classroom if they are out on the picket line or reporting sick when they are not sick? You don't think they are penalized?

MR. BERTOLINO: I think, Assemblyman, that strikes are unpleasant episodes that all of us would rather avoid.

As I say, I have been involved in just about every dispute and I don't know of any that teachers or anybody else got very much pleasure out of. They are a final resort and ought to be avoided whenever possible. I don't think Miss Stilwell meant to imply that the students aren't hurt, the community is not hurt or that there aren't basic disagreements that arise which last long after the strike is concluded. There are lots of things about a strike that are negative. But that doesn't mean to say that it is all that bad, that giving employees the right to withhold their services brings government to a halt or destroys the educational system or anything like that. Schools go on. Life goes on. People forgive and forget. As a matter of fact,in some of those districts where there have been very, very contentious strikes, we have had very good relations after the strike has been concluded, because nobody wants that to happen.

ASSEMBLYMAN EWING: It is still the child that gets hurt. Also she underlined "only" and made emphasis that it was "only the teachers." It is very unfortunate for an organization which purports to be interested in education of the children to make a statement like that.

MR. BERTOLINO: Excuse me, Assemblyman. Let me just say that is in the context of who gets punished and who goes to jail. That was the context in which that was written, I believe.

ASSEMBLYMAN EWING: Another question I would like to ask you: What would your Association's feeling be if all negotiations came into the NLRB?

MR. BERTOLINO: Well, at the present time, as you know, there is a bill submitted by Congressman Thompson ---

ASSEMBLYMAN EWING: That's right.

MR. BERTOLINO: (Continuing) --- which would do that and which would really supersede all state legislation -

1087, PERC and everything else.

ASSEMBLYMAN EWING: I realize that. That is why I asked you what the feelings of the Association would be.

MR. BERTOLINO: Obviously, if that bill passes or if the bill that has been presented and supported by the National Education Association passes, the issue here would become academic and public employees would have the right to strike.

ASSEMBLYMAN EWING: But do you favor that step or don't you?

MR. BERTOLINO: Yes, we do.

ASSEMBLYMAN EWING: That is all I wanted to ask you.

ASSEMBLYMAN LITTELL: Mr. Bertolino, how does the NJEA feel about both sides paying part of the cost for fact-finding?

MR. BERTOLINO: Of course, as we say, one of the advantages of the new law, 1087, one, two, three, is that the State now picks that up and that was obviously an NJEA-supported provision. And we are very happy about that.

ASSEMBLYMAN LITTELL: In our informal meetings we had testimony from several witnesses - as a matter of fact, it is my recollection that almost everyone that talked to us agreed that that was a mistake and that there should be at least partial payment by both sides in fact-finding.

MR. BERTOLINO: I can only say to you that our experience has been that there are many small districts, small local associations, for example, that have 15 or 20 teachers, and some of these fact-finding fees come to sometimes $500 to $1,000 and more. We think that that was an unfair imposition on smaller locals and this helps to remove that. I haven't really heard too many arguments as to why that provision is a bad one. I think it speeds up the process. The government is involved in the mediation

process and paying for the mediatior. Why shouldn't it also pay for the fact-finding cost as well?

DR. LESTER: I think the position was there is no pressure on the parties to settle in the same way.

MR. BERTOLINO: From our experience, I really don't think that matters.

DR. LESTER: Otherwise, it is strung out for a longer period of time.

MR. BERTOLINO: Mr. Chairman, I don't really see that that is a factor, but maybe others can show evidence that it is.

ASSEMBLYMAN LITTELL: I have another question. If there was a change in the law that required partial payment, maybe a third or a half, as it was,and a provision included that a small group could claim it was a hardship and apply for relief, would that be satisfactory?

MR. BERTOLINO: I don't think so. We like it the way it is. We think it is fine.

MR. STERNS: With regard to this question, would your position differ if the State permitted an agency shop; in other words, everyone had to support the collective bargaining entity?

MR. BERTOLINO: It might, but I would rather not say at this point. I am not sure.

ASSEMBLYMAN LITTELL: I have one more question. If you had a limited right to strike, would the NJEA agree to a mandatory jail sentence for violation of an injunction?

MR. BERTOLINO: That would be a matter that our legislative body would have to decide.

DR. LESTER: Other questions?

SENATOR DUMONT: Mr. Bertolino, granting, of course, that there are many small teacher organizations - and I know about some of them through personal contact - doesn't the NJEA help them financially in regard to their arguments?

MR. BERTOLINO: We certainly do. The NJEA doesn't have an unlimited budget either.

DR. LESTER: I have just one question if there are no more. On page 4, you propose binding arbitration of grievances. And I can understand your position. There is a difference between a grievance where you are interpreting an agreement and making a new agreement. But I am concerned about possibly two factors here. As you may know, the auto workers and General Motors have agreed that they will not put into their binding arbitration of grievances production standards. Now, if the board interprets the scope of collective bargaining widely --- Let's say, the workload of teachers, to make it comparable to some extent, has to be bargained about. It is true they don't have to come to a settlement. But wouldn't you tend to get left out of your agreements issues that the parties didn't want to go to final and binding arbitration?

