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ABSTRACT

Problems have arisen with the Michigan Public Employment Relations Act, which allows collective bargaining for public employees, because the act does not extend the right to strike and has no provision for a final resolution of a bargaining impasse in the event that voluntary settlement is not achieved. Neither voluntary negotiation nor fact-finding has been successful when the bargaining parties are far apart and the issues are numerous. The prohibition against striking has not worked either. The best solution to the collective bargaining issue is a combination of limited right to strike with binding "last-best-offer" arbitration. The limited strike right should include economic penalities for teachers and the school district and should restrict the length of time the strike can continue so as to limit the harm done to the public interest. (Author/IRT)

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REMARKS BY

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CRESTWOOD BOARD OF EDUCATION

MEDIATION, ARBITRATION, FACT-FINDING, IMPASSE

(CLINIC E-73)

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Thank you, Mr. Chairman.

Background

When the Michigan Public Employment Relations Act became law in 1965, it was hailed by Union officials as the best of the new state laws extending collective bargaining rights to public employes. That Michigan would be among the first to recognize the need of public employes to a larger voice in the control of their destiny was not surprising since Michigan is a highly industrialized state in which there has been a long history of acceptance of the concept of collective bargaining. Indeed unions play an important and vital role in the life of our state. The collective bargaining statute was drafted on the model of the National Labor Relations Act and it granted to public employe unions and their members virtually all of the rights and privileges enjoyed by their counterparts in the private sector -- with one notable exception -- the right to strike, and no provision was made for a final resolution of a bargaining impasse in the event that voluntary settlement was not achieved. Instead the authors of the statute provided for mediation and fact-finding. Under these circumstances, the Union, if it complied with the law, would be required, in the event of an impasse, to either accept the employer's final offer or play a waiting game, letting the impasse continue until public pressure could be brought to bear on the public employer to settle on favorable terms. It was not long before unions began to perceive this form of collective bargaining to be something less than even-handed. They called it "collective begging". Whether it was, in fact, is not as important as the fact that it could be so perceived. Strikes and threats

of strikes in violation of the legal prohibition followed almost immediately with teachers leading the way. Their unions found what unions in the private sector have long understood -- that school boards like private employers approach bargaining with a much greater sense of urgency and a higher degree of flexibility when they are not in a position to unilaterally determine the final terms of settlement. The possibility that striking teachers might be dismissed, provided for by the statute, failed to deter strikes because teachers were in short supply, the unions felt confident a labor supported judiciary would not permit it and there was genuine public concern over the effect such drastic action would have on the quality of education. Injunctions also proved to be largely ineffective. The courts were reluctant to issue them and even more reluctant to enforce them. Indeed, the Michigan Supreme Court in 1968 restricted the use of injunctions by requiring that a court must first determine that a school board has bargained in good faith and, more importantly, that "irreparable harm" would be caused if the strike was permitted to continue. What this has meant, in practical terms, was that despite an unconditional prohibition of strikes, a strike was permitted to continue until the loss of state aid was threatened, or lost days could not be made up by extending the school year to meet the state's requirement of 180 days of instruction. And the 180-day law guaranteed to striking teachers they would suffer no loss of income by striking.

The Crestwood Case

In 1973, Michigan had the dubious distinction of leading the nation in the number of teacher strikes. In 1974, although there were fewer strikes, those that occurred were particularly bitter and prolonged. And the longest and most bitter of these occurred in the Crestwood School

District. Eventually it resulted in the dismissal and replacement of virtually the entire teaching staff of 200 teachers, an action that promises to continue to be in litigation for some time to come. It was my unhappy lot and the lot of my colleagues on the Crestwood Board and our families to have lived through that very trying and tragic experience. One could probably spend a week or more rehashing the details of the Crestwood case, as it has come to be called. It is not my intention to take up our limited time here doing so. Suffice it to say that to the amazement of many, including myself, the Michigan Supreme Court sustained the Board's right to dismiss the teachers, and the Michigan Employment Relations Commission exonerated the Board of all unfair labor practice charges. After a year of turmoil the confrontation has moved from the streets and sidewalks into the courts where it belongs and the education of Crestwood children with a new staff is being accomplished in a peaceful environment without interruption once again. What is most important about the Crestwood experience is that it has prompted, at long last, an agonizing reappraisal in the Michigan legislature of the problem of teacher strikes and a serious effort to remedy the deficiency in the present law. It is to the question of possible alternatives that I wish to address my principal remarks today.