MR. BERTOLINO: I don't think so. In the 33 percent of the districts that presently have binding arbitration, I don't see that that is so. I think that whatever is negotiated and what becomes a provision of the contract needs to be subject to interpretation. And the way that has been devised is a grievance procedure which ends in binding arbitration.

That is an interesting point on this. I have had the argument thrown at me, "You know binding arbitration -- that is something you should negotiate."

DR. LESTER: We used to strike about it and then we did put it to arbitration.

MR. BERTOLINO: That is exactly the point, sir, and I have had it thrown to me: You know, you trade that off. You trade off binding arbitration for money and all this business. That's fine if you have the right to strike. But that is asking an awful lot of teachers to put their

jobs in jeopardy just to get binding arbitration in a contract, although we have had strikes in the State where that has been an important issue. Therefore, absent, at this point, even a limited right to strike, it would seem to me that it would behoove the Legislature and it would be in the public's better interest to require mandatory binding arbitration of grievances as a final step.

DR. LESTER: Let me ask you a follow-up question on that. It is true that in about 95 percent or more of the private contracts there is binding arbitration. But I am disturbed about requiring that in every agreement. I think it should be there, but I am disturbed about the Legislature requiring that. Do you know of any state that does have that requirement in its law?

MR. BERTOLINO: No, I don't, but I know that one of the laws, one supported by AFSCME, the National Education Association and others ---

DR. LESTER: That is a bill.

MR. BERTOLINO: Not the law, the bill - that's right. One of the two federal bargaining bills does provide for that. Of course, as you know, the present law makes it permissive.

MR. APRUZZESE: Of course, in the private sector, as you know, Mr. Bertolino, private employees have the right to strike and absence a no strike clause in a collective bargaining agreement, they also have a right to strike during the course of a collective bargaining agreement.

Now, my question to you is: You seem to find compulsory arbitration so repulsive in any form; at the termination date of a contract,why does your Association say during the term of a contract you want compulsory arbitration as opposed to a limited right to strike?

MR. BERTOLINO: Wait a minute. Sir, they are two separate issues. When we are talking about binding arbitration

of grievances, we are talking about the meaning and the interpretation of the agreement, the contract, that was voluntarily agreed upon by the parties. All we are saying there is that, as you know - many of you are lawyers and most of you are legislators - words mean different things to different people. Even though we all sit down and agree what a law says or what a provision in a contract says it means different things to different people. Therefore, when there is a disagreement about it, all we are saying is that the grievance procedure which would be utilized to make a final judgment about what those words mean should end in binding arbitration; in other words, that the arbitrator's decision with regard to that limited area - only the terms and conditions of employment negotiated - should be determined by a third party.

That is a little different, not a little different, a lot different from looking at it in terms of the total negotiating process. The whole contract, everything that is negotiated, everything that is put on the table, in our opinion, which has not been agreed to, by the way,-- we are saying that that should not, that great number of issues should be reduced to binding arbitration.

MR. APRUZZESE: I understand the distinction. You don't have to belabor the distinction. My point is that in private collective bargaining, even though the parties endeavor to agree on terminology and place it into a contract, a union does not have to agree to a "no strike" clause. And absent an agrement and no compulsory arbitration, they can strike to enforce what they think it means. What I am saying is that apprently in that situation, your organization considers the more responsible course, if you have a contract, arbitration and compulsory arbitration. That's the point. My question to you was: Why do you

consider that the better course than retaining a right to strike, even during the course of a collective bargaining agreement, to impose what you feel is the reasonable interpretation? Why the difference?

MR. BERTOLINO: I thought I answered that; perhaps I didn't.

DR. LESTER: Any further questions? (No response.) Thank you very much indeed.

MR. BERTOLINO: Thank you.

DR. LESTER: Is Mr. Tom O'Neil here?

ASSEMBLYMAN LITTELL: I have one more question.

DR. LESTER: Do you have a question?

ASSEMBLYMAN LITTELL: Yes.

DR. LESTER: I'm sorry.

ASSEMBLYMAN LITTELL: In the statistics supplied to us on public employee strikes, there have been numerous NJEA strikes on each page.

MR. BERTOLINO: Excuse me. To what are you referring right now?

ASSEMBLYMAN LITTELL: These are statistics that were compiled on the strikes for us from 1969.

MR. BERTOLINO: I don't have that in front of me.

ASSEMBLYMAN LITTELL: It lists the various boards of education and the number of employees involved. Have there been any of those strikes where you have not had teachers go to jail or have they gone to jail in every instance?

MR. BERTOLINO: There have been some where teachers did not go to jail. They did not go to jail in Trenton, for example, and there have been a number of others; Madison Township, I believe is another. There are a number of those in which teachers did not go to jail. It is so that not all judges have thrown teachers in jail. But most judges have issued restraining orders and many teachers

have been held in contempt of court and many of them have been fined and many of them have been put on probation, which many consider a black mark on their record even though they don't go to jail. Jail sentences have been suspended. That is the answer, sir.

DR. LESTER: Thank you again. I have overlooked another associate of yours, Gerard Restaino. Is he here? Would you come up, please. Mr. Restaino is President of the Edison Township Education Association.

G E R A R D R E S T A I N O: Dr. Lester and members of the PERC Study Commission, my name is Gerard Restaino. I am the full-time President of the Edison Township Education Association. My address is 124 Woodbridge Avenue, Metuchen, New Jersey.

WITH THE ADVENT OF CHAPTER 303, PL 1968, - RECENTLY AMENDED BY CHAPTER 123, PL 1974, - A NEW DIMENSION WAS ADDED TO THE FIELD OF EDUCATION — ACCOUNTABILITY. NOW FOR THE FIRST TIME, TEACHERS, ADMINISTRATORS, SUPERINTENDENTS AND MEMBERS OF BOARDS OF EDUCATION WILL ALL BE HELD ACCOUNTABLE FOR THEIR ROLE IN THE TOTAL SCHOOL COMMUNITY. WHAT DIRECTION WE ARE GOING IN AND WHAT THE FUTURE HOLDS FOR US WITH RESPECT TO ACCOUNTABILITY IS CONJECTURE AT THIS POINT.

TO TAKE APART CHAPTER 123, BEFORE IT REACHES A MATURATION LEVEL IS ILLOGICAL. IN ADDITION, TO ARGUE THAT CHAPTER 123, IS IN CONFLICT WITH OTHER STATUTES IS ERRONEOUS SINCE ALL LAWS MUST BE READ TOGETHER AND HARMONIZED. IMPLIED REPEALER IS NOT FAVORED IN THE LAW.

IF WE LOOK AT COLLECTIVE BARGAINING IN THE PUBLIC SECTOR, WE WILL SEE THAT THE CURRENT SCENE IS A MOST ACTIVE ONE. THAT ACTIVITY - WHICH IS OFTEN FILLED WITH HUMAN EMOTIONS - MANY TIMES PITS TEACHERS AGAINST OTHER IMPORTANT SEGMENTS OF A COMMUNITY.

WITH RESPECT TO TERMS AND CONDITIONS OF EMPLOYMENT, I FRANKLY DO NOT SEE HOW ANY LEGISLATIVE BODY CAN MAKE AN INITIAL DETERMINATION AS TO WHAT IS OR IS NOT NEGOTIABLE. THE ONLY FAIR WAY TO DEAL WITH THIS ISSUE IS ON A " CASE BY CASE BASIS " AS THE N.J. SUPREME COURT DID IN THE DUNELLEN TRILOGY DECISIONS. CASE LAW IS WHAT WILL POINT OUT THE POSITIVE AND NEGATIVE ASPECTS OF A STATUTE.

COMPULSORY ARBITRATION WILL NEVER SOLVE IMPASSES. IF WE LOOK AT THE LATTER PART OF THE 20th. CENTURY, WE WILL FIND THAT NEGOTIATIONS AND NOT WARS SOLVED ISSUES. TO DEMAND THAT BOTH PARTIES, EMPLOYER-EMPLOYEE ACQUIESCE TO A THIRD PARTY DECISION CONCERNING TERMS AND CONDITIONS OF EMPLOYMENT WILL ONLY RESULT IN DEEP-SEATED ANIMOSITIES BETWEEN THE PARTIES. BOTH PARTIES TO A COLLECTIVE BARGAINING AGREEMENT MUST HAVE THE OPPORTUNITY TO USE THEIR ABILITIES AND RESOURCES TO SECURE THE AGREEMENT.

AS I SEE IT, THE BURDEN IN NEGOTIATIONS IS TO ESTABLISH TWO POINTS: ONE IS THAT DEMANDS MADE ARE JUSTIFIABLE FROM A VIEWPOINT OF PROFESSIONAL RESPONSIBILITY AND SECOND, THE DEMANDS ARE APPROPRIATE WITH RESPECT TO THE EMPLOYER'S FINANCIAL POSTURE. ALL OTHER PROCESSES AND METHODS INVOLVED IN NEGOTIATIONS ARE SECONDARY. THERE IS NO POSSIBLE VALID ARGUMENT THAT CAN BE MADE FOR COMPULSORY ARBITRATION AS THE METHOD FOR DECIDING ON ALL WORKING CONDITIONS.

THE COLLECTIVE BARGAINING PROCESS IS CONSIDERED BY MANY AS AN INDISPENSABLE ELEMENT OF MODERN PERSONNEL PRACTICES. WITHOUT THIS PROCESS WE MIGHT AS WELL GO BACK TO THE DAYS OF CAIN AND ABEL, ATTILA AND OTHER LIKE PERSONS WRITTEN IN THE ANNALS OF HISTORY.