Personal Observations

Before I do, I would like to offer a few personal observations as one who is both a labor relations practitioner as well as a school board member.

In the private sector, by and large, the public has been willing to accept strike risks and costs as part of the price of a system having

more desirable social values than are inherent in alternative methods of resolving labor-management differences. The same cannot be said of the acceptability of strikes in the public sector. At best it can be said that brief disruptions of public services are tolerable in limited circumstances. Strikes by teachers may be tolerable provided they do not last for an extended time. Strikes by police and firemen are not at all tolerable. And strikes by sanitation workers cease to be tolerable when uncollected garbage becomes a health hazard. But in none of these circumstances is there general public acceptance of strikes as a legitimate bargaining strategy.

At the same time, alternatives to the strike weapon, most notably the use of some form of compulsory arbitration, find resistance among public employe unions and governing boards alike, largely because of the loss of control to outsiders when such mechanisms are employed. It is fundamental, however, that collective bargaining is a sham if it rests on a "take-it-or-leave-it" basis and some acceptable method of resolving an impasse must be provided. Neither the injunction processes of the courts, with their fines and jail sentences, nor the mass dismissal of public employes, as we were forced to do in Crestwood, are practical or socially acceptable methods and that is why they have not generally worked. What will work is the most critical issue in collective bargaining in the public sector today. The absence of a resolution of this issue will continue to confront us with examples of defiance of the law or of the judicial process with all that that implies for our society.

There are no perfect solutions to this issue, only a choice among alternatives which differ in the degree of undesirability as perceived

from one's own vantage point. It is now time, at least in Michigan, to face the hard choices that must be made and work out an accommodation that will minimize the prospects for future interruptions of the education process. Let's turn now to specifics and let's first consider the voluntary mechanisms we are all I am sure familiar with -- mediation and fact-finding.

Mediation

Mediation is probably the least effective means of resolving a serious impasse in bargaining, although it can be useful particularly where the parties are inexperienced. Because a mediator is a collective bargaining professional, he can often supply insights both as to form and substance in bargaining that the parties themselves lack. Although a mediator may often function as the communications medium between parties who are not talking to each other, his principal usefulness lies in his ability to suggest areas of possible compromise and thereby assist the parties toward a settlement. It has been my experience, however, that a mediator is relatively ineffective when the parties are far apart and strongly wedded to their positions. This was the case in the Crestwood strike. Under these circumstances, his role is reduced to that of a mail carrier, although his presence will insure that the parties are at least talking and are available to each other should one of them decide to move. If mediation is to be useful, it should be available upon request of either of the parties or upon order of the responsible state agency. It should not require the agreement of both parties as is the case in some states. In Michigan, either party may request the intervention of a mediator.

My seemingly negative comments on the effectiveness of mediation are not intended to depreciate the valuable and often tireless service

that mediators perform but rather to point out that provision for mediation in a state bargaining law will not bridge the gap that a prohibition of right to strike creates.

Fact-Finding

Neither, in my judgment, will provision for fact-finding, although there are many who would undoubtedly disagree. In the first place, the term fact-finding is misleading in itself. To the inexperienced it implies that the fact-finder's recommendations necessarily represent objective findings on the merits of the issues in dispute. Actually, this is not the case. The sole objective of fact-finding is to develop a compromise which both parties can willingly accept or which a recalcitrant party can be coerced into accepting by virtue of public pressure generated when the fact-finder's report is published.