IF WE LOOK AT A COMPREHENSIVE COLLECTIVE BARGAINING AGREEMENT WE WILL SEE THAT THE NUCLEUS OF THAT AGREEMENT IS A GRIEVANCE PROCEDURE. MY DEFINITION OF A GRIEVANCE PROCEDURE IS THAT IT IS A FORMAL PROCEDURE FOR SETTLEMENT OF WORK RELATED DISPUTES. IF THERE IS ONE CLEAR ABSOLUTE ABOUT CHAPTER 123, IT IS THAT WE MUST NEGOTIATE A GRIEVANCE PROCEDURE AND THAT THE PROCEDURE MAY PROVIDE FOR BINDING ARBITRATION AS THE MEANS OF RESOLVING WORK RELATED DISPUTES.

TO ASK AN EMPLOYER WHO HAS CREATED AN ADVERSE SITUATION TO RESOLVE THAT SITUATION AND ACCEPT HIS DECISION IS SHEER FOLLY. THAT IS ANALOGOUS TO ONE MAN WHIPPING ANOTHER AND ASKING THE MAN DOING THE WHIPPING IF IT HURTS.

BINDING ARBITRATION IS THE MOST EXPEDITIOUS, LEAST COSTLY METHOD FOR RESOLVING GRIEVANCES. IN ADDITION, ONCE YOU RECEIVE A DECISION FROM AN ARBITRATOR, UNLESS THAT ARBITRATOR HAS VIOLATED A LAW WITH HIS DECISION, HIS DECISION STANDS AND IS NOT APPEALABLE. IF WE ARE LOOKING FOR A METHOD TO BRING ABOUT ENLIGHTENED EMPLOYER-EMPLOYEE RELATIONS, BINDING ARBITRATION FOR THE ADJUDICATION OF GRIEVANCES IS THE FIRST STEP WE MUST TAKE.

FINALLY, WITH RESPECT TO THE PERC COMMISSION ITSELF, I PERSONALLY FEEL WE MUST MODIFY ITS GOVERNING RULES. MEMBERS OF PERC WHO ARE REPRESENTATIVES OF EMPLOYERS AND EMPLOYEES MUST BE ALLOWED TO SPEAK OUT ON ALL ISSUES THAT COME BEFORE THAT BODY. THE KNOWLEDGE AND EXPERTISE THESE PEOPLE HAVE WILL ALLOW ISSUES TO BE HEARD IN-DEPTH AND NOT TAKEN OUT OF CONTEXT.

UNLESS AND UNTIL THIS HAPPENS, BOTH SIDES, EMPLOYER AND EMPLOYEE WILL BE DENIED PROCEDURAL DUE PROCESS.

DR. LESTER: Are there questions? If not, thank you very much. I guess you are fortunate, in a sense, that there are no questions. I believe your predecessors got most of the questions you might otherwise have gotten.

MR. RESTAINO: They did a good job.

SENATOR MC DONOUGH: Is your group a member of the NJEA or the AFL-CIO teachers union?

MR. RESTAINO: NJEA.

DR. LESTER: Thank you again.

Now, is Mr. O'Neil here?

T H O M A S O ' N E I L: I hope that the length of these articles isn't significant. Mine is a little short.

DR. LESTER: We judge on quality rather than quantity.

MR. O'NEIL: Very good.

Dr. Lester and members of the Study Commission, my name is Thomas O'Neil. I live at 322 Walnut Avenue, Cranford, New Jersey. I am the Chairman of the Labor Committee for the State Firemen's Mutual Benevolent Association.

Gentlemen, the New Jersey State Firemen's Mutual Benevolent Association is the largest professional fire organization in the State of New Jersey.

The State FMBA has concluded that the following revisions must be made in the Public Employer-Employee Relations Act for it to become a truly effective law:

(a) The existing law must be clarified as to which employees may be included in a bargaining unit.

(b) There must be compulsory binding arbitration to achieve an equitable agreement.

(c) There must be compulsory binding arbitration to enforce an existing written agreement.

We of the State Association have an obligation to represent our 69 locals in negotiations. Both Chapter 303

and Chapter 123 have been fairly clear on who may be a representative. What is not clear is who may be represented. Fire Departments, as a rule, have the same organizational structure throughout the State. Yet, some local departments have been fractioned into two and three bargaining units while others have remained whole. The conflicts created by this fractioning are harmful to the local units involved and impair the ability of the State FMBA to represent its members equally.

The Commission should consider provisions which will separate firefighters from other public employee groups and allow single unit representation of all members in a fire unit.

In the fire service, the necessity of team work is paramount. Be it a three-man engine company or a seven-man engine company or truck companies, rescue companies, etc., each member of the team has a responsibility. The utmost cooperation is necessary to achieve the objective of the company. Someone must be in charge of this team to coordinate the work efforts. All of these men live, eat and work together as one cohesive unit. By dividing certain members of the team into a distinct bargaining unit, it will diminish the effectiveness of the team effort. We have found in our experience representing FMBA locals that division into distinct and separate units tends to cause disharmony and decreased effectiveness as a firefighting unit, for which only the public will suffer.

We recognize that any new legislation may pose problems. The State FMBA has been on record as opposing the original Public Employer-Employee Relations Act in 1968 because of its inadequacies and blind alleys. Our opinion has been substantiated by the enactment of Chapter 123 and the hue and cry for further substantial change. We are certain some sound recommendations will be forthcoming

by the Study Commission. Members of the FMBA have been privileged to attend labor seminars conducted by Mr. Weinberg at the Rutgers Labor Center and have also been fortunate to have had Mr. Jack Pearce appear as a lecturer at some of the New Jersey State FMBA Labor Seminars. I hope you agree with me. I don't understand why that was in there; it doesn't fit.

To digress a moment, there is a concept about firefighters which should be considered. It seems that too many municipal officials look upon the police and firemen as servants who should be grateful they are allowed to work in their municipalities. These officials ignore the fact that, for the most part, these men are educated and dedicated individuals who seek to do their job to the best of their abilities. This Commission can do a great public service by emphasizing that firefighters perform an essential job for a municipality and often die in the performance of that job so others may live. There are few jobs in this country which may require the ultimate sacrifice.

Many public employer representatives have laughed at our attempts to negotiate because they know full well that PERC has no authority to force them to arrive at any equitable solution in the negotiating process. There has been long delays and resistance to meaningful negotiations in many communities. Only time will tell if Chapter 123 which gives PERC new authority to set time limits for negotiations is going to work. This law is meaningless if PERC does not exert its power to enforce its decisions upon the parties.

It is our feeling that some public employer representatives will not bargain in good faith or honor recommendations or prior agreements until the Commission has the authority of force to make its decisions binding.

Chapter 123 has given PERC the power to determine unfair labor practices, to determine what is negotiable and

hopefully to limit and regulate the time span of negotiations; however, the Public Employer-Employee Relations Act is sorely lacking in that it does not provide for compulsory binding arbitration after impasse, nor does it provide for compulsory binding arbitration in connection with enforcement of an existing written contract.

In reference to Dr. William Weinberg's letter and the five points to be considered, we recommend the law be amended to provide mandatory compulsory binding arbitration for firefighters in their respective municipalities.

Assemblymen Christopher Jackman and Albert Burstein have seen the inadequacy in the supervisory section of the law as it pertained to police and firemen and supported legislation to remedy the situation. Perhaps the Commission should give special consideration to the unique problems confronting the representatives of the fire service rather than categorizing them with all other public employees.

Firemen are in a unique position. The ultimate tool of a labor organization is the strike. We are not before you today requesting that firemen be given the right to strike; however, we are before you to request a means to resolve that ultimate impasse. Firemen loathe to strike because no firefighter wants his conscience to bear the loss of life, be it an infant, parent or senior citizen.

To strike is a terrible decision to place on any fireman. He must feed his family and maintain a home the same as millions of other people. Yet, he cannot effectively bargain for necessary wages. He must rely on the goodwill of politicians who often see him as only so many votes for re-election, and just as often, see him as only an expense to the municipality which must be reduced. There is no substitute which can more effectively alleviate this burden than mandatory compulsory binding arbitration in collective negotiating.

We have stated that in New Jersey there must be binding arbitration in the negotiating process for the fire service if we are going to avoid chaos. To date, there is no effective means to negate impasse. If we request binding arbitration we incur the obligation to define the method to be used so that we can attempt to prevent inequitable decisions as have been rendered in the past.

It is the recommendation of the State Firemen's Mutual Benevolent Association that, after receipt of the fact-finder's decision, both parties be given a reasonable amount of time to sign the agreement. If either party refuses to sign the agreement, the parties must appear before a tripartite board consisting of one management representative, one labor representative and one neutral. After hearing both parties, the Board shall make a recommendation and this recommendation shall be final and absolute. The State FMBA feels that this method of resolving disputes is the most effective way to come to an equitable decision.

We also strongly urge this Commission not to recommend any changes in S 1087 and to allow a reasonable test period before suggesting alternative measures.

Should the Commission desire any additional information pertaining to the position of the FMBA, our Labor Relations State Attorney, Anthony D. Rinaldo, Jr., Esq., of 411 Westfield Avenue, Elizabeth, New Jersey, and our Labor Relations Committee will be available any time convenient to the Commission.

We thank you for the opportunity to express the views of our State Association on a subject which we consider a very important matter. Thank you.

DR. LESTER: Are there any questions?