Theodore Kheel, eminent New York arbitrator, mediator and fact-finder, in describing the problems with fact-finding under New York's Taylor states (quote), "neither employers nor employes are forced to agreement by critical editorials or public dismay . . . the fact is that either side can reject recommendations with impunity, leaving open the question of how the dispute is then to be settled. It is also true that when recommendations are rejected by one side and accepted by the other, the dispute usually becomes more difficult to settle. Positions become frozen, and the likelihood of a serious impasse is increased."(quote) Indeed, public disclosure of a fact-finder's recommendations may actually hinder agreement because those issues which might have been negotiable may no longer be conceded by the party favored in the fact-finder's report. And, if the parties reasonably expect that fact-finding will eventually be invoked and

realizing that the fact-finder will strike a compromise beyond their final positions, they will be inclined to hold back for this eventuality, thereby assuring that an impasse will develop.

The New York experience does not stand alone. In Michigan fact-finding has not prevented strikes. Compromises proposed by fact-finders have often been bad ones. Fact-finders too often appear to believe that it is the Union they must first satisfy because it is the Union that will strike. In too many instances they have been willing to propose accommodations that are unwise and inappropriate and which largely ignore the merits of the dispute. Rejection of the fact-finder's report by a school board has often been the cause of long and bitter strikes.

It seems to me that fact-finding, not unlike mediation, has the best chance of succeeding where the unresolved issues are few and the area of disagreement is narrow. It cannot, however, be relied upon to do the job in cases of serious impasse.

Well then, if mediation and fact-finding are inadequate, where do we go from here. The reality of the situation suggests that the time has come to reexamine the traditional view that there is no place at all for the strike in teacher bargaining and, in addition, to seriously consider the potential of arbitration and particularly "last-best-offer" arbitration.

Limited Legalized Strikes

In considering the question of whether strikes by teachers should be permitted as a matter of law, it seems to me that we must first

set aside the notion that such strikes are inherently subversive and constitute some sort of insurrection against the state. If one subscribes to that point of view, further consideration of the issue would seem to be foreclosed.

I, for one, do not subscribe to that point of view. Rather, I prefer to examine the issue from a pragmatic, not an ideological, frame of reference. In order to place the issue in perspective it may be helpful to point out some fundamental differences between strikes in the public and private sectors.

In the private sector, the strike is essentially an economic confrontation in which the resources of the employer are pitted against the economic resiliency of the employes and the union. The private-sector employer must confront where he gets the resources to fund either the costs of resistance or the cost of settlement. Not infrequently that involves his assessment of the demand and price factors in the markets in which his goods or services are offered, the effect of a strike on his competitive position, alternative courses of action with respect to resource utilization and substitute sources for the interrupted service or production. The private-sector union must confront the effect of the loss of income to its members and the resources it will require to conduct the strike. Public-sector strikes seem quite different in some ways. Unlike the private-sector employer, the taxpayer-employer can't decide to forego the service because its cost will have become too high; he can't abandon the market for the service to his competitors because his fellow taxpayer-employers are common employers with him; he can't reallocate his resources to some other substitute income-producing venture and he can't seek a different

source for the interrupted service because there is virtually no substitute available for that service. At the same time, because of his unique position as not only the ultimate employer but also the sole consumer of the services his employes provide, he must bear the costs of settlement since he is unable to pass these costs on through the pricing mechanism. In the case of teachers, as already pointed out, there are usually no economic consequences attached to striking because the law requires that lost days must be made up. Since there are no economic consequences, there is also little reason to oppose a strike recommendation or to pressure union leadership for settlement.

The differences are not only economic. The effect of granting a right to strike to public employes commensurate with that enjoyed by employes of private employers could result in frightful social consequences. For example, the prospect of a city at the mercy of criminals and arsonists because police and firemen withhold their services is simply not acceptable. The public will not stand for it. Nor will it stand for extended strikes by teachers which impair the education of children.