SENATOR MC DONOUGH: Mr. O'Neil, I have a couple of comments on your statement. You may take this information

back to your Association: The reason the Jackman-Burstein Bill was stalled in this House was because of this Commission. I believe you referred to it in your report here.

On page 1 you talked about fragmentation. Were you talking about the fragmentation because of the level an officer may arbitrate or were you talking about it because you might have custodial help in your departments that has nothing to do with the firefighting teams?

MR. O'NEIL: No. I was referring directly to the fragmentation where the so-called supervisor is split off into a different unit.

SENATOR DUMONT: Mr. O'Neil, on page 4 where you talk about this tripartite board, do you intend that the neutral be selected by the other two or by some fourth party like the Governor or the Legislature or somebody else?

MR. O'NEIL: In truth, I had not considered that. I don't believe that that is really too relevant.

DR. LESTER: This would be a separate board for each case; it wouldn't be, so to speak, a standing board?

MR. O'NEIL: I would hope that it would be a standing board.

SENATOR MC DONOUGH: One other question: Do you feel confident that you are well represented having, for example, the NJEA representative now working on the PERC Board or would you favor, as Mr. Tener suggested, a nine-member committee, two from the public employee organizations, and have them change, depending on who was negotiating the contract? In plain words, would you feel confident having the teachers' representative represent you on this nine-member board?

MR. O'NEIL: There are fundamental differences between teachers and the FMBA to the extent of what the effect would be on our jobs. There should be some input by the firemen separately so that their unique position would be known.

SENATOR MC DONOUGH: Would you feel then if we were to consider his recommendation that there should be a nine-member board, five public voting members and four from the negotiating teams, that should be a revolving board and that the four should not be permanent members, but should be called upon when a matter in which they have special expertise is considered?

MR. O'NEIL: I would agree with that, yes.

MR. APRUZZESE: Mr. O'Neil, just one question: We talked about last best offer selection. I want to be perfectly clear that you understand that. In other words, if the parties are negotiating, the union has a final position and the employer has a final position; what is your feeling if there was compulsory arbitration? Would you allow this panel to select either of those positions? In other words, would that be an acceptable alternative to what you have suggested?

MR. O'NEIL: Well, my understanding of the last best offer or final offer, as it was explained before, is that the choice would be between the two; in other words, "either/or" and not a combination of the two.

I can recognize the fact that possibly Jeff Tener would not want his members to be in a position of changing what the two parties were attempting to negotiate. But the last best offer is totally unacceptable. It would be better if the two could be combined for our purposes. I am only speaking for firemen; I am not speaking for teachers. For our purposes, it would be better if there could be a combination of the two and not an "either/or" type of situation.

MR. APRUZZESE: What about the combination of the last best offer and whatever the fact-finder had suggested? For example, you say they would either adopt what the fact-finder says and go to arbitration. Suppose it was an alternative so that there were three; in other words, the arbitrator could either impose the fact-finder's

solution or either of the last best offers. Would your answer still be the same?

MR. O'NEIL: If he was in the position of the last best offer and accepting "either/or," I would still think that that shouldn't be. I think that is a very poor policy.

DR. LESTER: Let me see if I can clarify this a little further. Suppose on each issue that was up,the choice of the arbitrating panel -- it would be the panel of arbitrators as you propose it, three arbitrators --- suppose on each issue, they could choose either one of three positions, either the employer's position, your organization's position or the fact-finder's position. Maybe that is too complex; it gives you too many choices. But that would be a possibility. There are a few state laws in those terms. I don't want to put you on the spot to ask you whether you have an opinion on that now. But it might be helpful if your organization would give us some indication in this area.

MR. O'NEIL: I don't see that as being complex if it is understood. I don't believe that it is complex. I think it is giving you all the alternatives. It hasn't pinned you down to one alternative.

SENATOR ORECHIO: Mr. O'Neil, at the top of page 2, you comment concerning the necessity to lump all members of the Fire Department into one unit. You talk about the need to have cohesiveness and esprit de corps. Are you implying, for example, that Captains, Commanders or other officers who represent management should all be in the same unit for the interest of the firemen? Wouldn't you run into some problems, say, of reprisals. The leaders or the men representing management have tremendous power and authority. Certainly having them in the same unit, they can be very strong willed - they can flex their muscles - and as a result, other men on the bargaining

committee that don't have rank, for example, might be pretty much subdued. I know in the police sector this happens. Maybe the fire unit is different. We haven't had problems with our Fire Department. I just feel that having men representing management in the same unit with rank-in-file policemen or firemen might be detrimental to the interest of the firefighter, especially nowadays with the economic conditions as they are if a system is developed of applying flat dollar increases for all ranks rather than percentages. When that happens, then the boys on the top get a little nervous and begin to flex their muscles and go for the percentage increase rather than the flat dollar amount increase. I see problems developing there.