But just as the public will not accept such strikes by public employes, public employes will not respect a legal prohibition of strikes if disobedience is the only means by which they perceive they can receive equitable treatment. And as experience has shown, declaring teacher strikes to be illegal does not assure that they will not occur or that teachers will give their best efforts in the classroom.

In this connection, the observations of Mr. Arvid Anderson, Chairman of the New York City Office of Collective Bargaining, merit thoughtful consideration. He states:

(quote) "The imposition of jail sentences against union leaders has done little more than provide them with an aura of martyrdom which has enhanced their prestige and job security. The practical necessity of bringing union leaders to the negotiating table in order to settle a strike led to delays in the sentencing process and persuasive requests for their early release from jail by the very authorities who prosecuted them. Furthermore, limited fines on some union treasuries have been too small to deter strike action; even a large fine is not excessively burdensome if it can be spread among the membership of a large union. And, as we have seen in New York City, individual and union fines may even be paid by other segments of the labor movement. Summarizing these difficulties, it has been suggested that prohibitions of strikes will not survive in the American political climate if their maintenance depends primarily on the severity of the penalties for violation." (quote)

Mr. Anderson is not saying that there is no place for penalties of this kind. What he is saying, and I quite agree, is that these penalties are justified and workable only if the law is even-handed to start with.

It seems to me that the only legitimate questions are whether teachers can be extended the legal right to strike under conditions that will avoid any substantial harm to the public interest, the education of children and whether legal strikes would produce a positive effect in facilitating voluntary and sensible contract settlements. Many believe this can be done and what I am about to describe is embodied in proposed legislation now pending in the Michigan legislature.

First, there must be a substantial economic price tag attached to a strike on both sides. This means that teachers must actually lose

pay for each day they withhold their services. The absence of economic consequences has been a major factor in Michigan's strike experience. To assure a loss of pay, it will be necessary to fix the holiday schedule during the school year and establish a terminal date for school which cannot be extended. In addition, the 180-day law will have to be amended to prevent the make-up of days lost as a result of a strike. The concept that strikers should lose pay is fundamental in private-sector bargaining.

This leads to the next point. If striking teachers lose pay, there must also be economic loss to the school district during a period of legal strike, otherwise the school district would actually profit by the strike and would have no incentive for settlement. One way of accomplishing this is to provide for a loss of state aid for each day a legal strike continues. Additional provision could be made for a forfeiture of tax revenues on a pro rata basis.

Of course, there must be a limit to how long such a legal strike could be permitted to continue before substantial harm to the education of children would become a reality. Just how long is a matter of considerable difference of opinion but a maximum duration somewhere in the range of from two to four weeks would appear to be appropriate. If a settlement has not been reached in that time, the remaining issues would be submitted to binding arbitration since it would by then be apparent that voluntary settlement just is not possible. During the period of legal strike, no attempt would be made to conduct classes. There would be none of the destructive confrontations between parents and striking teachers and between striking and nonstriking teachers that create the hostility and bitterness that is now experienced during an illegal strike and that is

so difficult to overcome, if it is possible to do so, after the strike is over. Contrary to the recent article in the Journal, I have never believed that it makes any sense to attempt to keep schools open during a strike with volunteer parents, substitutes and a few nonstriking teachers. There can be no effective teaching program under these circumstances and these efforts add little to the resolution of the dispute. At best they are window dressing aimed at showing the community that something is being done.

Binding Arbitration

Let us now consider the issue of binding arbitration.

For purposes of this discussion I do not believe it is fruitful to spend time debating the issue of whether or not arbitration is per se an improper delegation of legislative authority. It is my personal view that a statute which provides for collective bargaining inherently grants to the parties the right to agree to binding arbitration, although in my own state, the Attorney-General has recently stated otherwise. More importantly, express statutory provision for compulsory binding arbitration has been tested and approved by the courts in Michigan and elsewhere.