MR. O'NEIL: I would like to disagree with the first part of your statement. It would seem that the officers should have power and authority and ability to flex muscles, etc. In fact, the opposite is true; they don't. This applies on the job as well as fighting fires; that is, in the fire house as well as when fighting fires. At a fire they have the authority, but once you leave the scene of the fire, the authority is gone.

Fire departments have total central authority - only through the Chief.

SENATOR ORECHIO: What about recommendations? For example, we know that some public employees have other jobs and businesses while they are acting as public employees. Certainly if you curried the favor of your superior officer by giving in to his requests in a negotiations process and you don't agree with him, the chances are you could wind up on his black list. And you may want a day off or you may want to come in a little late. Don't you think you could incur the wrath of that man and wind up being on the short end because you believe in a principle?

MR. O'NEIL: I believe that is possible.

SENATOR ORECHIO: It doesn't happen in the fire area?

MR. O'NEIL: I didn't say it doesn't happen.

SENATOR ORECHIO: It doesn't generally happen?

MR. O'NEIL: Once again, generally speaking, if you were going to get a day off, it would be the Chief who would give it to you. So we are really talking about one man who has the authority; that is, the Chief of the Department.

SENATOR ORECHIO: Mr. O'Neil, with a centralized Fire Department, the Chief is only in one place; and the Captains or Deputies who run those fire houses pretty much recommend, don't they?

MR. O'NEIL: No.

SENATOR ORECHIO: They don't?

MR. O'NEIL: It is one of our biggest arguments with the four points of PERC, that they have the ability to recommend disciplinary action or effectively recommend same. That doesn't fit, but it has been made to fit in some communities. The jobs of the officers below the Chief, generally speaking, are really designed to operate at a fire. It is not a question that they are designed to function in the fire house with the same amount of authority.

SENATOR ORECHIO: I guess it really depends on the size of the department, doesn't it?

MR. O'NEIL: I have dealt with departments of five men up to three hundred and fifty and I haven't see a great difference in those departments.

SENATOR ORECHIO: Then it depends on whether you have a volunteer chief or a paid chief, I imagine.

MR. O'NEIL: That might make a difference.

ASSEMBLYMAN LITTELL: Mr. O'Neil, you probably have some small bargaining units in your operations in the FMBA. How does the FMBA feel about both sides paying a portion

of the cost of fact-finding?

MR. O'NEIL: Well, I don't agree that small units should have to pay for the cost of fact-finding. Then we are into the area of charging some people and not charging others. So I agree that the law should remain as it is.

ASSEMBLYMAN LITTELL: Question number two: On page one, you say "The State FMBA has concluded that the following revisions must be made in the Public Employer-Employee Relations Act for it to become a truly effective law." And on page 4, you say, "We also strongly urge this Commission not to recommend any changes in S 1087 and to allow a reasonable test period before suggesting alternative measures." Now, which one do you mean?

MR. O'NEIL: I was hoping you wouldn't notice that. What I was referring to is --- I don't know how I am going to get out of that. I think I will get out of it this way: I think that the law should remain the same and be given the time to have it worked on. But there should be an addition to the law and not a change.

DR. LESTER: If I could go back a minute to Assemblyman Littell's first question, I am not sure that the answer you gave was to the question that he really asked. He didn't say only small units should be charged something for fact-finding. He meant that there would be a proportionate charge, maybe one-quarter or one-fifth of the cost of fact-finding on each unit which was engaged in the fact-finding process. It wouldn't be a special cost to small ones; it would be a cost that would be uniformly arranged in percentage terms for both the employer and the employee organization and perhaps the State. Maybe it could be split three ways. I think that is really the essence of his question, whether you have an opinion on that kind of an arrangement.

MR. O'NEIL: Once again, I would not like to see the law changed. One of the factors that should be stated,

I think, about a cost factor is that I found generally in our organizations that they don't have the funds. Many of them are broke. They wouldn't even have the money for a small percentage and they would avoid fact-finding.

We have two problems: by charging people money, the hope is that they won't be inclined to use it; and then, on the other hand, if we don't charge them, we are afraid that they are going to use it. Arguments in between anyplace don't really seem relevant. Either we want it to be used or we don't want it to be used. I think charging is just a way of saying we don't want it to be used.

SENATOR DUMONT: Mr. O'Neil, is the FMBA financially able to help small units in their collective bargaining process?

MR. O'NEIL: Not really. I don't think it would be proper to get into budget amounts. But the amount of money that we receive through dues and whatever is spent yearly. We expend all our funds yearly. And, last year, we spent $9,000 more than we took in.

SENATOR DUMONT: Thank you.

DR. LESTER: Any other questions?

MR. O'NEIL: I would like to mention something that wasn't in the report, if I might. With regard to having fact-finding binding, two locals that I am currently working with have resorted to fact-finding where it was not binding. In neither case was the fact-finder's recommendations adhered to. I would say that is the rule rather than the exception. Right now, it would be a useless thing.

In another area, I would like to note that if we don't have binding arbitration in the negotiating process,as far as the firemen are concerned now, there is nothing to compel a public employer to bargain - there is absolutely nothing.

DR. LESTER: Well, under the rules of the Unfair Labor Practices Act, he would have to bargaie in good faith; that

doesn't mean he would have to make any specific offer, you mean.

MR. O'NEIL: That is correct. He doesn't have to agree; he has to talk. I was told in one negotiating session from the first time I got there - somebody had mentioned the word "impasse" - and I worked at it for three months. It involved impasse because, you know, we are going to come back to this table anyway. So I have been doing my best with persuasion. But other than that, there is nothing that we have to bargain with. There is no strike threat. There is no imposition authority with PERC to make anything binding on a community or us.

DR. LESTER: Is there binding arbitration of grievances in most all your agreements?

MR. O'NEIL: About half of our agreements have the binding arbitration in the grievance process.

DR. LESTER: I take it that you are in favor of that too?

MR. O'NEIL: Definitely. Otherwise, there is no purpose in it. If it can't be final at some step, it is a futile effort.

DR. LESTER: What is the resistance that the employer gives to that? Why haven't you been more successful than in roughly 50 percent of the cases?

MR. O'NEIL: Well, in no case does an employer want anybody to be able to have authority over the employer.

DR. LESTER: You mean, once you have developed a written agreement, even then the employer doesn't want the interpretation of that agreement left to anybody but the employer?

MR. O'NEIL: Yes, that is correct.

One of the things also I think should be considered in this respect is that it is possible and has happened that we deal with two different employers within the framework of one year when an election takes place while negotiations

are going on. We start with one employer and then wind up with another employer, usually neither of whom understand what we are there for.

DR. LESTER: This is pretty frequent and it may be one of your problems that the employer personified, whoever that may be, is changing quite a bit so you don't have an opportunity to work out your relations very fully and effectively before you get another fellow.

MR. O'NEIL: There is no continuity. A good argument for the municipality in the past has been that they are not responsible for what happened before and will not recognize that something should have been done - things of that nature. The lack of continuity is one of the reasons why I personally stressed that we should go for the final and binding arbitration. I don't agree with it. Mr. Bertolino stated all of my sentiments about that when he was here. Unfortunately, there is no other position that we could take because the strike power really is abhorrent to both fire and police. If you could guarantee a life wouldn't be lost, I am sure we would be delighted to take that strike power. But, short of that, we do have to have binding arbitration. I would not recommend it for teachers or anyone else.

DR. LESTER: Any further questions?

SENATOR ORECHIO: I was going to ask a question in connection with what you just said. You know we presume that men are reasonable on both sides when bargaining. In the settlement of a dispute through the compulsory binding arbitration process, isn't that really the answer to the prohibition on striking by public employees? Isn't that a good remedy?

MR. O'NEIL: No. I said if you could guarantee that no one's life would be lost, I would strike and I would want that right. It is only the possible loss of life that makes us come to this decision as to what we

need. As to the presumption that someone will be fair, usually who is going to be fairer is determined by who has the bigger stick. The presumption that everybody is equal also assumes everybody understands the same thing.

SENATOR ORECHIO: Let me ask you something. Why do public employees feel they are shackled for the rest of their lives in a job? If you are in the private sector and you are unhappy with conditions or money or what have you and you exhaust the other process, whether you are on a picket line or not, many times such people seek other vocations or other fields. Why is it that public employees feel they have no place to go?

MR. O'NEIL: That is a good question. There are a couple of good answers to it too. Before I became a Fireman, I did just that and that was how I got my raises. I would leave one place to go to another place and offer my services and I would get an increase and better benefits. I would like to know where I would go here in the State of New Jersey as a Fireman. I am not going anywhere. Nobody wants to pick up my pension. I would lose all my seniority and nobody is going to pay me for it. I am not going to make more money no matter how good I am. I don't have a service to sell to somebody else. Municipalities aren't competitive.

SENATOR ORECHIO: I can accept that. However, Mr. O'Neil, I think we lost sight of one thing. Most people who are in public employment are there because they were attracted by the security they would have. For example, before we had this bad economy and cities and governments didn't lay off people, you didn't lose a job through automation or you didn't lose a job because of relocation or you didn't lose a job because profits were so bad that the company went out of business. So security is probably the primary reason people are attracted to public employment. I think all of us understand the distinction between public

employment and private employment. In employment in the private domain, their operations are dependent upon profit. In the public domain, we only provide services. That distinction being so important, it is made pretty clear that with that kind of a process, with that kind of a function of government, you are not going to get all the frills and all the salary increases and benefits that you might get over on the other side in private employment. So there are some sacrifices you make which are inherent and which are understood when you take a job.

MR. O'NEIL: I would agree with you if that was understood when you took a job, but it isn't.

SENATOR ORECHIO: Then we have to clear that up.

DR. LESTER: Well, thank you very much indeed.

At this point, we will conclude the hearing for today.

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