I also do not intend to discuss the very important question of what are proper subjects for bargaining and arbitration and how definitions should be provided. I am sure we could fruitfully devote an extended discussion to this question alone. But briefly, it is my personal view that each issue must be considered separately as it arises and a decision rendered by an appropriate state agency subject to judicial review. I do not believe it is practical to write limitations into a bargaining statute.

It is essential, of course, that a statute providing for arbitration, whether voluntary or compulsory, set forth the criteria that the arbitrator must apply in reaching his decision and for judicial review to assure that he has done so.

In Michigan, compulsory arbitration is provided by statute in the event of an impasse in bargaining with unions representing police and firemen. The statute sets forth eight criteria to be applied. Included among them are considerations for the lawful authority of the employer; the interests and welfare of the public and the financial ability of the unit of government to meet those costs. Whether or not arbitration has resulted in unreasonably high compensation awards is debatable. The fact is that strikes in Michigan by police and firemen are no longer experienced.

In the area of teacher bargaining, conventional arbitration employed on a voluntary basis, I am sorry to say has been disappointing in view of many school boards that have employed it and this has given rise to strong resistance to the idea of compulsory arbitration. Many have felt and not without some justification, that all too often arbitrators have been more interested in striking a compromise the union would find acceptable than treating the merits of each issue. In this respect the theoretical distinction between fact-finding and arbitration has often not been observed. It would be naive to assume that it would be substantially different if arbitration were to be compulsory rather than voluntary. The problem it seems to me is largely inherent in conventional arbitration and that is why I favor the use of the somewhat controversial form of arbitration known as "last-best-offer" arbitration or "binding fact-finding" as it is sometimes called.

Under this concept of arbitration the arbitrator is not permitted to strike a compromise but must accept the position of one or the other of the parties. Because of this, the incentive for each of the parties to be as reasonable as possible because the party that sticks to a "way-out" position will lose. If the process works the way it is supposed to, the parties are more likely to reach a settlement themselves and if they do not the arbitrator will face a choice between final positions which are not substantially apart. Let me say that the jury is still out on whether this concept of arbitration will actually do the job it is supposed to do.

For one thing, where it has been used it has not prevented parties from presenting widely divergent positions. This occurred in Crestwood in the negotiations preceding our most recent crisis. The Union had clung for so long to its extravagant demands that it felt obliged for internal political reasons to stick with these demands in arbitration. As a result they lost the arbitration and they lost face and refused to consider any form of arbitration a year later. I choose to believe, however, that the concept is basically sound and there is an educational task that must be shouldered. In any new procedure there is bound to be a testing period. When the parties are convinced they cannot finesse or avoid the consequences they will play the game by the rules and make appropriate adjustments to the potential political ramifications.

There are many arbitrators who don't like it because it cramps their ability to write the settlement. They say they are often required to choose between alternatives which they regard as equally undesirable or which would create future tension. This is their justification for engaging in as much "award-splitting" as the arrangement permits so that both

parties walk away as partial winners. This can be done where each issue is considered separately, rather than as a complete package. I think this is a somewhat patronizing and self-serving approach and it is often a disservice to the parties. It thwarts the objective of educating the parties to settle their own disputes and it assumes the arbitrator knows what is best for the parties and often he does not. The best way to minimize this tendency is to require that economic issues are handled as a package which is precisely how these issues are best handled in bargaining. Non-economic issues can be grouped together if they are related or handled separately if they are not.

In conclusion let me say that if one accepts the premise that collective bargaining for teachers is here to stay, a premise which I accept without reservation, then it follows that the risk of strike is an ever-present reality. It also follows that the public interest demands a mechanism for final resolution of a labor dispute where voluntary means have failed. An approach which recognizes a limited right to strike as I have described coupled with binding "last-best-offer" arbitration addresses these requirements on a pragmatic basis.

I await with eagerness the reactions of Mr. Levy and Mr. Brommer.

Thank you very much.